

Victorian
Law Reform
Commission

Review of Family Violence Laws
Report

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne, Vic

Level 10
10–16 Queen Street
Melbourne Victoria 3000
Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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Warning to Readers

In line with our victim-centred approach, we have drawn extensively on the experiences of family violence victims in this report and often quote directly from their submissions, interviews and published accounts. We warn readers that some of the language used in these quotes and the graphic nature of the violence described may upset some readers and re-traumatise people who have experienced violence. Many of the first-hand accounts are in chapters 2 and 4.

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Preface

This is the Victorian Law Reform Commission's Final Report on the *Crimes (Family Violence) Act 1987*. The Act has not been comprehensively reviewed since its inception and attitudes towards family violence have changed substantially since 1987. In this report we have examined the dynamics of family violence and its many forms as the foundation of our recommendations about the purposes and principles of family violence legislation. In preparing this report we endeavoured wherever possible to draw upon the knowledge of victims of family violence and were able to directly interview a number of them. I thank them for their ability to speak frankly and openly about their difficult experiences.

This report makes recommendations on all aspects of the justice system and family violence. Our recommendations are based on research about family violence, the law, and the processes and procedures of Victoria Police and the Magistrates' Court. We have engaged in extensive consultation with victims of family violence, organisations working to support victims, personnel in government departments, operational police, magistrates, registrars and lawyers. We also drew on the experiences of people working in Tasmania and Western Australia who are responsible for the implementation of recently introduced changes to family violence legislation in those jurisdictions. The contribution of many people who assisted us by participation in our advisory committees and in other specially convened meetings and consultations is gratefully acknowledged.

The commission published a Consultation Paper in November 2004, accompanied by a separate publication, the Outline and Questions, which enabled our work to be more accessible to a wider audience. The Consultation Paper generated many submissions and we have drawn extensively on them in this report. In August 2005 we published *Family Violence Police Holding Powers Interim Report*. The recommendations in that report have been adopted in the Crimes (Family Violence) (Holding Powers) Bill 2005.

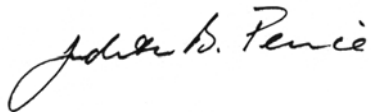
Although production of this report was a team effort, I make special acknowledgement of the principal authors Joanna Carr and Dr Zoë Morrison, who made an outstanding contribution to this work through their careful research and analysis. I particularly thank them for their professionalism and consistent dedication to this task.

Many other people were involved in preparing this report. Commission Chairperson Professor Marcia Neave, Part-time Commissioner Paris Aristotle, and

CEO Padma Raman were closely involved in its final form and provided important and valuable assistance throughout its development.

The publication was edited by Alison Hetherington. Trish Luker provided editorial and research assistance. Kath Harper proofread and prepared the index. Julie Bransden prepared the bibliography and Kathy Karlevski arranged the report's distribution.

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Judith Peirce, Commissioner

Acknowledgments

FAMILY VIOLENCE ADVISORY COMMITTEE

Renata Alexander, Barrister

Paris Aristotle, Part-time Commissioner, Victorian Law Reform Commission and Director, Victorian Foundation for Survivors of Torture

Antoinette Braybrook, CEO, Aboriginal Family Violence Prevention and Legal Service

Charmaine Clarke, Aboriginal Liaison Officer, Melbourne Magistrates' Court

Dr Rhonda Cumberland, Director, Women's Domestic Violence Crisis Centre

Maria Dimopoulos, Managing Director, MyriaD Consultants

Libby Eltringham, Legal Education Worker, Domestic Violence and Incest Resource Centre

Tania Farha, Researcher, Violence Against Women Review Team, Victoria Police

Joanna Fletcher, Law Reform and Policy Lawyer, Women's Legal Service

Leigh Gassner, Assistant Commissioner, Victoria Police—represented by Tania Farha, Victoria Police

Anne Goldsbrough, Supervising Magistrate for Family Violence and Family Law, Melbourne Magistrates' Court

Karen Hogan, Coordinator, Gatehouse Centre, Royal Children's Hospital

Fiona Sharkie, Director, Office of Women's Policy, Department for Victorian Communities—represented by Soo-Lin Quek, Deputy Director, Office of Women's Policy and Rachel Green

Dr Rosemary Wearing, Senior Lecturer, Dept of Sociology Politics and Anthropology, La Trobe University

SPECIALIST ADVISORY COMMITTEE—CULTURALLY AND LINGUISTICALLY DIVERSE COMMUNITIES

Paris Aristotle, Part-time Commissioner, Victorian Law Reform Commission

Samia Baho, Secretary, African Australian Welfare Council, Horn of Africa Women's Group

Margherita Coppolino, Diversity Consultant

Joumanah El Matrah, Manager, Islamic Women's Welfare Council of Victoria

Carmel Guerra, Director, Centre for Multicultural Youth Issues

Diana Orlando, Executive Officer, Immigrant Women's Domestic Violence Service

Phuong Pham, CALD Crisis Worker, Women's Health West

Silvia Urbach, Deputy Chairperson, Ethnic Community Council

Arthur Yong, Project Officer, Men and Family Relationships Program, Migrant Resource Centre North-East

SPECIALIST ADVISORY COMMITTEE—PEOPLE WITH DISABILITIES

Laurice Demina, Multicultural Support Coordinator, Action on Disability Within Ethnic Communities

Patsy Frawley, Disability Services Consultant

Phil Grano, Legal Officer, Office of the Public Advocate

Jonathon Goodfellow, Manager, Disability Discrimination Legal Service

Keryn Howe, Manager, Women's Social Support and Crisis Centre, Royal Women's Hospital

Marie Ireland, Co-convenor, Victorian Women with Disabilities Network

Chris Jennings, Disability Services Consultant

Nichole Langtrip, Solicitor, Villamanta Legal Service

Greg Leeson, Villamanta Legal Service

Vivienne Topp, Coordinating Solicitor, Mental Health Legal Centre

The following people provided their expertise and assistance in meetings and consultations with the commission during the preparation for the Final Report.

Cheryl Munzel, Department of Human Services Networker, Loddon Mallee Region

MAGISTRATES' COURT VICTORIA

Chief Magistrate Ian Gray

Magistrate Anne Goldsbrough, Supervising Magistrate, Family Violence and Family Law

Mick Francis, CEO

Magistrate Chris Thornton

Magistrate Noreen Toohey

Samantha Adrichem, Manager, Family Violence Division

Magistrates' Court Protocols Committee

Senior Registrars Committee

CORONER'S COURT

Graeme Johnstone, State Coroner

VICTORIA POLICE

Assistant Commissioner Lee Gassner

Inspector Wendy Steendam, Inspector in Charge, Sexual Offences and Child Abuse Coordination Office

Tania Farha, Researcher, Violence Against Women Review Team

Sergeant Peter Benjamin, Violence Against Women Review Team

Commander Ashleigh Dickinson

Inspector John Thexton

Sergeant Peter Barry, Family Violence Advisor

Sergeant Vivien Davis, Family Violence Advisor

Acting Senior Sergeant Paul O'Loughlin

Detective Sergeant Shaun Bingham, Flemington Crime Investigation Unit

MEETINGS ON POLICE POWERS

Sergeant Debbie Williams, Coordinator Safe at Home, Tasmania Police

Inspector Phil Ling, Tasmania Police

Prosecutor Christie Holloway, Tasmania Police

Inspector Colin Little, Tasmania Police

Magistrate Ian Matterson, Tasmania Magistrates Court

Norman Raeburn, Director, Tasmania Legal Aid

Margaret Chandler, Senior Safe at Home Officer, Tasmania

Liz Little, Principal Consultant, Department of Justice, Tasmania

Tracey Hales, Senior Programs Officer, Domestic Violence, NSW Police

Senior Sergeant Gordon Fairman, State Coordinator, Family Protection, Major Crime Division, Western Australia Police

Tony Walsh, Discipline Advocate, Police Association, Victoria Police

Greg Davies, Manager Discipline Legal, Police Association, Victoria Police

Diane Sisley, Committee Member, Liberty Victoria

MEETINGS ON LEGAL REPRESENTATION

Louise Blazejowska, Manager of Service Delivery Planning and Evaluation, Women's Domestic Violence Court Assistance Program, New South Wales Legal Aid Commission

Tracy Corbin-Matchett, New South Wales Legal Aid Commission

Jacqui Lane, Project Officer, Women's Domestic Violence Court Assistance Program, New South Wales Legal Aid Commission

Dominic Calabrio, Acting Manager, Regional Offices Division, Victoria Legal Aid

The Federation of Community Legal Centres (Vic)

The Victorian Bar Council Family Violence Subcommittee

Ross Maxtead and Beatrice Melita, Victorian Bar

Lee Formica, Family Violence Portfolio Holder, Family Law Section, Law Institute of Victoria

VICTIMS, MARGINALISED GROUPS AND INDIGENOUS COMMUNITIES

Anonymous victims of family violence interviewed for this report

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Antoinette Braybrook, Aboriginal Family Violence Prevention Legal Service

Greta Jubb, Victorian Aboriginal Legal Service

Diana Orlando, Immigrant Women's Domestic Violence Service

Rose Solomon, Chief Executive Officer, Elizabeth Hoffman House

Colleen Pearce, Director, Victim Support Agency

Suzanne Whiting, Manager, Victim Support Agency

Phil Grano, Legal Officer, Office of the Public Advocate

Janelle Morgan, Manager, Courts and Programs Development Unit, Department of Justice

Heather Birch, Office of Senior Victorians, Ministerial Advisory Council

James MacIsaac, Director, Senior Victorians and Veterans, Department for Victorian Communities

Lisa Moore, Aboriginal Affairs Victoria

Indigenous Family Violence Partnership Forum

Violence Against Women and Children Group, Federation of Community Legal Centres

Karyn Anderson, Clothier, Anderson and Associates Immigration Lawyers

Michael Clothier, Clothier, Anderson and Associates Immigration Lawyers

Contributors

Reference Team

Joanna Carr
Dr Zoë Morrison
Judith Peirce

Victorian Law Reform Commission

Chairperson

Professor Marcia Neave AO

Full-time Commissioner

Judith Peirce

Part-time Commissioners

Paris Aristotle AM

Her Honour Judge Jennifer Coate

The Honourable Justice David Harper

Her Honour Judge Felicity Hampel

Professor Sam Ricketson

Dr Iain Ross AO

The Honourable Justice Tim Smith

Chief Executive Officer

Padma Raman

Operations Manager

Kathy Karlevski

Policy and Research Team Leaders

Angela Langan

Mary Polis

Policy and Research Officers

Samantha Burchell

Joanna Carr

Claire Downey

Daniel Evans

Dr Zoë Morrison

Priya SaratChandran

Prue Elletson

Research Assistant

Alison Hetherington

Communications Officers

Trish Luker

Project Officer

Simone Marrocco

Librarian

Julie Bransden

Administrative Officers

Vicki Christou

Lorraine Pitman

Failelei Siatua

Terms of Reference

On 1 November 2002, the Attorney-General, the Honourable Rob Hulls MP, gave the Victorian Law Reform Commission a reference:

1. To consider whether the *Crimes (Family Violence) Act 1987* is based on a coherent philosophy and whether, having regard to national and international experience, its approach to family violence is the best approach available to Victoria.
2. To identify any procedural, administrative and legislative changes which may be necessary to ensure that the *Crimes (Family Violence) Act 1987* provides the best available response to the problem of family violence.
3. To undertake research to monitor the practical effect of such changes.
4. To develop and/or coordinate the delivery of educational programs which address any lack of knowledge or misconceptions relating to the *Crimes (Family Violence) Act 1987* and the existing processes under the Act.
5. To develop and/or coordinate the delivery of educational programs which may ensure the effectiveness of proposed legislative, procedural or administrative reforms.
6. In conducting this review, the VLRC shall have regard to:
 - The work of the Statewide Steering Committee to Reduce Family Violence.
 - The accessibility of the Act and whether it is working effectively for:
 - immigrant women (particularly recent immigrants);
 - Indigenous communities; and
 - people with disabilities.
 - The position of children in applications made under the Act and the intersections between the *Crimes (Family Violence) Act 1987*, the *Children and Young Persons Act 1989* (Vic) and the *Family Law Act* (Cth).

Abbreviations

ACT	Australian Capital Territory
art	Article
CALD	culturally and linguistically diverse
CCSM	Continuing Consolidation of the Statutes of Manitoba
CCTV	closed circuit television
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEO	chief executive officer
ch	chapter
Cth	Commonwealth
DHS	Department of Human Services
DVIRC	Domestic Violence and Incest Resource Centre
et al	and others
eg	for example
ibid	in the same place (as the previous footnote)
ie	that is
IO	intervention order
n	footnote
NAATI	National Accreditation Authority for Translators and Interpreters
NSW	New South Wales
NZ	New Zealand
OPA	Office of the Public Advocate
para(s)	paragraph(s)
pt	part
Qld	Queensland
reg	regulation
rev	revised
s	section (ss pl)
SA	South Australia
SCC	Supreme Court of Canada
SS	Saskatchewan Sessional volume
TAFE	Technical and Further Education
Tas	Tasmania
UN	United Nations

UNGAOR	United Nations General Assembly
UNTS	United Nations Treaty Series
v	and (civil) or against (criminal)
VALS	Victorian Aboriginal Legal Service
VLA	Victoria Legal Aid
VOCAT	Victims of Crime Assistance Tribunal
VPM	Victoria Police Manual
WA	Western Australia

Terminology

Our approach attempts to be inclusive, as far as possible, of everyone in the community, including children who experience violence, people in same-sex relationships and Indigenous people, because family violence affects all members of the community.

In this Final Report we discuss the research which argues that family violence is a gendered form of violence and is perpetrated primarily by men against women. Accordingly, in some instances in this report gender-specific terminology is used. The feminine pronoun is used about victims throughout this research in recognition of the fact that the vast majority of victims are female. The masculine pronoun is used in relation to accused and perpetrators, acknowledging that almost all offenders are male.

Below are some of the terms that we have used in this report, and an explanation for why we have chosen to use particular terms. Other terms defined throughout the report also appear in the Glossary.

agency: this term is used throughout the report to refer to victims' ability to act for themselves.

applicant: this is our preferred term for a person who lodges an application for a family violence protection order. The applicant may be the person who needs protection from family violence, a police officer, or a guardian of a child or young person.

child/young person: is used for any child/young person aged 18 years or under, in accordance with the *Children Youth and Families Act 2005* (Vic).

cognitive impairment/impaired mental functioning: we use the term 'impaired mental functioning' where referring to current Victorian legislation, as that is the terminology used in legislation. In all other cases we use the term 'cognitive impairment' as this is regarded as a more accurate description by disability groups, and is widely used and accepted.

complainant: this is the term used in the *Crimes (Family Violence) Act 1987* to describe a person who applies for an intervention order on their own behalf or on behalf of another person.

defendant: this is the term used in the *Crimes (Family Violence) Act 1987* for a person against whom an intervention order is sought, or for a person who has been charged or convicted with a criminal offence, for example, an assault or breach of an intervention order.

exclusion order: this is our preferred term for an order preventing a respondent from continuing to reside with an applicant in a formerly shared residence. In the Consultation Paper we referred to these orders as ‘ouster orders’. **Family Violence Act:** we recommend that the *Crimes (Family Violence) Act 1987* should be replaced and this is our preferred term for a new Act.

family violence protection order: is our preferred term for use in the proposed new Act to replace the current term ‘intervention order’ in the *Crimes (Family Violence) Act 1987*.

Indigenous: when we refer to Indigenous people or services in this report we are referring to Indigenous Australians unless reference is being made to international agreements about indigenous peoples.

interim order: is the term used in the *Crimes (Family Violence) Act 1987* for a temporary intervention order. We retain this term in the new Act.

intervention order: Intervention order is the term for the order made by the Magistrates’ Court under the *Crimes (Family Violence) Act 1987*.

perpetrator: we use the term ‘perpetrator’ in certain contexts instead of the longer terms ‘family member who uses violence against a family member’ ‘person/family member who has used violence’ or ‘violent family member’, mostly for expediency.

respondent: this is our preferred term in the proposed new Act for a person against whom an intervention/family violence protection order is sought or against whom an order is made.

victim: in some contexts in this report, we use the term ‘victim’, meaning ‘one who is harmed or killed by another’. We do not use or intend the term to have negative connotations of helplessness. We appreciate and have integrated into our analysis that people who experience family violence also exercise agency.

Executive Summary

PURPOSE OF THIS REPORT

An alarming number of Victorians experience violence and abuse within their families. In many instances, victims find the justice system fails to protect them. Victoria has had a civil intervention order system to protect family members from violence since 1987. The criminal law also applies to some forms of family violence. In this report we review the justice system's response to family violence—particularly the intervention order system—and provide detailed recommendations for ways that it can be improved.

A NEW APPROACH TO FAMILY VIOLENCE

Violence against women, including violence in the family, is a fundamental violation of human rights that the State has an obligation to eliminate. However, the justice system's response to family violence is often inadequate and inconsistent. The commission has found this can be partly attributed to the absence of a clear philosophy and overall approach in Victoria's family violence legislation. The *Crimes (Family Violence) Act 1987* is used to obtain intervention orders for people involved in neighbourhood and other community disputes and in stalking matters, as well as for family violence. This has led to confusion among people working with the legislation, one consequence of which has been that family violence matters are sometimes not treated seriously. We recommend that a new Act should be introduced to deal exclusively with family violence.

We also recommend that the new Act should contain clear purposes and principles. The most important aim of the new Act should be to ensure the safety of all people who experience family violence. It should also aim to prevent family violence, provide victims with effective and accessible remedies, and promote non-violence as a fundamental social value. Those making decisions under the Act should give primary importance to the safety of victims. They should also consider the gendered nature of family violence, the promotion of non-violence in society, the need to treat victims with dignity and respect, and the need to ensure perpetrators of violence are held accountable for their actions.

Another notable absence in the current legislation is a definition of family violence. The new Act should include a definition which makes it clear what

behaviour constitutes family violence. Family violence is violent, threatening and other abusive behaviour that coerces, controls or dominates family members or causes them to be fearful. A new Act should make it clear that this includes assault and physical injury, sexual assault and sexually coercive behaviour, damage to a person's property, kidnapping or depriving a person of their liberty, emotional, psychological or verbal abuse, and economic abuse.

It is also crucial that a new Family Violence Act covers all family relationships that exist in the Victorian community, including those in marginalised communities. In particular, a new definition of 'family member' should include a relative according to Indigenous tradition or contemporary social practice, a relative according to any other traditional or contemporary social practice, and a person who has provided paid or unpaid care to someone who is dependent or partially dependent on that person, such as a carer of a person with a disability.

For the legal system and the wider community to respond adequately to family violence, it is also essential that ingrained attitudes and beliefs are challenged. Stereotypical views of women and their role in society often mean that violence against them is not identified, is implicitly condoned or is seen as a private issue. We therefore regard a broad community education campaign as an essential element in bringing about change, including change in the way the law is applied.

CHANGES TO THE JUSTICE SYSTEM

In making recommendations for change, we have focused on how the justice system can respond better to victims of family violence. There are six main areas where we have recommended reforms to improve the justice system's response.

PROTECTION IN A CRISIS SITUATION

When a family violence victim calls the police for assistance, police must have adequate powers and procedures to be able to respond effectively. We support the new Police Code of Practice in this respect, particularly the pro-arrest policy. Most incidents of family violence occur out of office hours and an efficient after-hours system to enable police to obtain an intervention order is one of the most important protections for a victim in a crisis situation. Since 1999, police have not sought after-hours intervention orders and instead have made applications for complaints or warrants to be made, which do not provide appropriate protection for victims. An effective after-hours response by the Magistrates' Court would complement the holding power for police recommended by the commission in its August 2005 Interim Report, *Family Violence Police Holding Powers*. The Magistrates' Court has recently put new procedures in place to enable after-hours applications for intervention orders, and we recommend that this process is

monitored to ensure that it is providing timely and adequate protection to victims of violence.

CONSISTENT AND EFFECTIVE OUTCOMES FOR VICTIMS

Although some police, magistrates and court staff are helpful and supportive to victims of family violence, inconsistent decision making and insensitive treatment of victims was identified by those we consulted as one of the most serious problems with the intervention order system. To ensure more consistent and effective outcomes for victims in court, the commission recommends:

- A specialist list within the Magistrates' Court for family violence matters. All those working on the specialist list, including magistrates, court staff and legal representatives, should receive family violence training.
- A specialist police prosecution unit to conduct all police applications for intervention orders and criminal prosecutions related to family violence. This unit should include provision of appropriate support and advice to victims and witnesses.
- Funding for community legal centres to provide legal advice and legal representation to applicants in intervention order matters.
- Training for police, registrars and magistrates on the dynamics of family violence, to ensure that legal responses reflect the experience of victims and are not based on myths and stereotypes.

BETTER PROTECTION FROM ORDERS

In some circumstances, a victim may obtain an intervention order that does not provide adequate protection. To improve the protection offered by an intervention order, the commission recommends:

- Where the victim wishes to remain in the family home, there should be a presumption that she or he can do so. 'Exclusion orders' that allow this should be explicitly mentioned in the new Act and other terms and conditions of orders should be tailored to suit the situation of the victim.
- Where there are children of the relationship and it is appropriate that they have contact with the respondent, this contact must be regulated in the intervention order. This will make clear to the parties and the police the contact the respondent may exercise with the children and will therefore assist police to identify what behaviour constitutes a breach of an intervention order.
- It must be made easier to extend an order where the victim continues to fear violence, including where the order has expired.

-
- Charges of breaching an order must be heard by the court as a matter of priority. Lengthy delays between charges being laid and the court hearing mean that perpetrators are not deterred from committing further breaches.

SAFE AND ACCESSIBLE COURTS FOR VICTIMS

Attending court is an intimidating experience for most people. In a family violence situation it can be particularly traumatic. The commission therefore recommends:

- Physical safety measures at court must be improved. This includes the provision of separate waiting areas for applicants and respondents, safe entrances and exits to the court building, private space for making applications for intervention orders, and improved disability access.
- Respondents to an application must be required to inform the court prior to the final hearing whether they intend to come to court and defend the application. Currently, applicants attend court not knowing whether the respondent will be there.
- The court must provide accessible information in a range of formats on the intervention order system and what applicants can expect at court.
- Application forms and the terms and conditions of intervention orders must be written in plain English.
- It must be made easier for applicants to give evidence in court. This includes providing alternative methods for giving evidence such as closed-circuit television, preventing cross-examination of the applicant by an unrepresented respondent, giving the magistrate clear powers to close the court or exclude people from it where necessary and allowing the court to consider any evidence it considers relevant.

IMPROVED RESPONSE TO MARGINALISED GROUPS

Some groups of women experience particular difficulties and barriers when seeking protection from family violence. These include Indigenous women, immigrant women and women with disabilities. To improve access to justice for these groups, the commission recommends:

- Funds should be provided to increase the support available from specialist community agencies that provide services and support to victims of family violence, in particular, Indigenous organisations, migrant organisations and disability-specific organisations.

- Police, magistrates and registrars must be provided with more comprehensive training about issues relevant to Indigenous and immigrant victims of violence, as well as victims of violence with disabilities.
- There must be more information on family violence and the legal system that is tailored to the needs of marginalised groups. This includes information in various formats, information in community languages, and greater provision of information sessions for marginalised groups.
- The justice system must continue in its efforts to promote diversity in the recruitment of staff. In particular, the government should support schemes to train more Indigenous people for court registrar positions.
- Access to, and quality of, court interpreters must be improved.

BETTER SAFEGUARDS FOR YOUNG PEOPLE

Children and young people are particularly vulnerable in the justice system, both as victims of family violence and as perpetrators. The commission therefore recommends:

- In addition to those who are direct victims of family violence, children who have heard, witnessed or otherwise been exposed to family violence should be protected by the intervention order system.
- Where an order is made to protect a child, the court must make it clear that it prevails over a Family Court order and does not allow contact.
- Where a young person has perpetrated family violence, we recognise that it can be very serious and have a devastating impact on the victim. However, safeguards must be in place to ensure that an intervention order is an appropriate response. An order against a young person should last for a maximum of 12 months, unless there are exceptional circumstances. The court must be satisfied that there are grounds for the order, even if the young person consents to the order being made. An application against a young person must be heard in the Children's Court.

Recommendations

Chapter 3

1. The *Crimes (Family Violence) Act 1987* should be repealed and new legislation, entitled the Family Violence Act, should be enacted.
2. The new Family Violence Act should contain clear purposes and guiding principles.
3. The purposes of a new Family Violence Act should be:
 - to ensure the safety of all people who experience family violence;
 - to prevent family violence between people to the greatest extent possible;
 - to provide victims of family violence with effective and accessible remedies;
 - to promote non-violence as a fundamental social value.
4. In making decisions, courts should treat the safety of victims of family violence as paramount and should also have regard to the following matters:
 - the particular characteristics and dynamics of family violence, including that family violence is predominantly perpetrated by men against women and children;
 - the promotion of non-violence as a fundamental social value between family members, within the legal system and in the wider community;
 - the need to ensure that victims of family violence are treated with dignity and respect; and
 - the need to ensure that perpetrators of family violence are held properly accountable for their actions.
5. Further research should be conducted before restorative justice practices are considered for use in family violence matters in Victoria.

6. If restorative justice practices are introduced, standards should be established for particular processes, practitioners should be trained and programs should be monitored and evaluated.

Chapter 4

7. 'Family violence' should be defined in the new legislation.
8. The new definition of family violence should explicitly include non-physical forms of family violence.
9. The legislation should allow an intervention order to be renewed without the applicant having to prove that further family violence occurred during the period of an intervention order.
10. Provisions should be included in the new legislation to enable an intervention order to be made for a child who has been subjected to, heard, witnessed or otherwise been exposed to family violence.
11. The new definition of family violence should be broad enough to include abuses specific to certain groups in the community.
12. Causing or threatening the death, torture or injury of an animal should be included in a definition of family violence, even if that animal is not the property of the family violence victim.
13. The new definition of family violence should include specific reference to sexual forms of family violence.
14. The new legislative definition of family violence should be:
 - Family violence is violent or threatening behaviour or any other form of behaviour which coerces, controls and/or dominates a family member/s and/or causes them to be fearful.
 - Family violence includes causing a child to see or hear or be otherwise exposed to such behaviour.
15. The definition of family violence may include, but is not limited to:
 - assault or personal injury to a person;
 - sexual assault and other forms of sexually coercive behaviour;
 - damage to a person's property;
 - kidnapping or depriving a person of her or his liberty (eg forced social isolation);

- emotional, psychological and verbal abuse (see definition of ‘emotional abuse’);
 - economic abuse (see definition of ‘economic abuse’).
16. ‘Emotional abuse’ and ‘economic abuse’ should be defined as follows:
- emotional abuse includes:
 - (i) behaving in a manner that is intimidating or offensive or harassing towards a person;
 - (ii) causing or threatening to cause the death of, or injury to, an animal whether or not the animal is the applicant’s property;
 - (iii) repeatedly using other coercive or controlling behaviour not included in (i–iii) including verbal abuse;
 - (iv) using other incidents of emotional and psychological torment not covered by (i–iii) above. For example: threatening to ‘out’ homosexual partners to their friends and/or family when they do not wish to be ‘outed’; threatening to withdraw the care of an elderly person; or threatening to withdraw a visa application to coerce a person.
 - economic abuse includes:
 - (i) coercing a person to relinquish control over assets or income;
 - (ii) disposing of property owned by a person or owned jointly with a person against that person’s wishes;
 - (iii) preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses, or withholding or threatening to withhold the financial support reasonably necessary for meeting normal living expenses for a person and/or their children;
 - (iv) coercing a family member to claim social security payments;
 - (v) coercing a family member to sign a contract for the purchase of goods and services, for the provision of finance, loans and/or credit, for a contract of guarantee, or any legal documents for the establishment and operation of businesses;
 - (vi) otherwise controlling access to money or finances.
17. The current definition of ‘family member’ should be amended to include the following relationships:
- ‘a relative according to Aboriginal tradition or contemporary social practice’;

- ‘a relative according to any other traditional or contemporary social practice’;
 - ‘a person who has or has had a relationship with the original person involving the original person’s dependence or partial dependence on that person for paid or unpaid care’.
18. Examples of specific family relationships should be added to the legislation to clarify its scope.
19. The grounds for getting an intervention order should be:
- the respondent has committed family violence against a family member and is likely to do so again;
 - the respondent has threatened to commit family violence against a family member and is likely to do so again.

Chapter 5

20. Victoria Police should continue with their efforts to oversee, monitor and evaluate the implementation and use of the Code of Practice for the Investigation of Family Violence by all police officers.
21. Victoria Police should make additional efforts to provide comprehensive and regular training on the dynamics of family violence, particularly from a victim’s perspective, for all police officers.
22. An independent and external review of the impact of the Police Code of Practice for the Investigation of Family Violence should be conducted within two to three years of the code’s full implementation.
23. Victoria Police should establish a specialist family violence prosecution unit to deal with intervention order applications, prosecutions of a breach of an intervention order and criminal charges arising in situations of family violence.
24. A specialist prosecution unit should include the provision of appropriate support and advice to victims and witnesses.
25. Magistrates’ discretion to award costs against police for unsuccessful prosecutions for family violence offences, including breaches of an intervention order, should be limited. Magistrates should only be able to award costs against police where the court is satisfied that:
- the investigation into the alleged offence was conducted in an unreasonable or improper manner;

- the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner.
26. The Indigenous Family Violence Partnerships Forum should consider the possibility of providing an Indigenous victim support scheme that is available to offer support when the police are called to a family violence incident.
 27. Victoria Police should improve and further develop training in cultural awareness and barriers experienced by particular groups, including Indigenous communities, migrant communities, people in same-sex relationships and people with disabilities.
 28. Police should be able to apply for an interim intervention order regardless of the protected person's wishes.
 29. Police should not be able to apply for a final order without the consent of the protected person unless the person is a child or has a cognitive impairment.
 30. Police should be able to apply for a variation or revocation of an order, including where the police were not the original applicants. Police should obtain the consent of the protected person before making such an application, and in doing so, should clearly explain the consequences of any variation or revocation.
 31. A case management program for victims of multiple breaches should be established by Victoria Police to monitor the safety of the victim and behaviour of the offender.
 32. A victim of multiple breaches should be given a choice whether or not to accept support through a case management program and may choose to terminate participation in the program at any time.
 33. The new Family Violence Act should provide that a person protected by an intervention order cannot be prosecuted for aiding and abetting an intervention order breach under the *Crimes Act 1958*. If police believe a protected person has consented to a breach, they should explain to that person the procedure for varying or revoking an order. If necessary police should apply for a variation and revocation on behalf of the protected person with their consent.

Chapter 6

34. All registrars who come into contact with family violence cases, including all those working in the specialist family violence list, should receive specialised training. This training should include:
 - the effects of family violence, especially non-physical violence, on people experiencing family violence;
 - the impact of family violence on children;
 - the purposes and principles of a new Family Violence Act;
 - issues facing Indigenous women, migrant women and women with disabilities when experiencing family violence and seeking access to justice;
 - clarification of the registrar's role, that is, that registrars cannot refuse to allow a person to make an application for an order, should inform all applicants of the possibility of getting an interim order, and inform applicants and respondents of support services available in court;
 - strategies for obtaining information from applicants and ensuring all relevant information is provided on the application form.
35. The family violence Magistrates' Court list should include adequate numbers of registrars.
36. Registrars working in the family violence list should be provided with adequate support, including peer support programs, access to debriefing and counselling and schemes for performance review and recognition which take into account their specialist status.
37. The Magistrates' Court should establish a specialist list for family violence matters, including intervention order applications, criminal charges relating to family violence and victims of crime compensation.
38. All magistrates who sit on the specialist family violence list should complete training on family violence issues. This training should cover:
 - the effects of family violence, especially non-physical violence;
 - the principles and purposes of a new Family Violence Act;
 - issues facing Indigenous women, migrant women and women with disabilities when experiencing family violence and seeking access to justice;

- the types of information that should be provided to applicants and respondents once an intervention order is made (eg a clear explanation of the terms of the order).
39. Applicants and respondents should have access to legal advice prior to applications for intervention orders being finalised in uncontested applications and legal representation in contested matters.
 40. Community legal centres should be funded to provide court assistance services for applicants.
 41. Policies and programs should be developed for such services, including standards and management practices to improve consistency of access to legal advice and representation for litigants and courts.
 42. The Department of Justice should audit, update and coordinate delivery of information about the process of applying for or responding to an intervention order.
 43. The intervention order application form currently being used in the Family Violence Court Division should be used at all venues of the Magistrates' Court. The form should be available on the Internet for electronic use by services which support people applying for intervention orders. Future revisions of this form should include:
 - all questions written in plain English;
 - more space for details of previous abusive behaviours;
 - an illustrative list of types of behaviours that may be acts of family violence at the question on past incidents, in line with an expanded definition of family violence;
 - making the application form available on the Internet for electronic use by services who are supporting people applying for intervention orders.
 44. The intervention order received by applicants and respondents should be redrafted to:
 - be written in plain English;
 - refer to the parties by name rather than as 'aggrieved family member' and 'defendant';
 - provide examples of what particular terms of the order mean (eg 'this means you cannot telephone [name], drive past her home or go to her workplace');

- provide information on consequences of breaching an order and how to apply for a variation of an order.
45. The new Family Violence Act should require magistrates to provide a clear verbal explanation to the respondent and the protected person where either is present in court. This explanation should include the matters outlined in section 15 of the *Crimes (Family Violence) Act 1987*.
 46. Indigenous community agencies should be resourced to provide services to people seeking intervention orders.
 47. Community information sessions on family violence and the law should be more widely available for Indigenous Australians, particularly in regional and rural areas.
 48. The Department of Justice should investigate the most effective means of supporting provision of preparatory training for Indigenous applicants seeking to undertake the Certificate IV in Government (Court Services).
 49. Specialist disability community agencies should be resourced to provide services to people seeking intervention orders.
 50. Any materials developed about the intervention order system should be made available in braille, large print and audio tape formats. This information should be available in Magistrates' Courts, police stations and community agencies such as support services, libraries and health centres.
 51. Any materials developed on the intervention order system should be made available in a variety of community languages. Written information in other languages should include extra information on access to interpreters and access to immigration legal advice for those who are not permanent residents. This information should be available in Magistrates' Courts, police stations and community agencies such as support services, libraries and health centres.
 52. A community education strategy about the intervention order system, including the role of police, should be developed for migrant communities. This could involve education forums run by community legal centres and other community agencies, in conjunction with culturally specific services.
 53. Specialist community agencies should be resourced to provide services to immigrants seeking intervention orders.
 54. The government should conduct a review of the provision of interpreting services in the Magistrates' Court, with a view to developing standards for legal interpreting in family violence matters and the provision of and availability of interpreting services.

55. The Magistrates' Court should consider revision of the Family Violence and Stalking Protocols on the provision of interpreters. Specifically, the protocols should provide:
 - that where both parties need interpreters, separate interpreters must be provided unless they are not available;
 - that where only one interpreter is used for both parties, the court should ensure that interpreters behave consistently with their obligation of independence (eg by not sitting with one of the parties);
 - the court should ensure that interpreters always swear an oath or affirmation regarding their obligation to interpret accurately before they interpret in the court.
56. All courts dealing with family violence matters should have separate waiting areas in which it is possible to ensure the safety of an applicant waiting for a matter to be heard.
57. The availability of separate and safe waiting areas should be brought to the attention of applicants wherever possible before they attend the courtroom, and immediately on their arrival at the courtroom.
58. Wherever possible, there should be at least one separate and safe entrance and exit from the courtroom for the use of applicants in fear of their safety.
59. Applications for intervention orders should not be required to be made at the inquiries desk or other public spaces in court buildings.
60. A private space should be made available for inquiries and applications for intervention orders.
61. Training of court staff should include awareness raising about victims' experiences at court, and perceptions of the courthouse space and courthouse processes. Private security staff should also be included in this training process.
62. Awareness raising provides the basis for training on safety considerations in court.
63. All courts dealing with family violence matters should ensure there is sufficient disability access. This could include the implementation of individual Disability Action Plans by the courts.
64. Measures should be taken to provide facilities for children attending court in the context of family violence matters.

Chapter 7

65. The Magistrates' Court should implement a system for determining intervention order applications outside business hours.
66. Victoria Police should use the system implemented by the Magistrates' Court for after-hours intervention orders, rather than applying for complaint and warrants or complaint and summons from registrars.
67. The Department of Justice should establish a system to monitor any system implemented in the Magistrates' Court for granting after-hours intervention orders. If the Magistrates' Court is unable to provide quick and efficient access to intervention orders after hours, the government should consider giving police officers the power to make short-term intervention orders.
68. The Magistrates' Court Protocols should be amended to require registrars to discuss with applicants whether there is a need for an interim intervention order. The protocols should make it clear that it is not the registrar's role to decide whether an interim application will be placed before the magistrate.
69. The Magistrates' Court should revise the question about interim intervention orders included on the application form used in the Family Violence Court Division for use in all Magistrates' Courts. The question should be phrased simply, for example, 'Do you need protection immediately, before your final application is heard?'
70. Where an interim order has been made and the final hearing needs to be postponed, the interim order should be automatically extended up to two times until the new hearing date. This should be an administrative procedure which is done by the registrar when the hearing date needs to change, for example where police have been unable to serve the interim order on the respondent.
71. Where an interim order is automatically extended due to an inability to serve the respondent, the registrar should inform the applicant of the automatic extension and send the applicant a copy of the extended interim order.
72. Where there have been two automatic extensions of an interim intervention order due to an inability to serve the respondent and police are still unable to serve the order, the police should apply for an order for substituted service.

Chapter 8

73. The new Family Violence Act should include a provision stating that the appropriate venue for a final intervention order application is either the court closest to the defendant's or the applicant's residence or to where the incident occurred. If the applicant wishes to apply in a different court, the magistrate should exercise a discretion. When exercising this discretion, the magistrate should consider:
- the safety of applicants and their need to keep their general location secret from the respondent;
 - any desire of the applicant to access security or support services at a particular court;
 - any inconvenience that may be caused to a party by allowing an application at a court which is a long distance from where he or she is living.
74. Recommendation 73 should not apply to the Family Violence Court Division during the pilot period.
75. The new Family Violence Act should state that in all cases an application for a final intervention order can be made at the Melbourne Magistrates' Court.
76. The Children's Court should have jurisdiction over any intervention order application where a person aged under 18 years is involved, including jurisdiction over an adult–adult application that includes a child on the application.
77. The Child, Youth and Families Bill 2005 should be amended to declare the Children's Court a court of summary jurisdiction, so the court can exercise powers under the *Family Law Act 1975* to make, vary, discharge or alter a family law child contact order.
78. An intervention order should be able to be made against an associate of a respondent, if the applicant has an intervention order against the respondent, and the behaviour of the associate constitutes family violence.
79. An associate of the applicant should be able to obtain a separate intervention order against the respondent if the respondent's behaviour constitutes family violence and if the original applicant has an intervention order against the respondent.
80. A guardian should be able to make an application for an intervention order against the wishes of the person with an appointed guardian, in the same way that police can make applications without consent.

81. People with an appointed guardian who object to an intervention order application being made on their behalf should have their views heard separately from their guardian. This should occur through an independent legal representative.
82. Where police have been unable to locate a respondent for service of an intervention order or an application for an intervention order, they should apply to a Magistrate's Court for a court order requiring a state government department or agency to supply information that could assist in locating the respondent.
83. Where respondents intend to defend an intervention order application, they should be required to lodge a notice with the court at least five working days before the final hearing is listed.
84. To facilitate a notice system, the court should make interim orders for a minimum of 21 days.
85. Where a notice is received by the court, a registrar should inform the applicant of this within one working day of receipt. Where no notice has been received five days before the hearing, the registrar should inform the applicant if this is because of a failure to serve the applicant and the application will therefore not proceed.
86. A plain English brochure should be provided to respondents at the time of service that gives information to help them decide whether to contest an application or order. This brochure should be available in languages other than English.
87. Where a respondent fails to return the notice but attends court on the hearing date and wants to contest the order, the court should automatically give an adjournment for a new hearing. Any interim intervention order should be automatically extended until the new hearing date. The court should also consider imposing a sanction against the respondent, in the form of a costs order.
88. A mutual order should not be made unless the magistrate is satisfied that there are sufficient grounds for making orders against each party on the basis that each party has committed family violence.
89. The Chief Magistrate and delegates of the Chief Magistrate should have the power to declare a person involved in family violence proceedings a vexatious litigant and therefore require that the person seek leave of the court before making any further intervention order applications.

90. The Chief Magistrate or a delegate should be able to declare a person a vexatious litigant if the litigant has habitually, persistently and without any reasonable ground instituted applications under the Act.
91. The power to declare a person a vexatious litigant should be exercised on application from the person subject to the potentially vexatious proceedings, or the Attorney-General or on the court's own motion.
92. Before making a declaration that a litigant is vexatious, the court should provide the person with an opportunity to be heard. The court should also provide the person with an opportunity to obtain legal representation for the hearing.
93. A declaration that a person is a vexatious litigant may be reviewed by the Supreme Court on a point of law.
94. A vexatious litigant may apply to any Magistrates' Court for leave to issue an intervention order application. An application for leave to apply should be heard as soon as possible.
95. All applications for intervention orders against people who are aged under 18 years should only be heard in a Children's Court.
96. A new Family Violence Act should provide that before the Children's Court makes an intervention order against a young person that would exclude him or her from his or her ordinary place of residence, the court should inform the Department of Human Services. Once the department has been informed, it must conduct an inquiry into measures that need to be taken to ensure the young person's wellbeing.
97. The new Family Violence Act should provide that an intervention order made against a young person should not last for longer than 12 months unless there are exceptional circumstances.
98. Where young people consent to an intervention order being made against them, the court must satisfy itself that grounds exist before making the order.
99. The Magistrates' Court Protocols should state that an undertaking should only be accepted by the court where the court is satisfied that:
 - the applicant fully understands the consequences of accepting an undertaking (eg if the applicant has received legal advice or is legally represented);
 - in all the circumstances of the case, it is more appropriate to accept an undertaking rather than make an intervention order.

100. The Magistrates' Court Protocols should state that when deciding whether it is appropriate to accept an undertaking, the court should have regard to:
- the respondent's age (ie that an undertaking may be more appropriate where the respondent is aged under 18 years);
 - the nature of the violence perpetrated by the respondent, as disclosed in the application; and
 - whether making an intervention order with a condition that the respondent not assault or harass the applicant as the only condition is more appropriate in all the circumstances of the case, rather than accepting an undertaking.
101. The Magistrates' Court Protocols should make it clear that an undertaking has the legal effect of suspending the intervention order application for the period of the undertaking. If an undertaking is breached, the applicant has a right of reinstatement of the original application or may make a new application for an interim order.
102. The Magistrates' Court should develop a standard form to be used as an undertaking in all courts. This form should be able to be easily distinguished from the form of an intervention order and should clearly outline the effects of an undertaking. For example 'This agreement cannot be enforced by the police. However, if the agreement is broken, you may return to court immediately to seek an intervention order'.
103. The court should provide the parties with written information explaining the nature of an undertaking at the time an undertaking is made.
104. A new Family Violence Act should provide that costs should only be awarded against a police applicant where the court is satisfied that the application was made knowing it contained information that was false or misleading in a material way.

Chapter 9

105. The application form used in the Family Violence Court Division should continue to ask the question 'How long do you want the intervention order to last?' This form should be used in all Magistrates' Courts.
106. When determining the length of an intervention order, a magistrate should consider the:
- views of the applicant;
 - purposes and principles of the legislation.

107. The new Family Violence Act should make it clear that the list of possible conditions that can be included on an intervention order are illustrative only and that the magistrate has discretion to ‘impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances’.
108. The new Family Violence Act should provide a list of possible conditions for an intervention order that includes all the current examples, as well as a power to ‘direct the respondent to return certain personal property to the protected person or allow the protected person to recover or have access to personal property, whether or not the respondent has a legal or equitable interest in the property’.
109. The new Family Violence Act should explicitly include an ‘exclusion order’ as a possible condition on an intervention order. The list of conditions should include a condition such as ‘exclude the respondent from occupying the home previously shared, whether or not the home is rented or owned jointly by either of the parties’.
110. If the grounds for an intervention order are made out and the applicant seeks an exclusion order, there should be a presumption in favour of an exclusion order being granted.
111. In addition to a presumption in favour of exclusion orders, the magistrate should take the following factors into account when considering whether an exclusion order should be made:
 - the wishes of the applicant;
 - the welfare of any children involved;
 - the disruption that would occur to the applicant and any children if the applicant leaves the family home.
112. Where a court is making an exclusion order and there is a tenancy agreement for the family home in joint names or solely in the perpetrator’s name, the court should be able to order that the tenancy be transferred into the victim’s name. A court should also have the power to require the applicant to indemnify the respondent in relation to the tenancy agreement.
113. The court should provide information on the possibility of obtaining an exclusion order and outline the risks involved and matters an applicant may want to consider when making this decision.
114. The application form for an intervention order should include a question asking whether the applicant seeks to remain in the family home and have the respondent removed.

115. A resource for magistrates, prosecutors and police should be developed that outlines the types of temporary housing available for male respondents.
116. Any training of magistrates in the area of family violence should include:
- the impact of family violence on children and that therefore contact is not always in the best interests of the child;
 - the risk of violence and abuse for children during contact visits and during contact handover where the mother must attend;
 - ways that contact handover can be made safer in those cases where contact is desirable;
 - how section 68T of the Family Law Act operates and how it may be used.
117. When magistrates make an intervention order for a child or including a child, the magistrate should make it clear to the respondent that there must be no contact between the child and the respondent unless the Family Court or the Federal Magistrates' Court later decide otherwise. If there is a contact order in place, such orders should be suspended pursuant to section 68T of the *Family Law Act 1975*. This should be clearly stated on the intervention order.
118. Magistrates' Courts should be able to access Family Court contact orders through a national database.
119. The new Family Violence Act should include a requirement that magistrates must consider altering any pre-existing Family Court child contact order pursuant to section 68T of the *Family Law Act 1975* when making an intervention order on behalf of one of the parents.
120. When magistrates are amending a child contact order pursuant to section 68T of the Family Law Act, magistrates should consider changing handover arrangements so they are as safe as possible. This could include:
- handover occurring in a public place;
 - handover occurring at a police station;
 - handover being arranged and occurring at a child contact centre;
 - a court-appointed third party arranging and conducting child handover.

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

Chapter 10

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

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.
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.
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.
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.
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.
133. The new Family Violence Act should include a section that clearly describes the procedure for extension of intervention orders.
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.
137. The Sentencing Advisory Council should review the sentencing of defendants and penalties imposed for breaching intervention orders.
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.
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.

Chapter 11

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.
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 magistrates' discretion, taking into account the views of the parties.
143. In any family violence proceeding the respondent should not be able to personally cross-examine:
 - the applicant or complainant;
 - any family member of the parties;
 - any other person the court declares a protected witness.
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.
145. The magistrate must inform respondents in person that if they want to cross-examine the applicant or complainant, 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.
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.
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'.

Chapter 12

148. The Victorian Government should research, fund and implement a community campaign about family violence with the aim of bringing about changes in community attitudes about family violence and respect in family relationships. It might also include education about changes in the legal and service system responses to family violence and prevention of family violence. Such a campaign would ideally be launched in conjunction with the launch of the new Family Violence Act.
149. A community campaign should include a broad recognition of the nature of family violence, including emotional abuse and coercive and controlling behaviour.
150. A community campaign should be based on:
 - well-founded research and testing on target groups to ensure its overall effectiveness, including the recent and continuing research of VicHealth;
 - the principles expressed by the commission regarding addressing family violence.
151. A community campaign should be accompanied by financial and other support to the relevant agencies which would be affected by such a campaign before the campaign is launched.
152. The Victorian Government should consider introducing a statewide and consistent education program for Victorian secondary schools on respect in relationships.
153. In consultation with the State Coroner, the Statewide Steering Committee to Reduce Family Violence should investigate and make recommendations to the government regarding the creation of a family violence death review committee in Victoria.

Chapter 1

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SCOPE OF THIS REPORT

1.1 This is the Victorian Law Reform Commission's report on the review of the *Crimes (Family Violence) Act 1987*. The review started in August 2003 and this report presents the results of our review and our subsequent recommendations for law reform.

1.2 Our research, the consultations we conducted and the submissions we received show that widespread improvements are needed throughout the justice system to achieve administrative, legislative, procedural and cultural reform of the systems which protect family violence victims. All too often intervention orders fail to provide the

When referring to the **justice system**, we are talking about police, the courts, prisons and any other of the State's responses to crime or wrongdoing.

necessary protection for family violence victims. People from Indigenous and other marginalised communities face particularly significant barriers in seeking protection from family violence.

1.3 This report discusses how family violence should be defined, the role of criminal and civil law, and how the intervention order process should operate. We recommend the repeal of the *Crimes (Family Violence) Act* and the introduction of a new Act, which we have called the Family Violence Act.

BACKGROUND

1.4 The intervention order system was created in Victoria in December 1987 under the *Crimes (Family Violence) Act*. Other than the criminal law, the Act is the principal legislation used in this state to protect people from family violence. Since it was introduced, there have been several independent and government reviews to monitor its impact.¹ Significant changes to the system were made in 2004² which principally provide for the operation of two family violence courts which can deal with a range of legal matters that may arise from family violence situations such as criminal proceedings for summary offences and applications to the

A **summary offence** is one heard by a magistrate rather than a judge and jury.

Victims of Crime Assistance Tribunal (VOCAT). However, since its introduction, the Act has not been

1 See, eg, Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987*, Report (1992); Rosemary Wearing, *Monitoring the Crimes (Family Violence) Act 1987: A Study of Those Who Do Not Proceed*, Report (1996); Rosemary Hunter, 'Styles of Judging: How Magistrates Deal with Applications for Intervention Orders' (2005) 30 (5) *Alternative Law Journal* 231.

2 The *Magistrates' Court (Family Violence) Act 2004* established the Family Violence Division of the Magistrates' Court and provided for orders that require defendants to attend counselling. The Act was also amended in 2003 by the *Crimes (Family Violence) (Amendment) Act 2003*, which empowered magistrates to issue intervention orders where both parties consented to the order being made without hearing evidence of the merits of the application and whether or not a respondent admits to matters stated in the application.

comprehensively reviewed to determine whether it provides the best legal response to family violence.

1.5 Since 1987 our recognition and knowledge of family violence has changed. There has been increased public recognition of family violence as a social problem and a burgeoning body of research about its broad nature, dynamics and effects. New legislation to address family violence has also been enacted in other Australian states and overseas **Jurisdiction** is the territory over which judicial or State authority is exercised. jurisdictions, giving us the opportunity to learn from different approaches.

1.6 This review also takes place in the context of unprecedented change in Victoria in the development of family violence policy, service provision and legal response. Given this context, this review of family violence legislation is particularly timely.

1.7 However, the most important reason for reviewing the Act is that despite multiple efforts to address it, Victorians continue to experience violence and abuse at the hands of family members. Commentators have called for a review of the intervention order system in this light,³ because it is not providing effective enough protection for those who experience family violence.

CURRENT VICTORIAN POLICY DIRECTIONS AND OTHER DEVELOPMENTS

1.8 As mentioned, there are several new initiatives and developments occurring in Victoria which aim to improve responses to family violence. Many of these initiatives intersect with the operation of the Act and the matters we examine in this report.

STATEWIDE STEERING COMMITTEE TO REDUCE FAMILY VIOLENCE

1.9 The Statewide Steering Committee to Reduce Family Violence was jointly convened in August 2002 by Victoria Police and the Office of Women's Policy. It comprises representatives of the Department of Justice, magistrates, community legal services, the Law Reform Commission, the Department of Human Services, the Victorian Community Council Against Violence, rural and Indigenous services, women's services—including family violence services and refuges—and male family violence prevention services.

1.10 The role of the committee is to provide advice about improving responses to family violence from police, courts and all relevant service providers, and the

3 See, eg, Jenny Nunn and Marg D'Arcy, 'Legal Responses to Family Violence: The Need for a Critical Review' (2001) (3) *Domestic Violence & Incest Resource Centre Newsletter* 15.

development of an integrated response to family violence. While this review has taken place, the committee has developed and launched its model for a multi-agency integrated response to family violence.⁴ This framework states that the response to family violence must be coordinated to give priority to the safety of women, young people and children. It also outlines how multi-agency coordination will occur.

WOMEN'S SAFETY STRATEGY

1.11 The five-year Women's Safety Strategy was launched in October 2002. It aims to reduce the level, and fear, of violence against women in Victoria and is 'the first comprehensive strategy on violence against women by any Victorian Government for 16 years'.⁵ *Changing Lives: A New Approach to Family Violence in Victoria* was launched in November 2005, detailing the \$35.1 million spending plan to improve Victoria's response to family violence. The policy's programs are geared towards establishing an integrated rather than fragmented approach to family violence in Victoria. They include: use of a common risk assessment tool across service providers, a greater choice of housing options for victims, more support for victims to enable them to stay in their own homes and communities, and a stronger approach towards men who use violence.

VICTORIA POLICE CODE OF CONDUCT

1.12 In August 2001, Victoria Police began a review of violence against women, including family violence. A review team was established to analyse all aspects of crimes involving violence against women and to recommend improved strategies to deal with these crimes. The review team also analysed how police responded to crimes of violence against women and to the women subjected to violence. The review team's report, *Violence Against Women Strategy 'A Way Forward'*, contained 25 recommendations, many of which specifically addressed the police response to, and investigation of, family violence. Some of the recommendations have been implemented and others are being handled by an internal Victoria Police steering committee. One of the recommendations was the development of a code of practice for police response to family violence incidents. The Code of Practice for the Investigation of Family Violence was launched in August 2004 and all Victoria Police members are being trained in it. The code implements a pro-arrest response to family violence.

4 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria* (2005).

5 Office of Women's Policy [Victoria], *The Women's Safety Strategy: A Policy Framework* (2002).

MAGISTRATES' COURT FAMILY VIOLENCE DIVISION

1.13 In November 2002, the Victorian Government allocated funding to establish a Family Violence Division of the Magistrates' Court. Consultations were undertaken and work conducted towards developing an appropriate model for these courts. The family violence courts were opened in 2005 in the regional town of Ballarat and Melbourne suburb of Heidelberg. To enable the establishment of the Family Violence Division, the *Magistrates' Court (Family Violence) Act 2004* was introduced.

1.14 The aim of establishing family violence courts is to bring specialist expertise and targeted resources together to improve the Magistrates' Court's response to family violence, and to ensure the court works in an integrated way with police, health, housing and other support services. It aims to simplify access to the justice system and is able to deal with legal matters that may arise from a family violence situation. The Family Violence Division will hear intervention order proceedings. It will also deal with certain family law matters, criminal proceedings for a summary offence, and VOCAT applications.

1.15 Specialist family violence services are to begin at Melbourne Magistrates' Court in December 2005 and at Sunshine and Frankston Magistrates' Courts in June 2006. On one day a week this service will also be offered at Werribee Magistrates' Court. These services will provide additional specialist staffing resources, such as additional police prosecutors, magistrates, registrars and a specialist applicant worker who will support individuals who have experienced family violence and their children. Changed listing arrangements will provide additional courtroom time dedicated to family violence intervention order proceedings.⁶

A **police prosecutor** appears in court as the representative of the person who alleges the crime.

A **magistrate** is a judicial officer in the Magistrates' Court who judges civil and some criminal cases.

A **registrar** is a staff member at a court who carries out the court's administrative tasks.

FAMILY VIOLENCE COURT INTERVENTION PROJECT

1.16 A four-year pilot project targeting men who are subject to family violence intervention orders was announced in July 2002. Following consultation with various organisations, the Department of Justice developed a model for programs to be piloted over 29 months in Heidelberg and Ballarat. This includes the provision of court-directed counselling for men who have used violence towards family members, support programs and services to (former) partners of directed clients and support programs for children who have experienced or witnessed violence.

⁶ Office of the Attorney-General, 'Sites Chosen for Specialist Family Violence Service' (Media Release, 2 December 2005).

INDIGENOUS FAMILY VIOLENCE TASK FORCE

1.17 In the 2002–03 Budget, the Victorian Government announced it would fund an Indigenous Family Violence Strategy to help prevent, reduce and respond to family violence in Indigenous communities. As part of this initiative, nine local Indigenous Family Violence Action Groups were established and nine Indigenous Family Violence Support Workers were employed under a statewide coordinator. To advance the Indigenous Family Violence Strategy and to engage Indigenous people in the development of ‘community-led’ strategies for addressing family violence, the Indigenous Family Violence Task Force was established. Between 2001 and 2003 the task force conducted and funded a broad range of activities across Victoria aimed at developing community responses to family violence for inclusion in the strategy.

1.18 The Indigenous Family Violence Task Force released its final report in December 2003. The task force acknowledged the high incidence of family violence among Indigenous families and communities in Victoria, and the higher risk Indigenous women face of experiencing family violence and dying as a result of it compared to non-Indigenous women. The report also pointed out the complexity of issues relating to violence in Indigenous communities, due to factors unique to such communities. The report found significant gaps in the ability of government and Indigenous communities to provide responses to Indigenous family violence.

1.19 The government released its response to the task force’s 28 recommendations in October 2004. In the response, the government announced the establishment of an Indigenous Family Violence Partnership Forum to oversee the development and implementation of a ten-year Indigenous Family Violence Plan.⁷ The government response also reported current and proposed initiatives to address Indigenous family violence, including the establishment of three Holistic Family Healing Centres, an Indigenous Men’s Resource Advisory Service and funding for eight Indigenous Family Support Innovation Projects.

OUR APPROACH

1.20 The commission has considered Victoria’s international obligations to combat violence against women when making recommendations for change. Violence against women, including violence in the family, has been recognised at the international level as a fundamental violation of human rights. We outline the nature and extent of the State’s responsibility to ensure every person’s right to live free from violence in Chapter

⁷ Victorian Government, *Victorian Government Response to the Victorian Indigenous Family Violence Task Force Final Report* (2004) 15–18.

3. Consistent with this responsibility, we also consider the way in which changes to broader social structures and power dynamics could help to reduce family violence and support people who are affected by it.

1.21 Throughout this report we have attempted to use the perspectives, experiences and words of people who have been affected by family violence.

VALUES

1.22 An effective legal and social response to family violence must be based on an accurate understanding of its nature and dynamics. We recommend that the explanatory memorandum which accompanies the new Family Violence Act should refer to the values that underpin the recommendations in this report: non-violence, respect, empowerment, responsibility and accountability. These values should be discussed in educational programs for police, registrars and magistrates.

1.23 The values we recommend reflect three main themes. First, because family violence involves the exercise of power and control by the perpetrator over the victim, the substantive law and the way it is applied must not replicate this inequality of power. The legal approach to family violence must hold perpetrators accountable for their actions as well as protecting victims from harm.

The **perpetrator** is the family member who uses violence against another family member.

1.24 Secondly, because family violence involves the systematic disempowerment of people who experience it, legal processes must have the opposite effect. This requires police and courts to ensure that the perspectives of people who have survived family violence are taken seriously and are not repressed or ignored. The legal system must also ensure that victims are not blamed for the harm done to them, that their decisions are respected and that police and court processes do not victimise them further.

1.25 Thirdly, the report recognises that law alone cannot prevent family violence or provide support to those who have experienced it. It follows that the legal response to family violence must be supported by changes in community attitudes and integrated with a range of programs and processes which have been established to reduce violence and support those affected by it. The legal system response to family violence should take account of these other programs and processes and interact with them as effectively as possible.

NON-VIOLENCE

1.26 The provisions of the new Family Violence Act and the way it is applied must be based on the principle that all forms of family violence are unacceptable. This

principle recognises that all family violence is unacceptable because it is a fundamental violation of the basic human right to live a life free from violence. The principle should also underpin the broader social response to family violence.

RESPECT

1.27 Respect requires all people to be treated as valuable and independent beings. Family violence is based on a fundamental lack of respect for family members who experience it. By contrast, the legal system must hear the views of people who experience family violence and take account of their ideas about ensuring their own safety. Respect also requires the legal system and the broader society to recognise and appreciate the diversity of outlook, experiences and cultures in our community.

EMPOWERMENT

1.28 Family violence involves the systematic disempowerment of the people who experience it. Empowerment of people who have experienced violence enables them to put the violence behind them and regain power and control over their lives.

1.29 The principle of empowerment requires legal processes which do not further disempower a person who has experienced family violence and which encourage and assist people to plan for their safety and live a life free of violence.

RESPONSIBILITY

1.30 This principle recognises that responsibility for family violence lies with the perpetrator of the violence. It also recognises that the justice system should encourage perpetrators to take responsibility for their actions and that the community also has some responsibility to prevent family violence.

ACCOUNTABILITY

1.31 This principle refers to the need to ensure that perpetrators of family violence are held properly accountable for their violence. This requires courts to ensure that perpetrators understand: the full impact, effects and implications of their actions on people who were directly and indirectly affected by their violence; their responsibility for these actions; and their responsibility for stopping the violence.

1.32 Preventing family violence requires the community to understand the nature of it, to condemn the behaviour of those who perpetrate it and to provide support to people who need it at the earliest possible stage.

OUR PROCESS

1.33 We have drawn upon the emerging programs and policies to deal with family violence in formulating our approach to this reference. The recommendations in this report have been based on evidence from a wide variety of sources, including information obtained from consultations, submissions and interviews, current research on family violence, forums, advisory committees and our participation as an observer on the Statewide Steering Committee to Reduce Family Violence and the Family Violence Court Reference Group.

1.34 As with all its references, the commission has encouraged a broad cross-section of the community to become involved in the law reform process. It is part of our charter to ensure traditionally marginalised groups, such as Indigenous people, people from non-English speaking backgrounds, people living in rural areas and people with disabilities, have a chance to comment on any reform that may affect them.

CONSULTATIONS

1.35 Our first round of consultations helped us identify the range of issues to take into account during our review of the Act. We actively sought opinions and tested our views and recommendations with a wide variety of people.

1.36 Between January and July 2004 we conducted 41 consultations and held meetings in each Department of Human Services region in Victoria.⁸ Participants at these meetings included family violence workers, court staff, magistrates, lawyers, police, victims of family violence, Indigenous Family Violence Action Groups, workers with immigrant women's groups, and other workers assisting perpetrators, children and people with disabilities.

1.37 We conducted three forums involving 220 participants from Victoria Police, courts, government departments, the community sector and individuals who have experienced violence. The first forum, held in February 2004, considered the impact of specialisation of courts and the use of specialist prosecutors in family violence matters. The second forum, in November 2004, considered the needs of victims of family violence in the justice system. Both of these forums were held in partnership with the Victims Support Agency. A third forum, held in conjunction with Aboriginal Affairs Victoria, considered the views of Indigenous people about police powers, support needed for Indigenous people and alternatives to the legal system. A roundtable

⁸ The list of 41 consultations undertaken in 2004 appears as Appendix 1 in Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) 257–9.

discussion with Indigenous representatives and Department of Justice staff followed this forum.

1.38 Additional meetings, workshops and consultations with community groups were held in 2005 and involved 110 participants from the Immigrant Women's Domestic Violence Service; Domestic Violence Victoria Child Issues Sub-Group; Violence Against Women and Children Group of the Federation of Community Legal Centres; Aboriginal Family Violence Prevention Legal Service; Peninsula Community Legal Service; Eastern Community Legal Centre; Women's Group of the Horn of Africa, Welfare Council of Victoria; and representatives from the South Sudanese group from the Springvale Community Aid and Advice Bureau. These last two workshops were facilitated by a consultant with expertise in these issues, Maria Dimopoulos.

1.39 We were also able to meet with representatives of the Magistrates' Court of Victoria, the Magistrates' Court Protocols Committee and Senior Registrars Committee, representatives from Victoria Police and officers from the Broadmeadows Police Complex.

1.40 To consider community-based legal representation schemes, consultations were held with New South Wales Legal Aid, which administers the Women's Domestic Violence Court Assistance Program; Victoria Legal Aid; the Federation of Community Legal Centres; Victorian Bar Council Family Violence Subcommittee; and the Family Law Section of the Law Institute of Victoria.

1.41 In our research about whether police should have the power to issue intervention orders, we were greatly assisted in consultations with representatives from Victoria Police; NSW Police; Tasmania Police; Western Australia Police; representatives from Tasmania Legal Aid; the Magistrates' Court of Tasmania; Tasmania's Safe at Home project; the Tasmanian Department of Justice and Liberty Victoria.

1.42 Consultations were also conducted with the Office of the Public Advocate (OPA) and the Office of Senior Victorians.

1.43 A list of participants in these meetings appears in the Acknowledgments at the front of this report.

INTERVIEWS

To ensure that we understood and accurately represented the views of people who have experienced family violence, we conducted in-depth interviews with 10 female volunteers. These interviews were recorded and transcribed. The interviews are treated

anonymously, confidentially or otherwise according to the wishes of the interviewee. Despite our efforts, we were unable to secure any interviews with male perpetrators of family violence.

ADVISORY GROUPS

1.44 Our work was informed and assisted by a general advisory committee and two specialist advisory committees. The specialist committees were convened to consider family violence and its impact on people from culturally and linguistically diverse communities and people with disabilities. All the committees were comprised of individuals with expertise and experience in matters relevant to the review. The role of advisory committees is to provide advice about our proposed approach and the directions we take during the course of the review. The members of the advisory committees are listed in the front of this report.

PUBLICATIONS

1.45 Throughout the reference we have published an email newsletter to inform people of our progress and to encourage participation in our enquiry.

1.46 A Consultation Paper seeking responses from the community about the issues we identified in the first phase of this reference was published in November 2004. Following the call for submissions in the paper, we received 86 submissions, including four submissions which were taken directly from individuals or groups who were unable to prepare a written statement. Extensive reference to the submissions received is made throughout this report.

1.47 In August 2005 we published the Interim Report, *Family Violence: Police Holding Powers* in which we made recommendations to confer on police officers a power to remove, hold and detain people pending an application for an intervention order. The Crimes (Family Violence) (Holding Powers) Bill was introduced into parliament and read for a second time on 19 October 2005.

STRUCTURE OF THE REPORT

1.48 The rest of this report contains recommendations for changing the administrative, procedural and legal responses to family violence to better protect victims.

1.49 Chapter 2 deals with the definition and recognition of family violence and how typical patterns of abuse play out.

1.50 Chapter 3 discusses what an effective legal response to family violence should look like, keeping in mind the benefits and limitations of both criminal and civil systems. The chapter also outlines the commission's values framework, which has guided its formulation of a new Act, and the principles and objectives that should be included in legislation.

1.51 Chapter 4 defines family violence and family member for the purposes of legislation, and discusses what sort of behaviour should fall under the definition.

1.52 Chapter 5 is about the importance of police responses to family violence, especially the treatment of such violence as a criminal offence. It recommends the establishment of specialist police prosecutors and the need for police training to respond to marginalised groups in the community. It examines police applications for intervention orders and police reactions to intervention order breaches.

1.53 Chapter 6 details how magistrates and registrars can improve their processes and training in dealing with family violence victims and the importance of access to legal information and advice. It also discusses how courts can better serve people from marginalised groups and the need for greater safety in courtrooms.

1.54 Chapter 7 looks at how to get an interim intervention order, especially after hours, and Chapter 8 describes the process of getting a final intervention order. Issues involved with final orders include: where to get a final order, who can apply for an order, serving orders, cross applications, undertakings, costs, vexatious litigants, and orders against young people.

1.55 Chapter 9 examines the contents of intervention orders, including exclusion orders, and how orders may deal with child contact issues.

1.56 Chapter 10 looks at how orders may be revoked, varied or extended after a final order is made, as well as how the justice system should respond to intervention order breaches.

1.57 Chapter 11 takes us inside the courtroom to recommend changes to the way evidence is given to make it easier for victims to tell their stories, and Chapter 12 looks beyond the legal system to recommend changes in professional cultures and community understanding of family violence.

Chapter 2

Recognising Family Violence

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INTRODUCTION

2.1 In this chapter we describe the broad nature, dynamics and effects of family violence. Although family violence can take various forms, its predominant feature is that it involves the perpetrator exercising power and control over the victim. This has important implications for the way that both the legal system and the community respond to family violence.

2.2 Historically, the legal response to family violence has been inadequate because its particular dynamics and effects have not been well understood. Many people continue to be unaware of the specific characteristics of family violence. It is often seen as covering only physical assault; it may be regarded as something which occurs rarely or as behaviour which is a private family matter and not the business of others. We aim to raise awareness and dispel myths and assumptions about family violence by describing it in this chapter. This description of family violence is also the basis for the recommendations that we make in this report.

WHAT IS FAMILY VIOLENCE?

2.3 People generally confine their understanding of family violence to physical assault, such as hitting, punching, and pushing. Most research, as well as accounts by victims, contradicts this definition. Family violence is now generally recognised as much broader than physical assault,⁹ although there is still some debate about its precise definition.¹⁰

PHYSICAL ASSAULT

2.4 Family violence may take the form of physical assault, such as slapping, punching, pushing, biting, kicking, shaking, choking or hair pulling. It may include the use of a weapon, such as a gun, knife, spear or stick:

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- 9 See, eg, the Victorian Government's Women's Safety Strategy definition of family violence: 'Violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships ... This encompasses not only physical injury but direct or indirect threats, sexual assault, emotional and psychological torment, economic control, property damage, social isolation and behaviour which causes a person to live in fear': Office of Women's Policy [Victoria] (2002) above n 5, 20.
- 10 See, eg, Thérèse McCarthy, *Public Health, Mental Health and Violence Against Women: Report Produced for VicHealth* (2003) 10, and Domestic Violence and Incest Resource Centre, *What's in a Name? Definitions and Domestic Violence*, Discussion Paper No 1 (1998) 2.

I have been hospitalised eleven times. I have sustained many injuries such as a broken jaw, ribs, thumb, nose, cheekbone and toe. My teeth were smashed out and my head has been stitched up twice. Paul has hung me out the car door, my head only centimetres from the ground, whilst he was driving. He has assaulted me with a steering lock and hung me over a cliff. Many times my children and I have been dumped in the middle of nowhere at all hours. A hair dryer was lowered into my bath. Paul was lifting it in and out of the water whilst I was in the bath ... Some of these assaults I have no memory of, but the blood up the walls and the pools of blood on the floor tell me where it had occurred.¹¹

2.5 Physical forms of family violence may also include actions which particularly affect certain people, for example, taking the wheelchair away from a person with a disability:

But the worst thing was I didn't feel safe around them [my family]. I was permanently terrified. Whenever I went out they left me to struggle. I had to crawl backwards down steps; they just left me to manage. I remember one time on holiday they took a picture of me coming backwards down the stairs on a windy day and my dress blew up; they thought it very funny.¹²

PROPERTY DAMAGE

2.6 Property damage may include destroying or harming a person's personal possessions such as clothes, furniture, precious items or housing. One victim told us that her violent partner had destroyed parts of the house they jointly owned with an axe. The act of property damage is violent in its own right, but it can also threaten physical harm to the victim.

SEXUAL ASSAULT

2.7 Family violence may involve sexual assault or sexual abuse of children. Examples of sexual forms of family violence include rape and other non-consensual sexual acts, hurting someone during sex, forcing someone to have unsafe sex (eg without protection against pregnancy or sexually transmitted diseases); forcing people to take their clothes off or remain naked against their will; making someone pose for

11 Debra Parkinson, Kerry Burns and Claire Zara (eds), *A Powerful Journey: Stories of Women Leaving Violent Situations* (2004) 42.

12 Judith Cockram, *Silent Voices: Women with Disabilities and Family and Domestic Violence* (2003) 48.

pornography or in front of others; making someone look at pornography; or forcing them to watch sexual activities.¹³

The second time [I was raped by my ex-husband] my son was present ... They [the children] were out of control when it happened. Their poor little minds just didn't know how to deal with it ... My ex would come into the house and tell me to do what he said or he would wake the kids up and make them watch. By the end of it I just thought a mother does anything for her children, so I would let him do whatever, I would cry the whole time, but let him do it because I just didn't want him to wake my kids, to let them see again.¹⁴

2.8 Accounts of sexual assault reveal that it is not always viewed as a form of family violence. Perpetrators of family violence may believe that they have entitlement to sexual relations with their partners, irrespective of whether it is consensual:

My husband would get angry when I refused to have sex and he would continue to yell at me and grab me until I just gave in to shut him up.¹⁵

SOCIAL ABUSE

2.9 Family violence may take the form of social abuse, where someone restricts and supervises another person's social interactions. Examples of social abuse occur when the victim is not allowed to contact or see family or friends; not allowed to plan or attend social events or move around socially; not able to make telephone calls without permission or supervision; or is prevented from learning or speaking English or other languages. For example:

I had to be home at certain times. For example, he would come home at lunchtime and I had to be there. He would only put a certain amount of petrol in the car so you could only go so far. He'd always check where I was and who I was with. He used to shout whenever I had contact with my brother or my sister or outside contact with anyone.¹⁶

13 Victorian Indigenous Family Violence Task Force, *Final Report* (2003) 125.

14 Interview with Julie, 27 April 2005.

15 Mary Ellen Young et al, 'Prevalence of Abuse of Women with Physical Disabilities' (1997) 78 *Archives of Physical Medicine and Rehabilitation* S34.

16 Keys Young, *Against the Odds: How Women Survive Domestic Violence: The Needs of Women Experiencing Domestic Violence Who Do Not Use Domestic Violence and Related Crisis Services* (1998) 10.

PSYCHOLOGICAL OR EMOTIONAL ABUSE

2.10 Psychological or emotional abuse may involve manipulative behaviour, such as remaining silent for prolonged periods, unfairly blaming a person for adverse events or making them feel they are the problem in a relationship or family. It can include constant comparisons with other peers, which works to lower the victim's confidence, self esteem and self-worth.

I believed everything was my fault because I was such a disgusting sight and that's why Paul hated me. I once caught him masturbating over a 'People' magazine. He kicked me and pushed me back to bed and he said, 'Look at what I have to do because your body's so fucked'.¹⁷

2.11 Some victims have described the profound effects family violence has had on their sense of self:

You're feeling worthless at that point, you've been told you're worth nothing, so you're not going to think of yourself. At that point, you just think it's your lot in life, you must have done something to upset him and so deserve it. A woman in that situation is not thinking: 'Hey, you know what, I'm better than this, bugger off mate'. You are feeling so worthless, and a failure, and guilty, and on top of that with me, I also had the sexual violations, so I also felt dirty and that nobody would want me, that I was used goods. I remember thinking that I didn't care what he did to me, because I was so worthless.¹⁸

2.12 Psychological and emotional abuse may include pet abuse, where a perpetrator harms a pet or animal, or forces a person to harm a pet or animal.

VERBAL ABUSE

2.13 Verbal abuse is related to psychological and emotional abuse. It may involve frequent insulting or humiliating comments, in public or in private, about a person's intelligence, appearance, sexuality, body image, parenting skills or spousal capacity:

She would abuse me, swear, call me names. It would go on for ten or twenty minutes ... She has always told me that I make her like that. It's all my fault. She's not like it with anyone else, only me. She doesn't see that there is a problem with her behaviour. All the time she says she hasn't got a problem.¹⁹

17 Parkinson, Burns and Zara (2004) above n 11, 41.

18 Interview with Julie, 27 April 2005.

19 Rosemary Paterson (ed), *Breaking the Cycle: Six Women Tell Their Stories of Finding Ways to Deal with Adolescent Violence with Courage and Hope* (2001) 35–6.

2.14 Verbal abuse can also include threats to harm or kill someone, children, relatives or pets, or threats to destroy property or possessions, and harassment.

He said, 'I want to destroy your face so no man will ever look at you and I know you will be mine'. He said to me once 'If anyone ever hit you, I'll kill them'. I said 'Who's going to protect me from you?'²⁰

Then he stopped the car and he said to me, 'What are you going to do when you get back? I'll track you down at any domestic violence place, so I may as well kill you now.' He's a locksmith and he was saying to me, 'Any place you go, any refuge, I'll find you.' Then he hit me.²¹

2.15 It is important to note the way fear is evoked and the threat of death in these quotes because they demonstrate the perpetrator exercising ultimate power and control over the victim.

2.16 Another example of verbal abuse was provided by the Victorian Indigenous Family Violence Task Force:

Stupid, brainless, idiot, thick; slut, bitch, big hole, tart, dog; fat, shitface, ugly or expressions like 'you think ya look good', 'what ya tryin to prove?'; useless or 'good for nuthin', 'can't cook', 'can't even look after ya kids'.²²

ECONOMIC ABUSE

2.17 Economic abuse includes the unequal control of money or finances in a relationship or family. It may involve one person having complete control of money and income; preventing family members from accessing their own money or bank accounts; having unrealistic expectations of spending patterns and budgeting; controlling how other family members spend their income; forcefully taking money from family members; or threatening family members for money. For example:

Janine told of her husband's expectation that she provide food for herself and their daughter, Emily, even though she had no independent income: 'A lot of the time I can't afford food so I get help from the Salvation Army ... I don't care about food for myself, I just care about Emily. I often go days and days without food. It doesn't bother me at all. He loves her, don't get me wrong. He is the one that will buy a \$3000 computer for her

20 Parkinson, Burns and Zara (2004), above n 11, 106.

21 Ibid 46.

22 Victorian Indigenous Family Violence Task Force (2003) above n 13, 126.

but not \$10 for food. He says 'you're the mother, you have to look after that' ... He will go and eat at his mum's if there is no food here...²³

During the abuse, I spent little on myself and felt guilty about every cent. I mainly bought clothing, some cosmetics (such as shower gel) and some hobby items (scrap booking mainly). I still rarely spend on me, only recently allowing myself \$20 a fortnight for a massage. My ex-husband spent every cent of his money on himself.²⁴

I never shopped on my own, we always went to the supermarket together. I would want a packet of biscuits or something for the kids and he would make me feel guilty. I just don't think you should have to beg for things.²⁵

In our community, a lot of women try to get some presents and send some money home. The man gives \$20 pocket money a week to pay for them to go to work, and says what is left you can buy cosmetics and send some home. She can't even buy a can of drink with this.²⁶

RECOGNISING THE BROAD NATURE OF FAMILY VIOLENCE

2.18 Recognising the broad nature of family violence is particularly important because it identifies unacceptable behaviour and validates the experiences of victims, who may have experienced many different types of violence. A broad definition of family violence is also important to ensure that people are able to obtain legal protection through an intervention order. In Chapter 4, we make recommendations to expand the definition of family violence for the purposes of intervention orders.

PERPETRATORS AND VICTIMS OF FAMILY VIOLENCE

FAMILY VIOLENCE AND GENDER

2.19 Women are far more often the victims of family violence than men. Family violence is a gendered crime, and gendered power relations in society are a significant factor in its prevalence.

23 Coburg Brunswick Community Legal and Financial Counselling Centre, *His Money or Our Money? Financial Abuse of Women in Intimate Partner Relationships* (2004) 21.

24 Ibid 23.

25 Ibid.

26 Ibid 22.

2.20 The latest Victorian government statistics estimate that family violence affects one in five women,²⁷ while a benchmark Australian study based on a 1996 Australian Bureau of Statistics survey reported that 23% of women who have ever been in a married or de facto relationship had experienced physical violence from a male partner.²⁸ While such statistics are useful to indicate a substantial minority of women in our society are affected, researchers assure us that we will never really know the extent of family violence.²⁹ Some even argue that such data represents only the ‘tip of the iceberg’ in gauging the extent of some forms of family violence.³⁰ A World Health Organisation global report on violence showed that the overwhelming burden of partner violence is borne by women at the hands of men.³¹

2.21 There are several possible reasons for the gendered nature of family violence. One commentator describes such gendered power relations in the following way:

[A] man’s violence towards his female partner must be seen in the context of a set of social arrangements where men as a group have power at the expense of women as a group, and so violence by men in individual relationships can be understood as in various ways assisting the maintenance of the status quo. It is not necessary for individual men to be aware of this, although it is noteworthy how many perpetrators’ violence is not simply a form of expression of rage or frustration over conflict, but is a controlling response to their female partner’s ‘failure’ to be a ‘proper’ wife in dominant patriarchal terms.³²

2.22 Social sanctions often prevent open discussion of family violence and violence against women,³³ and much of the violence occurs in private homes away from the attention of others. A historical, gendered dichotomy between public and private spheres leads some to still consider violence in the home as a private issue, rather than one in which the State should interfere. One woman we spoke to only considered a long-term abusive relationship to be ‘family violence’ when her husband chased her into the frontyard, trying to kill her, as the attack was seen by her neighbours and then the police.

27 Victorian Government, Office of the Premier, ‘A New Approach to Reduce Family Violence’ (Media Release, 27 April 2005).

28 Australian Bureau of Statistics, *Women’s Safety Australia 1996* (1996) 50.

29 Dale Bagshaw and Donna Chung, *Women, Men and Domestic Violence* (April 2000) 2.

30 Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003) 26.

31 World Health Organisation, *World Report on Violence and Health* (2002) 89.

32 Domestic Violence and Incest Resource Centre, *Men as Victims of Domestic Violence: Some Issues to Consider*, Discussion Paper No 2 (2001) 45–6.

33 Ibid.

2.23 Even when violence against women does reach the public domain it is often considered less serious than violence that takes place outside the home between acquaintances or strangers. This is one of the reasons why family violence has rarely been prosecuted as a criminal offence. The full extent of violence against women often goes unrecognised. Alternatively, it may be attributed to individual men and not recognised as a social problem.³⁴ These attitudes also reflect wider power relations in society.

CHILDREN AND YOUNG PEOPLE AS VICTIMS OF FAMILY VIOLENCE

2.24 Children and young people may be affected by family violence by being physically and verbally assaulted themselves or by witnessing or being present when their parent is abused. Research is now recognising a connection between family violence and child abuse,³⁵ for example, one study identified the presence of domestic violence in at least 52% of families where children were abused or neglected.³⁶ Even if a child or young person is not a direct victim of family violence, witnessing family violence and living in a household where family violence takes place can be extremely harmful.

[Along with the violence perpetrated against me, my ex-husband] has head butted [my son] Anthony, knocking him clean out. He has also punched and emotionally abused him... Josh [my other son] has been thrown into the wall, hit and also emotionally abused ... There were times when Josh didn't want to go with his father [on access visits], but he knew he didn't have a choice. [His father told him before one access visit] 'Wave to your mother, because you won't see her again'. Josh had looked back at me and I could see him screaming ... Josh didn't want to go [on another access visit] ... [he] wet his pants before going that day.³⁷

2.25 When family violence occurs in a marriage or other intimate partnership, and the couple has had children together, children can become part of the dynamic of power and control in the violent family relationship. Threatened or actual violence towards children can be a way of controlling a child's parent. Children also affect the decisions people make about staying in or leaving a violent relationship. Some victims

34 Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey* (2004) 7.

35 Adam Tomison, *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence* (2000).

36 Ibid 6.

37 Parkinson, Burns and Zara (2004) above n 11, 37–8, 42.

report that the impact of the family violence on their children was the reason they decided to leave. Some victims report that their children are one of the reasons they do not want to leave the relationship.

2.26 After separation, conflict about children can become the focus for further violence.³⁸ As Laing puts it: ‘After separation, the children may find that ... they move from the periphery to the centre of the conflict’.³⁹

2.27 Child contact can be a way for the perpetrator to maintain contact with a victim of family violence, where the victim is also the child’s mother. Some perpetrators will harm children on child contact visits as a way of harming their mother. Others may use disputes over child contact as a way of controlling victims, occupying them with legal disputes and threatening them with a lack of child contact.

2.28 Legal and social support systems must take account of issues relating to children to respond adequately to the needs of family violence victims. Research has found that one of the main reasons women fail to report family violence is because they fear their children will be removed.⁴⁰ This is often because they are held accountable for failing to protect their children in a family violence situation, despite the fact that it is the perpetrator who is responsible for the violence and for any harm caused to the children through exposure to the violence.

2.29 Laing suggests that it is more helpful to support women in the actions they are already taking to assist their children, than to ‘pathologise’ them and presume they are ignorant or incompetent because they are abused.⁴¹ It is also important not to separate the needs of children from the needs of mothers who are the victims of family violence. Instead of treating women and children as entities with completely separate interests, the legal and social response to family violence should recognise that ‘the best interests of children in families with domestic violence cannot be separated from the best interests of their mothers’.⁴²

38 We make recommendations for ways that child contact can be restricted and made safer at recommendations 116–122.

39 Lesley Laing, *Children, Young People and Domestic Violence* (2000) 2.

40 Ibid 17.

41 Ibid 6.

42 Ibid 21.

YOUNG PEOPLE AS PERPETRATORS OF VIOLENCE

2.30 Children and young people can also of course be perpetrators of family violence. A recent and growing field of research documents the violence perpetrated against parents by their children, including physical and emotional violence.⁴³ Adolescent children, in particular, can be the perpetrators of family violence towards a parent or parents, or other people in their household.

MEN AS VICTIMS OF FAMILY VIOLENCE

2.31 Over the past few years, there has been growing interest in the topic of men as victims of family violence.⁴⁴ The Lone Fathers Association and other men's groups have been vocal about this topic. Claims have been made that the Australian Bureau of Statistics and the Office for the Status of Women have falsified and suppressed statistics that would otherwise have shown the 'true' extent of female violence towards their male partners.⁴⁵

2.32 Studies conducted in the United States and more recently in Australia have been used to support claims that men and women are equally violent,⁴⁶ and that men are victims of family violence in the same number as women.

2.33 The most common measure used to ascertain rates of violence is the Conflict Tactics Scale.⁴⁷ Studies conducted in the United States during the 1970s and 1980s that examined the incidence of physical aggression in heterosexual relationships showed that men and women perpetrated violence at roughly the same rate.⁴⁸ However, these studies did not consider the degree of severity of the violence, the effect of the violence on the victim, the different motivations of men and women in perpetrating violence, and the use of forms of family violence other than physical (eg marital rape, verbal abuse, threats and intimidation, financial deprivation).⁴⁹ When examined closely, men's and women's violence is not equivalent. Men's violence to women is more severe and more likely to inflict severe injury; women are more likely

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

44 Submissions 24 (James Hickey), 56 (Lone Fathers Association (Australia)).

45 Kerrie James, 'Truth or Fiction: Men as Victims of Domestic Violence', in Jan Breckenridge and Lesley Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 153.

46 Bagshaw and Chung (April 2000) above n 29.

47 James (1999) above n 45, 154.

48 Ibid.

49 Ibid 155.

to be killed by current or former male partners than by anyone else; less than 10% of male homicides are carried out by an intimate partner, and when they are, there is a history of the female being a victim of domestic violence in more than 70% of cases.⁵⁰

2.34 Men are far more likely to be harmed by a stranger than by a family member and women's violence towards men is more likely to occur in self-defence. Women's violence has been found to be a response to frustration and stress, whereas men's violence is most often an attempt to dominate and control. Women's violence is often a reflection of dependence, whereas men's violence is a reflection of dominance.

2.35 As one researcher concludes:

Whilst it is true that women can be violent and that women's violence can constitute a problem for their male partners, it is a fiction that their violence is equivalent to men's in intent, frequency, severity or outcome ... The significant differences between men's and women's violence give us much greater cause to be more concerned about men's violence towards women than women's violence towards men, and legitimises current social policy direction and priority.⁵¹

FAMILY VIOLENCE AND DIVERSITY

2.36 Gender is not the only factor in determining who is affected by family violence. Family violence may occur in the context of same-sex and other relationships. Race, ethnicity, age, physical disability and cognitive impairment also contribute to particular groups in society being more often affected than others. This is discussed further at paras 2.76–2.91.

DYNAMICS OF FAMILY VIOLENCE

2.37 In this section, we discuss the dynamics of family violence, focusing on the way it can be used by perpetrators to exercise power and control over other family members. Understanding these dynamics is important in shaping the legal response to family violence. These dynamics help to explain why victims respond in ways that present challenges to the legal system, for example, by exhibiting extreme fear in situations where it does not seem justified to others, by leaving and then returning to the perpetrator, or by maintaining the hope that the violence will not occur again.

50 Bagshaw and Chung (April 2000) above n 29.

51 James (1999) above n 45, 161–2.

PERPETRATORS AND CONTROL

2.38 Repeated coercive and controlling behaviour which limits, directs and shapes a person's thoughts, feelings and actions is a common pattern of family violence. In this way it is different from other types of violent behaviour, which are more likely to take the form of one-off incidents.

2.39 Perpetrators use abusive behaviour to try to dominate, coerce and control other people. Whether they are physically violent, psychologically and emotionally abusive or violent in any other way, many perpetrators use a combination of subtle and unsubtle methods to maintain their control over a victim. They want them to 'act, talk and think' in ways that please them. They also make family members responsible for their own fears and problems. For example:

I use violence because I wasn't getting my own way.⁵²

She would go on and on, I would try to get away, I'd push her.⁵³

My body language says to her 'I am going to get abusive' you can see it (fear) in her eyes.⁵⁴

I punched the wall ... I guess it was a way of releasing, probably two things, releasing some sort of pent up violence in me. This is a physical situation, and when I say I haven't hit my four kids I most certainly have more than once punched out a wall. I slammed a door so hard until it is, you know, virtually broken. Yes, the release of pent up type anger and I think also a way that says, 'Hey, I am the one that's controlling the situation, you're not.'⁵⁵

2.40 Acting in one's best interests, other than attempting to avoid the further violence and control of the perpetrator, can be very difficult indeed. As some victims describe:

When you're in this situation, your identity goes, you're pleasing this person all the time, not doing what you want to do. You start to realise that.⁵⁶

I was charged with driving an unregistered car. He'd forced me to drive it. I remember the police officer saying, 'How can anyone make you do it?' He'd punched me—that's how someone can make you do it.⁵⁷

52 Kerrie James, Beth Seddon and Jac Brown, *Using it' or 'Losing it': Men's Constructions of Their Violence Towards Female Partners* (2002) 4.

53 Ibid 5.

54 Ibid 4.

55 Ibid.

56 Parkinson, Burns and Zara (2004) above n 11, 81.

57 Ibid 45.

2.41 Physical violence, or its threat, is not the only way that perpetrators of family violence achieve control. The following vignettes, taken from a men's behaviour change book, illustrate this point. The first illustrates economic and verbal/psychological abuse as a means of controlling family members; the second illustrates psychological and verbal abuse.

Both John and his wife worked. They had two children at a private school, a big house with a recently added extension and the latest car. They both earned good money, but no-one knew what happened to John's wage. They were deeply in debt and his wife and children were forced to survive on her income as well as meet all the bills and loan repayments. She never had any money left over and had to endure insults about her budgeting abilities and intelligence.⁵⁸

When George came home from work he would systematically go through the house, checking to see that all the cleaning and other work he expected his wife to do had been done. Sometimes he'd wipe his finger along the top of the window frame to find dust, or he'd deliberately mess something up as an excuse to denigrate his wife's ability to keep the house clean. George also had very unrealistic expectations of his son, especially in sports. If his son scored 100 in cricket he'd tell him he should have scored more. In fact, his wife and children could never do anything right. Sometimes he'd threaten to kick both his wife and children out of his house if they didn't do things his way.⁵⁹

BEING IN CONTROL WHEN USING VIOLENCE

2.42 Perpetrators usually have control over their own actions when they are violent but may state that they did not know what they were doing or were 'out of control' when they were violent. Recent research suggests that this is rarely the case. There are only a tiny number of people who, through illness or accident, do have a neurological or mental disorder which interferes with their way of thinking and may result in violence and impulsive behaviour.⁶⁰ Instead: 'The majority of violent or abusive men are just normal people who try to distance themselves from their actions by trying to blame others'.⁶¹

58 Ruth Frances (ed), *Mirrors, Windows and Doors: A Self-Help Book About Violence and Abuse in the Home* (rev ed, 1998) 24.

59 Ibid 22.

60 Ibid 62.

61 Ibid 62.

2.43 George, a perpetrator, describes in his own words the use of this control while performing a violent act:

If someone knocked on the door when I was arguing with my wife, I could stop mid-sentence—I would instantly become MISTER NICE GUY. The second they left it was like turning a tape recorder back on—I could start EXACTLY where I left off.⁶²

2.44 Research has found that some perpetrators view their violence in ‘instrumental’ terms to overtly ‘get their own way’. For example: ‘I know exactly what I am doing, but fuck you woman—I’ll grab you and make you listen’.⁶³

2.45 Perpetrators who ‘knowingly’ use violence to control their partners—the ‘tyrants’, as some academics have called them—are less likely to describe themselves as violent and admit to their violence. Conversely, research suggests that perpetrators who say they ‘lose it’—the ‘exploders’—are more likely to acknowledge they use violence, but blame their partners for provoking them.⁶⁴ Both these explanations by perpetrators reinforce the importance of the law’s role in holding perpetrators accountable for their actions.

2.46 Victims’ accounts of violence also demonstrate the control perpetrators exercise when performing a violent act and how victims are affected by understanding that the perpetrator is in control.

I feel that Susan has got some control over what she does, even though she says she doesn’t know what she’s doing. If she wants to she can sit and talk quietly to someone but then walk out the door and abuse all of us, so she’s got to be able to control it when she wants. It’s probably harder thinking she knows what she’s doing. It’s easier to blame the Tourettes or the other problems she’s got.⁶⁵

He had me up against the pole holding me with his hand on my throat and had the hammer in his other hand. He was banging it and just missing my head. I knew that if I screamed or did the wrong thing he would kill me. All I could think of doing was to look him straight in the eyes and if he loved me, he wouldn’t kill me. The thing was that his mobile phone rang, and he’d answer it. He was really nice as pie on the phone taking business calls. He was holding the door so I couldn’t get out, nice as pie on the phone, and

62 Ibid 63 (emphasis in original).

63 James, Seddon and Brown (2002) above n 52, 4.

64 Ibid 4–5.

65 Paterson (2001) above n 19, 29.

then trying to suffocate me. He was taping the whole thing on a micro cassette recorder like he'd done with his previous partner.⁶⁶

2.47 Understanding that perpetrators have control over their violent behaviour has important implications for the legal and social response to family violence. Not only does it mean that perpetrators must be held accountable for stopping the violence. It also explains why many perpetrators of family violence can appear 'charming', 'personable' or even 'a pillar of the community'. When perpetrators are only violent towards a certain family member or members, but behave non-violently and politely towards other people, it may be difficult to believe victims' accounts of their actions. It is important to recognise that perpetrators can appear perfectly calm and non-violent (such as when the police attend a call at a family home, or at court) but still be perpetrating violence against a family member.

PERPETRATORS AND SITUATIONAL FACTORS

2.48 Some perpetrators are under various forms of pressure. Newly arrived refugees may have suffered terrible trauma in their home country, the fracturing of their extended family and community, and significant loss of their role and status in their new country, causing intense internal confusion and pain. Carers of people with disabilities may be overworked, over-tired, underpaid, and under-appreciated. For Indigenous Australians, the profound and continuing harms of colonisation and structural violence of race relations creates pressures and deep fissures in communities. These must be kept in mind with the high levels of family violence found in Indigenous communities. Family violence is also associated with alcohol and drug use. However, it is a myth that alcohol causes family violence. The use of alcohol may just make it easier to behave in more extreme and thoughtless ways.⁶⁷

2.49 Other social factors and family background can have an impact on perpetrators' behaviour. Gender roles in society and communities, such as ideas of 'manhood' or traditional/patriarchal ideas of how a husband behaves, may have an impact on some male perpetrators.

2.50 All of these factors may contribute to family violence. However, some of these factors are also present in other areas of criminal behaviour and do not excuse perpetrators from liability. Researchers suggest that abusive behaviour is never entirely determined; there is always an element of free choice. As one researcher argues:

66 Parkinson, Burns and Zara (2004) above n 11, 31–2.

67 Ruth Frances (ed) *Mirrors, Windows & Doors: A Self-Help Book for Men About Violence and Abuse in the Home* (Revised by N Belfrage and I Wilson ed) (1998).

For some [men] whose early lives may have been influenced by violence, the choice to eschew violence may be a more difficult choice than for [men] whose early lives were violence free. However, it is still a choice and it could be argued that there is an even greater moral obligation on men who experienced violence early in their lives to be vigilant about their own behaviour.⁶⁸

2.51 Acknowledging the influence of all these factors is very important. But it does not remove the fact that perpetrators are in control of their violent behaviour and they need to take responsibility for making the violence stop. Indeed, the fact that many perpetrators are not violent towards anyone else in the community, other than a particular family member or members, is one way of confirming the choice they make to be violent in some situations.

PATTERNS OF FAMILY VIOLENCE

2.52 Some commentators have described a three-phase cycle of family violence. They describe a first phase, the ‘tension-building’ phase, as being when the perpetrator engages in increasingly abusive behaviour—verbal abuse, constant criticism, harassment, public embarrassment, humiliation and minor physical incidents. The victim may react by withdrawing or avoiding contact with the perpetrator to avoid ‘setting him or her off’. When the tension increases to the second phase, the ‘violent incident’, this may be represented by an act of physical, emotional or sexual violence against the victim, often accompanied by severe verbal abuse. The third phase is called the ‘honeymoon’ phase, where the victim may respond with anger or rejection after the incident, and the perpetrator may respond with apologies, gifts, compliments, promises to change and so on. According to this cycle, phase three then leads back to phase one.

2.53 Many victims describe a situation where the violence begins with verbal and emotional abuse followed by physical assault with increasing degrees of severity.

2.54 Some family violence victims also describe the development of patterns of cruelty in which strategies of abuse become more diverse and severe over time.⁶⁹ Many describe a situation where the violence begins with verbal and emotional abuse followed by physical assault.

68 James, Seddon and Brown (2002) above n 52, 2.

69 Ibid.

2.55 Victims find the unpredictability of family violence particularly difficult to cope with. Perpetrators may control victims by putting them in a situation where they are under a constant threat of attack. As one victim said:

I had a sense of fear. He was extremely explosive. Even if it was only a couple of times a year, it was like a tantrum, throwing things through windows, a real anger within him. I never knew when this would happen.⁷⁰

2.56 Although a particular incident may not seem serious to others, to the victim it may be part of a broader pattern of controlling behaviour which influences what the victim does, and how he or she behaves. As one researcher puts it:

Contrary to popular belief, women who are subjected to assault have perfected the art of behaving just the way their assailants expect them to. After years of repeated assault, they have learned what precipitates violence.⁷¹

2.57 Through violence, perpetrators can begin to control how victims behave and even think, feel and experience their life. As some victims have said:

He controlled what I wore, what I saw, and my money (I worked).⁷²

All this [abuse] made me change my behaviour so I could avoid physical abuse ... I would take the children out and on the way home say 'Just be really good'. I saw this as a way of at least having a chance of avoiding his violence'.⁷³

He taught me from early in the relationship to switch off, because if I laughed, I was laughing at him. If I was sad, I was just an absolute sook. I was never allowed to be sick. There was so much control.⁷⁴

My palsy affects my speech, making it slower than normal and sometimes slurred. I will never forget when he told me not to laugh loudly as I sounded so ridiculous, so for years I never laughed again. I had to be conscious of everything I did.⁷⁵

70 Parkinson, Burns and Zara (2004) above n 11, 26.

71 Women's Policy Co-ordination Unit, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence* (July 1985) 14.

72 Parkinson, Burns and Zara (2004) above n 11, 105.

73 Cockram (2003) above n 12, 45.

74 Interview with Julie, 27 April 2005.

75 Cockram (2003) above n 12, 45.

MYTHS ABOUT FAMILY VIOLENCE

2.58 Perpetrators can only be made accountable for their actions if myths about family violence are rejected. Historically, theories about family violence tended to locate responsibility and blame for family violence with the victim, who was considered to have provoked or deserved the violence.

2.59 While social and legal attitudes to family violence are gradually changing, there is still a misunderstanding of the reasons why women do not leave violent relationships immediately. The following section examines and tries to explain the difficulties faced by victims leaving violent relationships.

WHY DON'T THEY JUST LEAVE?

2.60 The question 'why don't they just leave?' reveals a fundamental misunderstanding of the position of many family violence victims and the dynamics of family violence. In the section above we discussed the power and control which perpetrators may exercise over victims. As one woman commented:

We remain in these relationships because we have lost faith in ourselves; after all the one person we love and would do anything for makes us believe we are such sorry excuses for life. Our spirit breaks, and subconsciously we believe ourselves to be worthless. We fear failure, and the loneliness we have previously experienced, makes us become dependent upon the one who hurts us.⁷⁶

I couldn't function without thinking of him all the time. That's what it was like. The step away is the most positive move you can make but when you're in the situation you believe there is nothing wrong. He has you believe that. People say, 'Why don't you leave?' You don't. When they say, 'Why do you put up with it?' the answer is, you just do. You love them, and you can't see they're doing anything wrong.⁷⁷

2.61 Sometimes, levels of fear of violence are so acute that, paradoxically, it seems safer to stay in a violent relationship than risk what might happen on leaving. Statistics confirm that the most extreme form of family violence, homicide, occurs more often when a victim has *already left* the abusive relationship. Approximately 58 women in Australia each year are murdered by their male partner or ex-partner. Women are more likely to be killed by current or former partners than by anyone else.⁷⁸ In a

76 Parkinson, Burns and Zara (2004) above n 11, 21.

77 Ibid 77.

78 Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia*, Trends and Issues in Crime and Criminal Justice No 255 (2003) 3.

comprehensive study of all family homicides in Australia from 1989 to 2002, Mouzos and Rushforth found that the major precipitating events in homicides where men took the lives of their spouses were domestic altercations, separation and jealousy.⁷⁹ Homicide in these cases is often the ultimate attempt of males to exert power and control over their partners/wives.⁸⁰ Some victims are acutely aware of the possibility of the violence escalating if they leave:

The day before [I left] he was really sick and was half out of it, so I asked him if he would let me move out ... He started laughing and said, 'You're not fucking getting your own place, cunt, the only way you're getting out of here is in a body bag'.⁸¹

Towards the end [of the relationship] when I became stronger, that was when he became violent—physically attacking me. It was so scary I can't describe it. It scatters the whole inside of me. Basically I feel people are good. This destroyed my sense of what should be and takes a while to get over.⁸²

He said to me, 'If you leave me and don't come back, I'll get you. But it won't be when you are down. When you're happy, that's when I'll come and get you'.⁸³

Three days after we separated he came back and raped me the first time. The last time was [13 months later].⁸⁴

BARRIERS TO LEAVING

2.62 In addition to the control which may be exercised over the victim, there are other structural factors that may make it difficult to leave a violent relationship, including: inadequate income, lack of information on support services, lack of appropriate support services, lack of access to legal representation, lack of affordable, appropriate housing, and lack of affordable childcare. Ineffective responses from either the legal system or support services can create significant and crucial impediments to moving beyond family violence.

It was hard breaking from that day-to-day routine of normal living. It was hard not having John there, although he wasn't really there even when he was ... It was hard to change after 33 years of being relied on by others. It was difficult to do something different.⁸⁵

79 Ibid 3; Ken Polk, *When Men Kill* (1999) 28.

80 Ibid.

81 Parkinson, Burns and Zara (2004) above n 11, 41.

82 Ibid 26.

83 Ibid 50.

84 Interview with Julie, 27 April 2005.

It's so hard to leave and so easy to stay. About 500 people apply for each house that's available for transitional housing ... I thought [leaving] was a big mistake at first. I had to leave all my friends and support in the city. It was depressing that I had no one and nothing when I got here. I didn't have a bed.⁸⁶

It's hard now because I live with my parents and he lives over the road from us. That's really hard. He's got a jukebox and plays really loud music. Just to annoy me, he used to drive up on his Harley round and round the block and check on what I was doing.⁸⁷

I live independently and have some home help. I don't believe there will be reconciliation with my family. This is often hard, as I don't have anyone else. I don't have anyone to remember my birthday. I now live with a double isolation, my disability and breaking up with my family. And I have to try and come to terms with the years of abuse. My family really didn't have to do much to support me, but withdrawing and ignoring me was so dangerous. I am often astounded that I came out of it in one piece.⁸⁸

2.63 Some victims face other specific barriers to leaving. For instance, if people have disabilities and must rely on others for their care in the home, or have special facilities set up in their home, it may be impossible for them to leave the place where they are living with the abusive person.

2.64 Leaving is often a non-linear process. It is common for family violence victims to attempt to end the violent relationship several times before they finally succeed. Separating often occurs in stages. Perpetrators can use a variety of measures to make leaving as difficult as possible, including threatening the children, threatening legal action and depriving the victim of money. Lack of support from friends and family, or professionals such as court personnel, the police, counsellors, and clergy, may all cause victims to return to the relationship.

I've tried to leave him from six months into the marriage till twelve years later and finally I did it. It takes a long time to leave, but you get there in the end.⁸⁹

The first time I left, I went to a refuge. I had such a need to [procreate] that it pushed me back to him ... I left my ex lots of times and went back. I went interstate. I've done all

85 Parkinson, Burns and Zara (2004) above n 11 56.

86 Ibid 45.

87 Ibid 34.

88 Cockram (2003) above n 12, 48.

89 Parkinson, Burns and Zara (2004) above n 11, 131.

sorts of things ... When I left for good, it was pretty freaky. I'd never rung the police on my ex, but I did that time.⁹⁰

2.65 These patterns create particular challenges for police and courts in dealing with victims. For example, police and prosecutors may find it frustrating to deal with a victim who has sought their assistance but has then returned to a violent partner. Similarly, courts may be sceptical about the seriousness of alleged violence if the victim keeps returning to the alleged perpetrator.

2.66 However, police, courts and family violence support agencies need to recognise the extent of control which a violent person may exercise over the victim and the emotional and practical barriers faced by victims when they attempt to leave a violent relationship. Legal processes should be designed to provide advice and support which may eventually lead to the victim being empowered to leave the violent relationship. They should also allow victims and children to remain in their home if they wish to do so after they have separated from their partner. It should not be seen as a 'failure' of the system or individuals involved when a victim takes many attempts to leave.

2.67 Such legal responses could assist people to move successfully and happily beyond violent relationships. For some people, separating from violence has meant almost literally getting their life back:

I remember after that, driving down the highway crying, feeling happy and sad and thinking, I'm free.⁹¹

There was a time in my life when I was overflowing with happiness, high on life. I was a positive, carefree and contented person. Slowly I am returning back into that person I was, and it is a great feeling ... I like my new life without dramatic scenes, no fear, very few inhibitions and the freedom to be whoever we want to be.⁹²

HOW VICTIMS RESPOND TO FAMILY VIOLENCE

2.68 Despite the power and control which perpetrators exercise through various forms of violence, victims are not completely deprived of their ability to act for themselves and protect their children. Some women exercise this capacity or 'agency' in a violent relationship, to cope with or 'survive' the violence. For example, one victim described how she would wear her running shoes and carry her keys to bed as a

90 Ibid 40–1.

91 Ibid 43.

92 Ibid 21, 24.

way of quickly escaping if things got very bad.⁹³ Another described how she would try to defend herself during a violent incident: ‘It wasn’t like I sat there and let it happen ... he threw me across the kitchen one day and I picked up the pan ... and smacked him over the head with it’.⁹⁴

2.69 Others may exercise it by planning to leave the violent relationship and ultimately doing so. Victims’ agency and exercise of personal power can play an important part in being able to take steps to move beyond or escape violence. For example, as one victim described:

For five or six months prior to this last assault I was trying to plan a way to escape. I had secretly been seeking legal advice, but at the end of the day, I knew it was up to me.⁹⁵

2.70 For some this happened gradually: ‘Getting the intervention order was a huge step in that it was the first time I took control of my life again. It was the first little bit of self esteem that I got back’.⁹⁶ For others, it was sudden.

2.71 Recognising that family violence victims are not completely powerless and have a capacity to act to protect themselves does not mean that they are in any way responsible for the violence they experience. As Laing puts it:

In discussing women’s agency ... it is important that this is not seen as discounting the terror and abuse with which many women live, or as holding the woman accountable in any way for the abuse she experiences.⁹⁷

2.72 Research on family violence now suggests that victims act assertively, logically and creatively in response to the abuse they have experienced. Rather than being passive and defeated, this research finds that they contact a variety of helpful sources, such as friends, relatives, social services and the police. Often these support-seeking strategies have little result because of deficiencies in the services and sources to which the victim appeals. It is important to recognise this in developing appropriate responses by police, courts and support services.

93 Personal story told at the Facing Family Violence workshop at WIRE—Women’s Information, Melbourne, 18 July 2005.

94 Shirley Patton, *Pathways: How Women Leave Violent Men* (2003) 36.

95 Interview with Kate, 21 April 2005.

96 Interview with Julie, 27 April 2005.

97 Lesley Laing, *Working With Women: Exploring Individual and Group Work Approaches*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 4 (2001) 4.

VICTIMS' AGENCY AND THE JUSTICE SYSTEM

2.73 Family violence victims often have a more accurate understanding than others about how the perpetrator is likely to react in certain situations and how to protect their own safety. Police, registrars and magistrates must be prepared to take account of the perceptions and views of victims.

2.74 An effective legal and social response to family violence must also respect the capacity of victims to make choices about what they need. The legal system must be sensitive to different needs at different times. The response which may be appropriate when victims need immediate protection in a crisis may be different from the response needed when they are in the process of moving on from a violent relationship.

2.75 Recommendations made later in this report recognise the capacity of victims to choose a legal remedy which is appropriate to their situation, while still ensuring they are protected against violence.

FAMILY VIOLENCE AND DIVERSITY

INDIGENOUS PEOPLE

2.76 The extent and seriousness of family violence against Indigenous women and children has been well established in research.⁹⁸ Indigenous Victorians are eight times more likely to experience family violence than non-Indigenous Victorians.⁹⁹ The Victorian Indigenous Family Violence Task Force has found that 'one in three Indigenous people are the victim, have a relative who is a victim or witness an act of violence on a daily basis in our communities across Victoria'.¹⁰⁰

2.77 The Victorian Indigenous Family Violence Task Force recognises that from an Indigenous perspective, the causes of this family violence are located in the history and impacts of white settlement, and the structural violence of race relations since then.¹⁰¹

98 Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 19 <www.hreoc.gov.au/sex_discrimination/customary_law/submission.html> at 21 December 2005; Victorian Indigenous Family Violence Task Force (2003) above n 13; Pam Greer, 'Aboriginal Women and Domestic Violence in New South Wales' in Julie Stubbs (ed) *Male Violence and the Law*, The Institute of Criminology Monograph Series, No 6; Partnerships Against Domestic Violence, *Indigenous Family Violence*, Phase 1 Meta-Evaluation Report (2004).

99 Victorian Indigenous Family Violence Task Force (2003) above n 13, 4.

100 Ibid.

101 Victorian Indigenous Family Violence Task Force (2003) above n 13, 133–6.

Such 'structural violence' includes: dispossession of land and traditional culture, breakdown of family kinship systems and Aboriginal lore, economic exclusion and entrenched poverty, alcohol and drug abuse, the effects of institutionalism and child removal policies, inherited grief and trauma, and the loss of traditional gender roles and status.¹⁰²

2.78 Such wider structural and social issues also affect the way family violence in Indigenous communities is recognised. There is a significant under-reporting of family violence against Indigenous women, especially the rape and assault of women by men. Again, this is often linked to structural factors. As one report put it, 'the lack of trust between Aboriginal people and the police means that violence and sexual abuse within Aboriginal communities is vastly underreported'.¹⁰³

2.79 Because of the wider patterns of kinship and family relations in Indigenous communities, the nature of violent family relationships may also be different. For example, wider family networks may become involved in a particular family violence situation, so that a women feels threatened not only by an immediate partner, but by members of his family as well. Or, people may have a violent relationship with a member of their extended family, rather than an intimate partner. This diversity has implications for appropriate legal recourse, and also how we define 'family member' in the context of family violence.

FAMILY VIOLENCE AND DIVERSE COMMUNITIES

2.80 Differences also exist in the violence and family relationships in some immigrant communities. There has been no comprehensive statistical research into the levels of family violence experienced by women from non-English speaking backgrounds at a national or regional level, though some research has been done with specific cultural and language groups.¹⁰⁴ Some research has indicated it occurs at lower or the same levels as in English-speaking backgrounds. However, it has also been pointed out that there are factors which may result in an understatement of its extent in immigrant communities, including the reluctance of women to report violence to the police and their perceptions of what violent behaviour is.¹⁰⁵ One study has reported

102 Ibid.

103 Human Rights and Equal Opportunity Commission (May 2003) above n 98, 11.

104 Women's Service Network, *Domestic Violence in Regional Australia: A Literature Review* (2000) 9.

105 Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) 32.

a 'strong indication that marital homicide and battering may take place among the overseas-born at a rate disproportionate to the population size'.¹⁰⁶

2.81 Ethnicity and family violence has been seen by researchers as controversial because such findings could be used to substantiate stereotypes and existing prejudices. Some researchers have identified particular women, such as Asian women who marry through networks and Muslim women in arranged marriages, as particularly at risk.¹⁰⁷ The lack of good information on this information is perhaps indicative of the difficulties for non-English-speaking women in accessing appropriate support and services.

2.82 It is also important to point out that cultural differences can mean that family violence may have been dealt with in different ways in countries of origin and in specific communities. For example, newly arrived immigrants from Sudan explained to us that family violence in their home country was dealt with partly by extended family members, partly by the community, and partly by State and tribal justice systems. When the extended family, community and tribal systems no longer exist (because of fragmentation due to immigration), these measures to deal with family violence also no longer exist. Migrants may come from countries where violence in the family is seen as acceptable by authorities or is not penalised by the criminal law. For example, the United Nations (UN) has found that only three African countries and three Asian countries have specific laws that make family violence a criminal offence.¹⁰⁸

FAMILY VIOLENCE AND PEOPLE WITH DISABILITIES

2.83 Research suggests that women with disabilities are assaulted, raped and abused at between twice and twelve times the rate of other women.¹⁰⁹ As well as being more vulnerable to abuse, people with disabilities experience it from different sources and in different forms. This may require different responses to those which are appropriate for people without disabilities.

106 Patricia Easteal, 'Multiculturalism and the Law: Marital Violence Among the Overseas-Born' (Paper delivered at the Criminal Justice System in a Multi-cultural Society Conference, Melbourne, 4–6 May 1993) 23.

107 Ibid 1.

108 United Nations Development Fund for Women, *Not a Minute More: Ending Violence Against Women* (2003).

109 Carolyn Frohmader, *Violence against Women with Disabilities: A Report from the National Women with Disabilities and Violence Workshop* (February 1998) 10.

2.84 People with disabilities can be more vulnerable to family violence because of the care they may require, placing them in potential situations of powerlessness and dependence. This may make them vulnerable to violence, not only by their intimate partners or members of their immediate and extended family, but also by the people who are employed or volunteer to care from them. The very nature of some of this care—for example, washing and assistance using the toilet and sanitary products—can occur in the context of a close live-in relationship, requiring a degree of trust and skill which is sometimes exploited. Some researchers have concluded that this makes people with physical and mental disabilities ‘easy targets’ for abuse.¹¹⁰

2.85 People with disabilities can also be more vulnerable to violence because of problematic, disrespectful social norms about their bodies, their sexuality, their emotions and their minds. Researchers point out that it is not the disability itself that creates a vulnerability to violence, but rather the social and political reaction to the disability.¹¹¹ People with disabilities experience forms of violence which are not only often condoned, but to a certain extent institutionalised in our society. This includes being forced into dependent living situations and the denial of sexual relationships and participation in family planning decisions.¹¹² These are not usually defined as forms of violence, nor considered criminal, yet such common treatment of people with disabilities can set up a social norm which can further increase their vulnerability to more commonly recognised forms of family violence.

2.86 The tolerance of violence against people with disabilities is high and often one of the greatest difficulties people with disabilities face is the reluctance of others to recognise and believe that such abuse has taken place. What is commonly seen as ‘challenging behaviour’ (in the carer’s terms) could in fact be the result of abuse:

I believe the big difference for a woman with a disability experiencing domestic violence is that people just don’t believe you. They still have this underlying assumption that the able bodied partner is wonderful taking on a person with a disability. In my case it fed his ego. I was astounded by people who didn’t believe my fear when I eventually told them. They believed I was overacting. I remember the disbelief of some of my neighbours and one

110 Kay McInnes, ‘Easy Targets’, (Paper delivered at the Disability and the Criminal Justice System: Achievements and Challenges conference, Melbourne, 13–15 July 2005).

111 Women with Disabilities Australia, *More than Just a Ramp—A Guide for Women’s Refuge to Develop Disability Act Action Plans* <www.wwda.org.au/cnts.htm> at 20 December 2005.

112 Ibid.

saying he wouldn't do that, he has done so much for you for so many years. All the lifestyle improvements I advocated for myself, but the perception was he had done it all.¹¹³

FAMILY VIOLENCE AND AGE

YOUNGER WOMEN

2.87 Younger women are more at risk of violence than older women—19% of women aged 18–24 had experienced one or more incidents of violence in a 12 month period compared to 6.8% of women aged 35–44 and 1.2% of women aged 55 and over.¹¹⁴ Women can be particularly vulnerable to violence during pregnancy. A significant proportion of family violence in intimate partner relationships begins when the woman first experiences pregnancy. The *Women's Safety Survey* found that 20% of women who disclosed violence from a previous partner and had been pregnant at some stage of the relationship stated that the onset of violence occurred during pregnancy.¹¹⁵

ELDERLY PEOPLE

2.88 Another form of family violence is elder abuse, where elderly people are abused by younger family members, most often children and grandchildren, and also by carers. Elder abuse can take many forms. Economic abuse occurs when children sell elderly people's homes because 'they don't need it anymore', leaving them dependent on others for their housing. Elder abuse can also be physical, verbal, emotional, spiritual, social, sexual and so on. Many elderly people are particularly vulnerable to abuse because of physical frailty and mental impairment.

FAMILY VIOLENCE AND SEXUALITY

2.89 Family violence is also a factor in some lesbian and gay relationships. While types of abuse in gay and lesbian relationships take the same form as other family violence, there are also forms of abuse specific to gay and lesbian relationships.

2.90 'Sexuality abuse' can take the form of deriding a victim's sexuality. 'Outing' or threatening to out a homosexual person to friends, family, employers, the church, police and others in the community is also a form of abuse. Abusers can rely on the

113 Cockram (2003) above n 12, 46.

114 W McLenna, *Women's Safety Australia*, Catalogue No 4128.0 (1996) 10.

115 Ibid 8.

pervasiveness of heterosexism in our society to convince partners the abuse is ‘normal’, to hide the abuse, and increase the power and control over their partner.

My abuse came from non consensual S/M [sadomasochistic sexual behaviour]—who would ever believe me, let alone take action. I didn’t agree to her tying me up and leaving me by myself for two days. I thought I was going to die, but who would believe that—certainly not the coppers.¹¹⁶

2.91 Historically homosexuality was punished by the criminal law. The criminalisation of homosexuality and the perception that some police are homophobic may make it particularly difficult for homosexuals to approach the police for assistance if they are affected by family violence.

INDIVIDUAL AND SOCIAL IMPACTS OF FAMILY VIOLENCE

2.92 The effects of family violence on individuals include physical, mental, psychological and economic harms. They are widespread, often severe, and sometimes fatal.

2.93 Family violence can also have a profound impact on a victim’s sense of self and ability to make choices. Victims may feel responsible for and ashamed about their experiences, not only because perpetrators blame them for the violent behaviour, but also because friends, family and wider society do not attribute responsibility for the violence to the perpetrator.

2.94 As well as having a severe impact on individuals, family violence affects the whole community. Overall, it is the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years.¹¹⁷ It is responsible for more disease burden than the well-known and more recognised risk factors of high blood pressure and obesity.¹¹⁸

2.95 A recent Access Economics report found that family violence costs Australia about \$8 billion a year nationally and \$2 billion a year in Victoria, a substantial proportion of which is borne by the victims themselves.¹¹⁹ It constitutes a profound

116 Jude Irwin, ‘Lesbian Domestic Violence: Unseen, Unheard and Discounted’ (Paper presented at Second Australasian Women and Policy Conference, Emmanuel College, University of Queensland, 7–9 July 1999) 3.

117 VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004) 10.

118 Ibid.

119 Access Economics, *The Cost of Domestic Violence to the Australian Economy: Part 1* (October 2004) 63.

cause of disadvantage handed from one generation to the next and its effects on children can be devastating. One-quarter of all Australian children have witnessed violent behaviour towards their mother or stepmother,¹²⁰ which a growing body of research suggests may be a form of child abuse in its own right.¹²¹ These statistics highlight the effects family violence can have on the health and economic wellbeing of society.

FAMILY VIOLENCE AND LAW REFORM

2.96 In this chapter we have discussed the nature, dynamics and effects of family violence. Family violence involves the use of different forms of abuse to control, coerce and dominate another person. It follows that the purpose of the law should be to empower victims, to hold perpetrators accountable and to take appropriate measures to eliminate and prevent violence. An effective response to family violence must recognise the power imbalances which exist in our community, including the power imbalances which affect women in their relations with men, Indigenous women, women from CALD backgrounds and people with disabilities.

2.97 Our approach in the remainder of this report reflects the understanding of family violence we have described. First, it recognises that family violence involves a fundamental oppression of and disrespect for the experience and opinions of its victims. This can also happen within the social and legal contexts that seek to deal with family violence. The legal response to family violence recommended in this report seeks to challenge the imbalance of power which is manifested in family violence.

2.98 Secondly, we have taken an approach which attempts, as far as possible, to put the perspectives and experiences of those who have been affected by family violence at its centre. The purpose of any laws that seek to address family violence are, first and foremost, to serve those who are or have been affected by family violence, as well as the community as a whole. The experiences and perspectives of people affected by family violence are particularly useful in guiding our analysis of the principles, contents and implementation of any family violence law reform.

120 David Indermaur, *Young Australians and Domestic Violence* (2001) 1.

121 Partnerships Against Domestic Violence, *Children, Young People and Domestic Violence*, Phase 1 Meta-Evaluation Report (2003) 42, 44; John Fantuzzo and Wanda Mohr, 'Prevalence and Effects of Child Exposure to Domestic Violence' (1999) 9(3) *The Future of Children* 21, 26–8; Joy Osofsky, 'The Impact of Violence on Children' (1999) 9(3) *The Future of Children* 33; World Health Organisation, *World Report on Violence and Health* (2002) 103.

2.99 The following provides a summary of the description in this chapter, for the purpose of education, awareness raising and training.



SUMMARY

Family violence involves perpetrators exercising power and control over victims through the use of diverse and multiple forms of violence.

Women, children, and people with disabilities are most likely to be affected by family violence.

Family violence affects victims in a diverse range of family relationships: including intimate partnerships, in both heterosexual and homosexual families, between adults and their children, and between people and their carers.

People from Indigenous minorities and some racial and ethnic groups may face particular barriers in seeking remedies for family violence.

Family violence is particularly prevalent in our society.

Family violence can cause catastrophic harm to individual victims and also affects society as a whole.

Family violence is perpetuated and upheld by problematic social norms and by inadequate legal and social responses to family violence.

When seeking to understand family violence it is important to:

- listen particularly carefully to victims and other people who are directly affected by it;
- take into account the wider social factors and factors relating to legal and support services which have an important impact upon its prevalence and perpetuation.

Chapter 3

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INTRODUCTION

3.1 In the last chapter we looked at the nature and dynamics of family violence. In this chapter we outline the State's international obligation to combat this violence and describe how violence against women has been treated as a human rights violation in international instruments.

International instruments include treaties, declarations adopted by the UN General Assembly, findings of UN special rapporteurs and other mechanisms.

3.2 We then discuss the extent to which the current legal response deals adequately with family violence. We argue that there is a need for both a criminal justice and civil response to family violence and that changes need to be made to both systems to meet the needs of victims. We recommend the introduction of a new Family Violence Act with clear aims and principles that articulate the philosophy underpinning the legal response.

3.3 In recommending reforms, we acknowledge that the justice system alone will never adequately prevent family violence or completely meet the needs of people who have experienced it.¹²² An effective response to family violence must also include support for victims and attitudinal changes in the community.¹²³

FAMILY VIOLENCE AND HUMAN RIGHTS

3.4 Violence against women, including violence within the family, is a fundamental violation of human rights. In this section we outline how family violence has been considered at the international level and discuss the international obligation of all Australian governments, including the Victorian government, to work towards its eradication. We also describe the rights of children and young people (as both victims and perpetrators of violence) that the legal system must take into account when responding to violence. This understanding of the State's international obligations to combat violence against women informs our recommendations for change.

122 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 306–7; Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40 *British Journal of Criminology* 14, 33.

123 We make recommendations to encourage attitudinal change and for better community support for victims in Chapter 12.

INTERNATIONAL RESPONSIBILITY TO COMBAT VIOLENCE AGAINST WOMEN

3.5 Under international human rights law that is binding on Australia, there is an obligation on State agencies to combat violence against women. International human rights standards are the bare minimum of what every person should expect to enjoy in their daily lives.¹²⁴ Human rights principles recognise that all people are 'born free and equal in dignity and rights'.¹²⁵ Traditionally, international human rights law has focused on the obligation of the State to prevent and punish violations committed by its own agents. For example, the prohibition on torture has traditionally been understood as a prohibition on acts of torture carried out by agents of the State such as the police or military personnel. However, the international community has recently recognised the duty on States to take all necessary measures to prevent and punish human rights abuses committed by private individuals. This responsibility is sometimes referred to as an international legal obligation to exercise 'due diligence' to respect, protect and fulfil each individual's human rights.

3.6 Violence against women has been repeatedly recognised at the international level as a human rights issue that must be addressed by all countries. The UN Special Rapporteur on violence against women has noted:

The insidious nature of domestic violence has been documented across nations and cultures worldwide. It is a universal phenomenon ... At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women.¹²⁶

3.7 The Committee on the Elimination of all Forms of Discrimination Against Women has stated:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships, women of all ages are subjected

124 Amnesty International, *Making Rights a Reality: The Duty of States to Address Violence Against Women* (2004) 1; United Nations Division for the Advancement of Women, 'Report of the Expert Group Meeting' (Paper presented at the Good Practices in Combating and Eliminating Violence Against Women conference, Austria, 17–20 May 2005) 13.

125 *Universal Declaration of Human Rights*, GA res 217A (III), UN GAOR, 3rd sess, UN Doc A/810 at 71 (1948), art 1.

126 Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Doc E/CN.4/1996/53 (1996) paras 22–7.

to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence and coercion ... The effect of such violence on the physical and mental integrity of women is to deprive them [of] the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.¹²⁷

3.8 In terms of binding treaty obligations, the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW)¹²⁸ was ratified by Australia in 1983. In 1992, the UN committee in charge of CEDAW's implementation identified violence against women as a form of discrimination and therefore prohibited under the convention. All States who are party to the convention, including Australia, must therefore take positive measures to eliminate all forms of violence against women.¹²⁹ In implementing this obligation, States should be guided by the UN General Assembly *Declaration on the Elimination of Violence Against Women*, which was unanimously adopted by all member States in 1993.¹³⁰ This declaration was adopted to strengthen and complement the convention, and provides guidance to States on measures they should take to eliminate violence against women.¹³¹ The declaration also refers to other human rights that are impaired by acts of violence against women, such as the right to equality, the right to equal protection under the law, the right to the highest attainable standard of physical and mental health and the right not to be subjected to torture or other cruel, inhuman or degrading treatment.¹³² A woman's right to be free from violence is inherently linked to the provision of other civil, political, economic and social rights, such as the right to life, the right to bodily and physical integrity, the right to education and the right to work.¹³³

127 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993).

128 *Convention on the Elimination of all Forms of Discrimination Against Women*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) .

129 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993).

130 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993)

131 Ibid art 4.

132 Ibid art 3.

133 Statewide Steering Committee to Reduce Family Violence, *A Submission on the Human Rights Community Discussion Paper and a Human Rights Charter for Victoria* (2005) 1, 6; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 7.

3.9 Other international standards that are relevant to the elimination of violence against women, and will be referred to throughout this report, include the UN General Assembly *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*¹³⁴ (UN Model Strategies) and the General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.¹³⁵ The Beijing Declaration and Platform for Action,¹³⁶ adopted at the fourth world conference on women, also provides important guidance and standards for the elimination of violence against women. The Platform for Action is one of the most detailed agreements setting out the rights of women and was signed by 189 governments, including Australia. It includes violence against women as one of 12 critical areas of concern and outlines three strategic objectives and strategies to work towards its eradication.

3.10 The UN Human Rights Commission appointed an independent Special Rapporteur on violence against women, its causes and consequences in 1994.¹³⁷ The Special Rapporteur is mandated to seek and receive information from governments and non-government organisations on violence against women and recommend measures for the elimination of violence against women.¹³⁸ In performing this mandate, the Special Rapporteur submits annual thematic reports to the Human Rights Commission which contain recommendations to all governments. She also conducts fact-finding country visits and transmits urgent appeals and communications to States about alleged cases of violence against women.¹³⁹ The Special Rapporteur's recommendations and findings are useful guides to all States' obligations in this area, and will therefore be referred to throughout this report.

3.11 The responsibility of the State to combat violence against women means that where States know or ought to know about violations and fail to take appropriate steps to prevent the violations, they can become responsible for the action. This does not

134 Adopted as an annex in *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) .

135 *General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (1985) adopted 29 November 1985.

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

137 See Commission on Human Rights Resolution 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, UN Doc E/CN.4/Sub.2/1994/56 (adopted 4 March 1994).

138 Ibid.

139 For more information, see 'Special Rapporteur on Violence Against Women its Causes and Consequences', <www.ohchr.org/english/issues/women/rapporteur/index.htm> at 21 December 2005.

detract from the individual civil or criminal liability of the person who commits the violation.¹⁴⁰ The obligation to exercise ‘due diligence’ regarding the highest attainable standard of health has been outlined by the Committee on Economic, Social and Cultural Rights in the context of the right to health in the following way:

Human rights impose three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil* ... The obligation to respect requires States to refrain from interfering directly or indirectly with the right to health. The obligation to protect requires states to take measures that prevent third parties from interfering with [the right]. Finally the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right.¹⁴¹

3.12 The outlined international agreements contain detailed guidance to all States on fulfilling their responsibility to combat violence against women. Our report uses these guidelines and standards as a benchmark to demonstrate how the Victorian justice system can better fulfil its responsibility to combat violence against women by, for example:

- providing an adequate response to family violence that incorporates both civil and criminal remedies;¹⁴²
- providing adequate training for people in the justice system, such as police, magistrates, judges and court staff, to respond effectively to women who have experienced family violence;¹⁴³
- providing court mechanisms and procedures that are accessible and sensitive to the needs of women subjected to violence;¹⁴⁴
- providing adequate support and assistance to victims of violence in the justice system;¹⁴⁵
- ensuring that, if the woman wishes, the perpetrator is removed from the shared home and the woman and children are able to remain in the home;¹⁴⁶

140 Amnesty International (2004) above n 124, 8.

141 Committee on Economic Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000) para 33.

142 See paras 3.37, 5.9.

143 See paras 5.78, 6.16, 6.27–6.28.

144 See paras 5.50, 6.99, 6.108, 6.116.

145 See para 5.50.

146 See paras 9.41–9.42.

- ensuring that any contact that perpetrators are allowed with their children is arranged to avoid forcing the woman to have contact with the perpetrator;¹⁴⁷
- developing and implementing public awareness and education campaigns that prevent violence against women by promoting equality, cooperation, mutual respect and shared responsibilities between men and women;¹⁴⁸
- providing support services to victims, including legal aid, counselling, shelters and rehabilitation services.¹⁴⁹

3.13 The commission acknowledges the recent efforts of the Victorian Government to initiate community consultation about a Charter of Human Rights for Victoria.¹⁵⁰ The commission encourages the Victorian Government to consider the right of all women to live free from violence as an integral part of this process. The commission refers to the submissions of some groups to that consultation in this report.¹⁵¹ However, as noted, guaranteeing women's right to live free from violence involves more than just legislative change.

PROTECTING RIGHTS OF CHILDREN AND YOUNG PEOPLE

3.14 The State also has a responsibility under international human rights law to protect the rights of children and young people. These rights are comprehensively outlined in the *Convention on the Rights of the Child*, which is almost universally accepted and was ratified by Australia in 1990.¹⁵² The convention relies on four general principles: upholding the best interests of the child; the prohibition against discrimination; the right to life, survival and development; and respect for the views of the child.¹⁵³ It is the only international convention to explicitly address violence within

147 See para 9.86.

148 See Chapter 12 for discussion about public education in international standards.

149 See paras 6.68–6.69.

150 Attorney-General Rob Hulls, *Human Rights in Victoria: A Statement of Intent* (2005); Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 53–8.

151 See, eg, Statewide Steering Committee to Reduce Family Violence, *A Submission on the Human Rights Community Discussion Paper and a Human Rights Charter for Victoria* (2005); Women's Health West, *Submission to the Victorian Government's Community Consultation on Human Rights* (2005).

152 Only two States, the US and Somalia, have not ratified the convention: *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990).

153 *Economic and Social Council Resolution on the Administration of Juvenile Justice*, ECSOC Res 1997/30, UN Doc E/RES/1997/30 (1997) Annex: Guidelines for action on children in the criminal justice system.

the family.¹⁵⁴ Children's rights apply to children and young people who are victims of family violence, as well as children and young people who are perpetrators of violence.

CHILDREN AND YOUNG PEOPLE AS VICTIMS OF FAMILY VIOLENCE

3.15 As direct and indirect victims of family violence, children and young people have specific rights under international human rights law. When we refer to child 'victims' of family violence, we are referring to children or young people who are victims of violence themselves or who are aware of violence within their family, usually by hearing or witnessing violence. National and international research has demonstrated the devastating effects of family violence on children and young people, especially its impact on their development. Children who have been exposed to violence between their parents often display similar reactions and developmental problems as children growing up in war zones.¹⁵⁵ The State has a responsibility to:

- Protect children from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child'.¹⁵⁶
- 'Promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.¹⁵⁷
- Protect and support child victims or witnesses through the justice system by, for example, providing advocacy services, modifying the way children can give evidence, training police and court staff to behave in a more child-friendly way and taking children's views and concerns into account in matters that affect them.¹⁵⁸

154 International Save the Children Alliance, *Preventing Family Violence: A Manual for Action* (1999) 35.

155 Helene Berman, 'The Relevance of Narrative Research with Children who Witness War and Children who Witness Woman Abuse' in Robert Geffner et al (eds) *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention and Policy Development* (2000). This is discussed further at paras 2.24, 2.29, 4.27.

156 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990), art 19.

157 Ibid art 39.

158 Detailed guidelines for supporting child victims and witnesses in the justice system are provided in *Economic and Social Council Resolution on the Administration of Juvenile Justice*, ECSOC Res 1997/30, UN Doc E/RES/1997/30 (1997). This resolution provides guidance to State parties of the *Convention on the Rights of the Child* on more specific ways that they can implement their obligations under the convention.

CHILDREN AND YOUNG PEOPLE AS PERPETRATORS OF FAMILY VIOLENCE

3.16 Children and young people also have rights as perpetrators of criminal acts. International human rights law recognises the negative consequences of contact with the criminal justice system at a young age and therefore encourages the use of criminal sanctions, particularly imprisonment, only as a last resort.¹⁵⁹ International standards have recognised that a young person's contact with law enforcement agencies 'might profoundly influence the juvenile's attitude towards the State and society'.¹⁶⁰ Therefore, alternative interventions and support services are encouraged. The State has the following responsibilities for young perpetrators of family violence:

- Arrest, detention or imprisonment must only be used as a measure of last resort.¹⁶¹
- Where children have been accused of committing a crime there should be 'measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.¹⁶²

3.17 While this report focuses predominantly on the civil response to family violence, through the intervention order system, these rights are still relevant to our consideration of how the State responds to violence perpetrated by young people within the civil system. As a breach of an intervention order is a criminal offence, we have made recommendations to limit the granting of an intervention order against a young person.¹⁶³ These recommendations should ensure that criminal penalties, as the result of breaches of intervention orders, are applied as a last resort to a young person's violent behaviour and that alternative services are initially provided.

159 Similarly, the Children's Court may only impose a custodial sentence on a person aged under 18 years if it considers 'that no other sentence is appropriate': *Children, Youth and Families Act 2005* ss 410(1)(c), 412(1)(c).

160 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN Doc A/40/53 (1985), commentary to rule 10.

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

162 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(3)(b). See para 8.61.

163 See recommendations 95–98.

3.18 This understanding of the State's international obligations to combat violence against women and to uphold the rights of children and young people informs the recommendations made by the commission throughout this report. We now examine Victoria's current legal system and the changes that need to be made to ensure that it adopts the most effective approach possible in responding to family violence.

CRIMINAL RESPONSE TO FAMILY VIOLENCE

3.19 The criminal law imposes standards of behaviour by prohibiting certain conduct. Some acts of family violence were not originally considered to be a crime. For example, the law condoned 'beating' as within the lawful rights of a husband,¹⁶⁴ and rape within marriage was only criminalised in Victoria in the late 1980s.

3.20 Even where acts of family violence are classified as criminal offences, the criminal law has rarely been applied to criminal behaviour in the home. Overall, the law has treated what happens in families as a 'private' matter, in which police and the courts have been reluctant to interfere:

Traditionally the law was reluctant to intervene in the area of family violence because it occurred in the private sphere and was considered to be beyond the realm of law.¹⁶⁵

3.21 By the 1970s and 1980s, there was increased acknowledgment of this matter,¹⁶⁶ and calls for family violence to be recognised and treated as a crime were a central theme of early family violence advocacy. This has influenced policy and justice system reforms in countries such as the United Kingdom (UK), the United States (US) and Canada.

BENEFITS OF THE CRIMINAL RESPONSE

3.22 The criminalisation of family violence responds to persistent 'critiques ... that the privacy of the family created a screen behind which some men [and others with power in families] brutalised women and children'.¹⁶⁷ Criminalisation has both symbolic and practical benefits.

164 *Re Cochrane* (1840) 8 Dowl. 630; 4 Jur, cited in Jocelyne Scutt, *Women and the Law: Commentary and Materials* (1990).

165 John Tobin, 'Family Violence: Opening up the Silence' (1992) (18)4 *Melbourne University Law Review* 851.

166 See, eg, Women's Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*, Discussion Paper (1985); Law Reform Commission [Australia], *Domestic Violence*, Report No 30 (1986).

167 Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions* (2001) 1.

3.23 At a symbolic level, criminalising family violence sends a clear message to society that it is wrong and will not be tolerated.¹⁶⁸ It no longer treats family violence as a ‘private’ matter. It gives effect to the State’s responsibility to prosecute perpetrators of family violence¹⁶⁹ and responds to and takes seriously victims’ experience of harm, their need for assistance and redress, and their basic human right to have a life free from violence. Punishment of people who use violence enforces this right as a social norm and also locates responsibility for the violence in the hands of the perpetrator, rather than with the actions or behaviour of the victim.

3.24 The practical significance of the criminalisation of family violence is that it allows police to intervene in family violence incidents, which can stop victims suffering further harm. Criminal charges allow the police to arrest perpetrators and detain them in custody pending determination of the case. A criminal justice response may also deter perpetrators from committing offences again.

When the police arrest someone, they must **charge** them with a crime.

LIMITATIONS OF THE CRIMINAL RESPONSE

3.25 There are some limitations in the criminal justice response. These include:

- lack of acceptance by police, courts and community that family violence is a serious crime and a consequent failure to enforce the criminal law;
- problems of proof;
- problems with the role of the victim in the criminal justice process;
- not all forms of family violence being criminal offences.

FAILURE TO ENFORCE THE CRIMINAL LAW

3.26 While some forms of family violence such as physical and sexual assault are criminal acts, in practice, these acts have not been and are sometimes still not treated as a crime by police, or regarded seriously by the courts and society.

168 Ibid 2; Robyn Holder and Nicole Munstermann, ‘What Do Women Want? Prosecuting Family Violence in the ACT’ (Paper presented at the Expanding our Horizons conference, Sydney, 18–22 February 2002) 1.

169 A criminal response to family violence has been recognised as essential in international human rights instruments. See, eg, Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(r)(i); *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 125(d).

3.27 Police and prosecutors are responsible for enforcing the criminal law. They decide whether action will be initiated, what charges will be laid, whether bail will be opposed, whether the prosecution will proceed and what evidence will be used. Some police members' attitudes towards family violence are encapsulated in the phrase that a family violence incident is 'just a domestic'. This may prevent family violence matters from coming within the realm of the criminal justice system in the first place. There was a strong response from submissions that a criminal response to family violence should be more common in Victoria.¹⁷⁰ There are very low rates of arrest and prosecution for family violence offences. The percentage of family violence incidents reports submitted by Victoria Police that resulted in criminal charges decreased from 10.95% in 2002-03 to 9.49% in 2003-04.¹⁷¹ This percentage increased to 17.7 % of reports submitted in 2004-05.¹⁷² This represented a 73.2% increase in the rate of reports submitted resulting in criminal charges being laid. Victoria Police attributed this largely to the introduction of the Code of Practice.¹⁷³

Evidence includes statements, objects or other things used to prove the facts in a legal hearing or trial.

The actions of police and judiciary are influenced by the legacy of non-intervention in the private sphere, such that they continue to perceive family violence as an individual and private issue, rather than the gender specific and social phenomenon that it is.¹⁷⁴

3.28 In Victoria, aspects of the police response to family violence have recently improved. A new Code of Practice for the Investigation of Family Violence was launched in August 2004, which states that it takes a 'pro-arrest' stance to family violence.¹⁷⁵ From June 2004 to June 2005, the number of charges laid by police concerning 'family violence incidents'¹⁷⁶ increased by 73.2%, from 2994 the year before to 5185.¹⁷⁷

3.29 Some women may receive a worse response from police and the courts than others. An Adelaide study by Beth Tinning found that women not conforming to traditional stereotypes of the 'good girl'—for example, ex-prisoners, women working

170 Submissions 8 (Werribee Legal Service), 22 (Kim Robinson, social worker), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

171 Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) 128.

172 Victoria Police, *Victoria Police Crime Statistics 2004/05* (2005) 128.

173 Victoria Police, *Provisional Crime Statistics 2004/2005* (10 August 2005) 1.

174 John Tobin (1992) above n 165, 852–3.

175 We discuss this code in more detail in Chapter 5.

176 This includes charges for breach of an intervention order as well as for the original family violence offence.

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

in the sex industry and women who expressed anger vocally—believed they would never be considered a ‘good’ witness for the prosecution and found the criminal justice process an exercise in social control.¹⁷⁸ Other research has found that women with cognitive impairment may have great difficulty in having their concerns taken seriously by police when attempting to report a family violence offence.¹⁷⁹

PROBLEMS OF PROOF

3.30 Conviction for a criminal offence requires proof beyond reasonable doubt. This can be difficult to satisfy in family violence cases if the victim is the only witness to the offence, or if other witnesses are reluctant to report or become involved in what they perceive to be a ‘private family matter’. Difficulties with proof of family violence offences have also been historically used by police as an excuse for failing to enforce the criminal law. This means that evidence has not routinely been collected at family violence incidents. We endorse the Police Code of Practice which requires thorough evidence gathering.¹⁸⁰ Also, the criminal law has historically developed to deal with single incidents rather than a pattern of behaviour and is not always flexible enough to deal with the dynamics of family violence.

ROLE OF THE VICTIM

3.31 When police attend an incident they sometimes leave it to the victim to decide what action should be taken against the offender, including criminal action. It is inappropriate to make the victim responsible for all decision making about the perpetrator at this point of crisis. The new Code of Practice for the Investigation of Family Violence provides that, when attending a family violence incident, police should take all measures to immediately ensure the victim’s safety, prevent further offences and hold the perpetrator accountable. We support this approach.¹⁸¹

3.32 Some police may also minimise family violence victims’ concerns about their own safety, and that of their children. This attitude can lead to an ineffective and

178 Beth Tinning, ‘Lost in Distraction: The Impact of the Criminal Justice Response to Domestic Violence on Women from Marginalised Communities’ (Paper presented at the Refocusing Women’s Experience of Violence conference, Sydney, 14 September 2005).

179 Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*, Final Report of Stage One of the Sexual Offences Project (2003) 56; Kelly Johnson et al, *Silent Victims, a Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48. We discuss the police response to victims with disabilities at para 5.74.

180 See paras 5.25–5.28.

181 See paras 5.94–5.100.

potentially dangerous police response to family violence. In this report, we support the Code of Practice's training and other measures to change some police attitudes towards family violence and its victims.¹⁸²

3.33 If a criminal family violence matter reaches the courts, the role of victim is confined to witness for the prosecution and they are given very little if any say over the legal process. This problem is exacerbated when police officers and prosecutors do not ensure that people who have experienced family violence are supported and kept informed about the process and outcome of their case.¹⁸³ In this report we recommend witness support for family violence criminal cases.¹⁸⁴ We also propose that in the existing case conferencing system, a priority should be given to hearing the victim's perspectives and concerns.¹⁸⁵ If a victim receives adequate support at this point and participates in case conferencing, but still does not want to give evidence in court, we support the position stipulated in the code that the case should not proceed.

3.34 Some magistrates and judges presiding over courts dealing with family violence matters may minimise the effects of family violence and misunderstand its dynamics (see Chapter 2), which may be reflected in the decisions made. For example, they may misunderstand the potential fear and other consequences of a so-called technical breach of an intervention order (see Chapter 10). To counter this misunderstanding we recommend training initiatives to improve magistrates' knowledge of family violence and a specialist list for magistrates to encourage magistrates and court staff with expertise in family violence to work on the cases listed.

Magistrates and police sometimes use the term **technical breach** to refer to a breach that does not involve physical violence, eg a respondent coming within a prohibited distance.

3.35 Many victims are also distrustful of the criminal justice process. They may have had negative experiences with the police and courts in the past and may not be confident that the system will protect their interests. Some victims are reluctant to have family members charged because of the effect this may have on them. This reluctance to become involved in the criminal justice system is particularly apparent among victims who have little access to power and privilege in the community.¹⁸⁶

182 See paras 5.3, 5.79.

183 Ruth Lewis et al, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence' in Edna Erez and Kathy Laster (eds) *Domestic Violence: Global Responses* (2000) 195–6. We outline the State's international obligations in relation to keeping victims and witnesses informed and supported throughout a criminal trial at para 5.50.

184 See paras 5.53–5.54.

185 See para 5.35.

186 Tinning (2005) above n 178.

Women from Indigenous communities, who have experienced law enforcement agencies as sources of discrimination and persecution rather than assistance, can be very reluctant to involve police.¹⁸⁷ Women from refugee backgrounds may also be reluctant to approach the police for support when they have had negative experiences with law enforcement agencies in the countries they have fled.¹⁸⁸

NOT ALL FORMS OF FAMILY VIOLENCE ARE A CRIME

3.36 A criminal justice response does not apply to all forms of family violence. Psychological and emotional abuse or forced social isolation are not currently criminal offences, despite the fact they can be some of the most damaging forms of family violence. In a recent South Australian study victims of family violence reported that ‘verbal, psychological and emotional abuse’ not only ‘occurred daily’ (compared to the physical assaults which for the majority occurred at least once or twice a week) but were also ‘far more devastating and long lasting in [their] effects’ than the physical assaults.¹⁸⁹

3.37 These limitations in the criminal justice response mean that civil remedies that seek to restrain the violent behaviour of the perpetrator also need to be available. The need for both a criminal and civil justice response has been recognised at an international level. The committee in charge of the implementation of CEDAW has stated that ‘measures that are necessary to overcome family violence should include criminal penalties where necessary and civil remedies’.¹⁹⁰ Similarly, the UN Special Rapporteur on violence against women has said ‘the ideal legislation with regard to domestic violence would be one that combines both criminal and civil remedies’.¹⁹¹

187 Submissions 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 75 (National Network of Indigenous Women’s Legal Services); Loretta Kelly, ‘Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities’ in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 210; Elizabeth Hoffman House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People*, Consultation Outcomes, Reports and Recommendations (2004) 32.

188 Ruth Gordon and Munira Adam, *Family Harmony: Understanding Family Violence in Somali and Eritrean Communities in the Western Region of Melbourne* (2005) 7; submissions 2 (Vietnamese Community in Australia—Vic Chapter), 68 (Statewide Steering Committee to Reduce Family Violence), 70 (Asylum Seeker Resource Centre).

189 Bagshaw and Chung (April 2000) above n 29, 9.

190 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th sess, 1992) UN Doc A/47/38 at 1 (1993) para 24(r)(i).

191 Radhika Coomaraswamy (1996) above n 126, para 29.

CIVIL RESPONSE TO FAMILY VIOLENCE

3.38 Intervention orders were introduced as a practical means of protecting victims in response to the limitations of the criminal justice system. Intervention orders were recommended in a Victorian Government report, *Criminal Assault in the Home*, released in July 1985,¹⁹² which aimed ‘to assist women who have been subjected to domestic violence and to reduce the incidence of domestic violence in the community’.¹⁹³ These recommendations were implemented in the Crimes (Family Violence) Act. The intervention order system is in fact a hybrid system because it incorporates civil and criminal elements. Breaching a civil intervention order is a criminal offence.

BENEFITS OF THE CIVIL SYSTEM

3.39 Intervention orders were recommended for four main reasons. First, it was believed they would be ‘accessible’ for women. An application for an intervention order was seen as a ‘simple procedure’, under which an order could be obtained in the Magistrates’ Court ‘on the balance of probabilities’, rather than the ‘beyond reasonable doubt’ standard of criminal proof. Secondly, intervention orders were seen as ‘flexible’ and able to curb a variety of threatening and assaulting behaviours, including those which are not criminal offences. Their flexibility would also allow a victim to seek a wide range of remedies, such as excluding the perpetrator from the home. Thirdly, the order could prevent the escalation of violence. Unlike a criminal charge, they provide the victim with protection before rather than after an attack. Finally, they are able to be used by women reluctant to involve the police (for reasons already mentioned).

Balance of probabilities is the standard of proof in civil cases, and requires the magistrate to determine if it is more likely that the applicant or the respondent is telling the truth.

3.40 The report conceived the intervention order process as complementary to rather than replacing the criminal justice response:

In light of both the public comments and research indicating the deterrent effect of criminal processes, it must be stressed that the intervention order *should not* be seen as an alternative to the criminal process. The commencement of proceedings for an intervention order (or the existence of an order) does not, and should not, preclude the possibility of

192 The report was written by the Legal Remedies Sub-committee of the Victorian Domestic Violence Committee, which was convened by the Department of Premier in 1981 to investigate problems associated with domestic violence.

193 Women’s Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*, Discussion Paper (1985) ii.

criminal proceedings being made at the same time for a domestic assault ... It is not designed to usurp the role of criminal law.

The police *should* continue to institute criminal action where an offence has occurred whether or not proceedings for an intervention order have also been commenced.¹⁹⁴

3.41 The report went so far as to say the ‘most effective way’ of deterring family violence would be through pursuit of a ‘rigorous policy of mandatory arrest’. The report also recognised the importance of the police prosecuting perpetrators for breaches of intervention orders: ‘The effectiveness of intervention orders will be very much dependent upon the police effecting arrests when orders are breached’.¹⁹⁵

LIMITATIONS OF THE CIVIL SYSTEM

3.42 While the intervention order system was intended to deal with the limitations of the criminal law and provide greater protection for women and children, our consultations have shown that many improvements to the system are needed. The most significant criticism of intervention orders is that they do not necessarily provide protection from violence. Some studies show that intervention orders have minimal effect, especially where there is a history of prior, persistent abuse and where the parties have children, which results in some ongoing contact.¹⁹⁶ Other studies suggest that intervention orders do have a deterrent effect on many perpetrators.¹⁹⁷

3.43 In the civil system, responsibility for tackling violence is divided between the person in need of protection and the State. Although an individual can apply for an order without involvement from the State, the enforcement of civil orders is dependent on the police, prosecutors and the courts. Enforcement of intervention orders can be hampered by many of the factors that prevent the criminal law from

194 Women's Policy Co-ordination Unit, Department of Premier and Cabinet, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence* Summary Paper (1985)123.

195 Ibid125.

196 See, eg, Adele Harrell and Barbara E Smith, ‘Effects of Restraining Orders on Domestic Violence Victims’ in Eve Buzawa and Carl Buzawa (eds) *Do Arrests and Restraining Orders Work?* (1996) 229–33, 240–1.

197 Julie Stubbs and Diane Powell, *Domestic Violence: Impact of Legal Reform in NSW* (1989) 142–3; New South Wales Bureau of Crime Statistics and Research, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997) 61; Margrette Young, et al, *The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australians* (2000) 4–5; Cathy Humphreys and Ravi Thiara, ‘Neither Justice nor Protection: Women's Experiences of Post-Separation Violence’ (2003) 25 (3) *Journal of Social Welfare and Family Law* 195, 209; Andrew Klein, ‘Re-abuse in a Population of Court-restrained Male Batterers: Why Restraining Orders Don't Work’ in Buzawa and Buzawa (eds), above n 196, 200, 202.

being applied to family violence.¹⁹⁸ This reliance on agencies that sometimes respond inconsistently and inadequately to breaches, and to family violence in general, was probably the greatest concern raised during our consultations and in submissions. While anecdotal evidence suggests the police response to breaches has improved since the introduction of the Code of Practice, the commission believes that the concerns expressed in submissions and consultations are well founded.

3.44 The next section considers what might be the best justice approach to address family violence. Our recommendations are based on an understanding of the dynamics of family violence, as discussed in Chapter 2. The commission believes that understanding the nature of family violence leads to a recognition that different approaches are necessary at different stages of a violent relationship and for different victims. Acknowledging that there are different needs at different stages, we look at the reforms necessary to provide an effective response to family violence which can provide remedies to victims in a ‘crisis’ situation, and in the medium and long term.

BEST APPROACH TO FAMILY VIOLENCE

3.45 In our Consultation Paper we asked people making submissions to consider the most appropriate justice system response to family violence. In this section we synthesise the themes that came through our consultations and submissions.

CRIMINAL AND CIVIL RESPONSE

3.46 Submissions generally acknowledged the importance of both criminal and civil responses to family violence:

It is appropriate to have criminal and civil options for addressing family violence but [we] emphasise that criminal options should generally be taken where there has been criminal behaviour.¹⁹⁹

[We] consider that the current system represents a reasonable balance between civil and criminal approaches.²⁰⁰

3.47 The commission agrees that both approaches are necessary, but believes that significant improvements must be made to the criminal justice and intervention order processes to ensure they provide realistic options for protecting victims and preventing

198 We discuss concerns about enforcement of intervention orders at paras 5.114–5.118 and 10.67–10.98.

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

200 Submission 41 (Victoria Legal Aid).

family violence. The commission makes recommendations to strengthen the criminal response and intervention order process throughout this report.

3.48 Not all submissions favoured reliance on a criminal justice response. The Victorian Aboriginal Legal Service (VALS) argued that this should be seen as a last resort:

Greater reliance on the criminal justice system to intervene in family violence should be a last resort given the cost, the ineffectiveness and the threat to family and community safety that it represents.

3.49 VALS believes that restorative justice provides an appropriate alternative to criminal sanctions, especially in addressing family violence in Indigenous communities. The appropriateness of applying a restorative justice approach to family violence is considered at the end of this chapter.

Restorative justice refers to the process that brings together people who have a stake in a specific crime or wrongdoing to decide how to deal with the consequences of the wrongdoing.

APPROACH THAT DOES NOT MINIMISE FAMILY VIOLENCE

3.50 Submissions said that an effective legal response to family violence should recognise its seriousness. Sometimes this was linked to the need to rely on the criminal justice system.

The justice system should acknowledge the gendered nature of violence, ensure that it does not reflect women's unequal treatment in society generally, and treat violence seriously.²⁰¹

FLEXIBLE APPROACH

3.51 Submissions suggested the need for an overall flexible approach, which provides victims with a number of options. Flexibility is necessary because family violence covers a range of behaviours, different in nature and severity, and can occur in a variety of relationships. The overall approach therefore needs to be sensitive to this diversity:

A wide-ranging response to family violence which provides options for victims/survivors is positive ... The situation for each victim is quite distinct requiring a response appropriate to that particular circumstance.²⁰²

The justice system should adopt a variety of processes to allow justice in all situations.

201 Submission 63 (Darebin Family Violence Working Group).

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

A flexible system, that is better equipped to deal with a more complex and diverse range of behaviour, is required.²⁰³

3.52 A flexible response is also necessary because the needs of victims may be different, depending on when they seek a legal response and their individual situation.

INTEGRATED APPROACH

3.53 Submissions also expressed the importance of an integrated approach, stressing that the justice system could only be part of a wider social response to family violence:

The Act must be more integrated with other services and systems that address family violence ... Ideally greater integration should actually occur Australia-wide ... we believe that the Attorney Generals of each state and territory should make it a priority to address this issue ... greater integration at either a state or federal level must promote the proposed aims of the statewide model for responding to family violence.²⁰⁴

VCCAV supports an integrated approach to prevention, protection, crisis response and system reform which is consistent with the recent developments such as the Police Code of Practice, the Domestic Violence Courts and the initiatives of the Statewide Steering Committee to Reduce Family Violence.²⁰⁵

3.54 There was also the recognition that the justice system is not a 'cure all'²⁰⁶ and that each part of the family violence system [has] very different roles in addressing family violence.

3.55 The commission believes that an effective response to family violence involves a strengthened criminal response where necessary and a significantly improved civil process for obtaining protection orders. An effective response must also:

- acknowledge the seriousness of family violence and its effect on victims, who are predominantly women and children;
- be based on an understanding of the dynamics of family violence;
- be capable of responding flexibly to the needs and circumstances of victims;
- be integrated with other systems which are designed to prevent family violence and support those affected by it.

203 Submission 64 (Federation of Community Legal Centres).

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

205 Submission 69 (Victorian Community Council Against Violence).

206 Patton (2003) above n 94.

3.56 An effective response to family violence may also require a different approach at different stages of a violent relationship. The most effective response for a victim in a crisis situation may not be the same as an effective medium- and long-term response.

BEST APPROACH IN A 'CRISIS' SITUATION

3.57 A crisis situation refers to incidents of family violence or threats of family violence that have occurred or are occurring and the victim contacts the police. Research has found that police contact usually occurs after victims have unsuccessfully tried every other strategy they have to stop the violence or threat of violence. Recent research shows that victims deploy a great range of innovative 'survival' strategies, which include contacting informal supports (friends, family) and formal support agencies.²⁰⁷ 'Survivor theory' argues that such survival strategies do not always work because of the deficiencies of these informal and formal support services, rather than some sort of deficiency of the victim.

3.58 A UK study found that, on average, a woman has been assaulted 37 times before her first contact with the police.²⁰⁸ If a victim does contact police, an effective response is crucial, as it can be a key factor in assisting the victim in leaving a violent relationship and can profoundly affect the medium- and long-term outcomes they experience.²⁰⁹ In a recent Tasmanian study, women who identified police as a 'key enabler' in helping them leave a violent relationship were more likely to have permanently left the relationship shortly after this police contact.²¹⁰

3.59 The following police actions have been found to be most effective in a crisis:

- believing the victim;
- responding to reports by victims of an alleged assault as a priority;
- taking a pro-arrest approach;
- initiating criminal action following an assault;
- initiating criminal action following a breach of an intervention order;
- carrying out their work with a non-judgmental and respectful attitude;
- processing and serving intervention orders efficiently;

207 See, eg, Lewis (2000) above n 183.

208 A McGibbon, L Copper and L Kelly, *What Support? An Exploratory Study of Council Policy and Practice, and Local Support Services in the Area of Domestic Violence within Hammersmith and Fulham* (1989).

209 Patton (2003) above n 94.

210 Ibid 56.

- taking a position that condemns perpetrators' violence against their family members;
- removing the violent family member from the home;
- providing information on legal rights and support services, and facilitating provision of this support.²¹¹

3.60 By contrast, victims define an ineffective initial police response to family violence as including 'delays in the serving of intervention orders' and a 'failure to take any legal action following an assault or breach of an order'.²¹² If victims of family violence contact the police following an alleged assault and there is a subsequent lack of legal action, they often remain in the violent relationship longer.²¹³ They may also have an increased sense of fear because the perpetrator has experienced no consequences or sanctions for the violence, and also because nothing has been done to prevent the perpetrator harming them again. Such inaction can confirm what perpetrators themselves tell victims as part of their violent and threatening behaviour—that the police will not respond to their calls for help, and if they do, they won't believe them or act on what the victims say. Our consultations also found that an ineffective first response by the police, such as not responding immediately²¹⁴ or requiring the victim rather than the perpetrator to leave the family house,²¹⁵ inhibits a victim from contacting the police again during a violent crisis situation. These issues are detailed more fully in Chapter 5.

3.61 The best approach in a crisis situation may involve balancing victims' safety with their apparent agency or empowerment. For example, if the police attending a violent situation decide that a criminal charge is the best response, yet the victim resists this action, a conflict between 'safety' and 'agency' exists. The commission believes that when a victim of family violence calls the police, she is asking for urgent and immediate assistance for her and potentially other family members' personal safety. The first priority in this situation should therefore be a response which ensures the victim's safety. Empowerment is crucial in any response to family violence, yet empowerment must be genuine and not simply an excuse to pass responsibility for action in a crisis directly onto the victim. Genuine empowerment includes responding effectively to a victim's immediate needs.

211 Ibid 56.

212 Ibid 57.

213 Ibid.

214 Interview with Aid, 18 May 2005.

215 Interview with Kate, 21 April 2005.

3.62 In a crisis situation, it is therefore particularly important that family violence is taken seriously. The safety of the victim should be the first aim of any legal response to a crisis situation, taking priority over any other aim. We have made recommendations to improve the police and court response in a crisis situation later in this report.²¹⁶ The commission believes that a strengthened criminal response is particularly important in a crisis. Understanding the dynamics of family violence suggests that police and support workers need to be proactive to ensure the safety of victims.

BEST APPROACH IN THE MEDIUM AND LONG TERM

3.63 An effective medium- and long-term legal response to family violence will pay particular attention to victims' perspectives and be informed by an understanding of the dynamics of family violence.²¹⁷ For example, leaving a violent family relationship can be a gradual process that may take several attempts. This means that even if victims have called the police many times before, their safety concerns must be given the same attention, and even if they are not prepared to support legal action against the perpetrator, they could be prepared to do so at a later stage. Victims need support from a justice system which is based on a genuine understanding and respect for their situation.

3.64 A flexible legal system is also necessary to provide a number of options and be responsive to the individual safety strategies family violence victims. For example, the process of obtaining, varying and renewing intervention orders needs to be flexible enough to be responsive to victims' different and potentially changing safety needs.²¹⁸

3.65 For most victims, referral to support outside the justice system is also particularly important.²¹⁹

3.66 The commission also believes that the values that should underpin the justice system's approach to family violence need to be articulated. To this end, we recommend purposes and principles to be included in any new Act in the next section.

216 See paras 5.98–5.100 and Chapter 7.

217 See, eg, Recommendation 29.

218 See chapters 8 and 10.

219 We discuss the new police obligation to refer victims to support agencies when they attend a family violence incident at para 5.18.

IMPACT OF STALKING PROVISIONS

3.67 In 1994 the *Crimes Act 1958* was amended to create the offence of stalking and to extend the application of the intervention order system to stalking, even when the stalker is not a family member.²²⁰ Stalking-related intervention orders are commonly sought for situations which do not involve family violence, such as disputes between neighbours and schoolchildren. Once introduced, applications for intervention orders for stalking increased exponentially.²²¹

3.68 While our terms of reference do not specifically require us to address stalking, the issue was repeatedly raised in consultations. In particular, concern was expressed that applications for intervention orders for stalking which are not family violence-related are diverting the limited resources of police and courts.²²² Consultations also revealed a perception by some individuals and groups that the increase in applications for intervention orders in such situations undermines the seriousness of family violence.

RECENT INITIATIVES

3.69 There are limited avenues available for the resolution of non-violent disputes.²²³ This is behaviour which may not be appropriate to criminalise. The provisions under the Crimes Act for intervention orders for stalking were not intended to cover non-violent interpersonal disputes, but rather to target predatory stalking which incites fear in the victim and causes ‘physical or mental harm or apprehension or fear for his or her safety, or that of another person’.²²⁴ This highlights the question of whether the intervention order system, which prohibits behaviour rather than

220 *Crimes Act 1958* s 21A(1)–(4A), as amended by the *Crimes (Amendment) Act 1994*. Under s 21A(2), stalking is defined as engaging in behaviour such as following the victim, loitering near the victim’s home or workplace, contacting the victim (by post, phone, fax, text message, email or other electronic communication) or keeping the victim under surveillance—with the intention of causing physical or mental harm or of arousing apprehension or fear for the victim’s safety, or the safety of other people. Similar provisions exist in all other Australian jurisdictions.

221 Between 1995–96 and 2000–01, the number of stalking intervention orders increased by 277%, while the number of intervention orders for family violence remained static.

222 See Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) above n 8, paras 4.34–4.39.

223 One avenue available is the *Magistrates’ Court Act 1989* s 126A, which provides for ‘binding over to keep the peace’.

224 Victoria, Crimes (Amendment) Bill 1994, Second Reading Speech, Legislative Assembly, 20 October 1994, 1383 (Geoff Coleman, Minister for Natural Resources).

resolves disputes, is an appropriate mechanism for remedying conflicts which do not involve family violence.

3.70 Recent initiatives in Victoria intend to provide avenues for the diversion of intervention order applications which do not involve family violence.

3.71 Between July 2002 and June 2003, the Department of Justice implemented a pilot project to refer appropriate intervention order cases, principally neighbourhood disputes, from the Magistrates' Court to the Dispute Settlement Centre of Victoria (a mediation centre). A review of the project was conducted by the International Conflict Resolution Centre.²²⁵

3.72 The Attorney-General's recent Justice Statement announced the establishment of the Gateways to Justice project which 'provides an integrated approach to dispute resolution policy and services, and delivers a range of court-based and non-court based dispute resolution processes'.²²⁶ In the 2005–06 Victorian Budget, an allocation of \$8.9 million was announced to improve access to civil justice, specifically targeting civil legal and consumer problems experienced by disadvantaged people, including the establishment of new community legal centres and two community-based mediation pilots for the resolution of neighbourhood disputes.

3.73 In August 2005 the Attorney-General announced the establishment of the state's first Neighbourhood Justice Centre, located in Collingwood, to begin operation in 2007.²²⁷ The centre will incorporate a multi-jurisdictional court and a range of services for victims, offenders, civil litigants and the local community. It is proposed that the operation of the centre will be based on partnerships between the court and local and state governments, service providers, schools, the local retail trade and community groups, and will focus on the resolution of disputes and problems from the local area, employing a therapeutic and restorative approach, including diversionary programs.²²⁸

225 Melissa Conley Tyler, Brock Bastian and Jackie Bornstein, *Review of the DSCV Magistrates' Court Mediation Diversion (Intervention Order) Project* (unpublished).

226 Department of Justice [Victoria] (May 2004) above n 150, 8.

227 The centre is to be located at the old Northern Metropolitan TAFE site and will begin operations in 2007. It is modelled on the Red Hook Community Justice Center in New York and a similar initiative, the North Liverpool Community Justice Centre, in the United Kingdom.

228 'Innovation brings justice back into the community' (September 2005) 2(4) *Justice Review* 1. Further information available from <www.justice.vic.gov.au/neighbourhoodjusticecentre> at 21 December 2005.

VIEWS FROM SUBMISSIONS

3.74 In the Consultation Paper we asked whether stalking intervention orders should be dealt with under separate legislation. In response to this question, a number of submissions reiterated the concerns raised in consultations.²²⁹ Some pointed out that it was particularly difficult to prove stalking in court.²³⁰ Many submissions made the distinction between stalking which occurs in the context of family violence and stalking which does not involve family violence, such as in neighbourhood disputes.²³¹

3.75 The Murray Mallee Community Legal Centre argued that the current legislative provisions do not sufficiently differentiate between intervention order applications for violent behaviour in intimate and other family relationships and applications for behaviour outside a family relationship, for example, between neighbours or schoolchildren. The submission reported that in the experience of the centre:

very few applications for stalking orders are in respect of classic stalking scenarios. The vast majority of applications are in respect of neighbourhood disputes, problematic social relationships between young people and animosity between the new domestic partners and the old domestic partners of a non-applicant party. The dynamics in these relationships are considerably different to the dynamics in intimate family relationships—in the former both the applicants and respondents are more likely to be angry or bitter and less likely to be afraid, and the incidents alleged are more likely to constitute harassment than violence or threats. Stalking applications are also more likely to be contested, be heard in a context of cross applications between the parties and be conducted by unrepresented parties.

3.76 There was general support for the notion that intervention orders for stalking which do not occur in the context of family violence require a different response.²³² The Women’s Legal Service Victoria pointed to two reasons for dealing with stalking intervention orders separately:

229 Submissions 27 (Robinson House), 28 (Murray Mallee Community Legal Service), 33 (Women’s Domestic Violence Crisis Service), 65 (John Willis, La Trobe University), 72 (Victoria Police).

230 Submissions 27 (Robinson House), 40 (Whittlesea Domestic Violence Network).

231 Submissions 25 (Barbara Roberts), 33 (Women’s Domestic Violence Crisis Service), 49 (Domestic Violence and Incest Resource Centre), 53 (Women’s Electoral Lobby, Victoria) 64 (Federation of Community Legal Centres), 72 (Victoria Police), 74 (Women’s Legal Service Victoria).

232 Submissions 8 (Werribee Legal Service), 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 33 (Women’s Domestic Violence Crisis Service), 49 (Domestic Violence and Incest Resource Centre), 53 (Women’s Electoral Lobby, Victoria), 64 (Federation of Community Legal Centres), 66 (Aboriginal Family Violence Prevention and Legal Service), 72 (Victoria Police), 74 (Women’s Legal Service Victoria), 78 (Department of Victorian Communities), 79 (Department of Human Services).

Whilst behaviour between non-family members may look the same as family violence—ie be of similar severity, the family context of family violence makes it different and changes the dynamic. It is therefore important practically and symbolically that it be dealt with separately.

It will enable the Act to properly fit in to the proposed statewide model for responding to family violence.

COMMISSION'S VIEW—A NEW ACT

3.77 The commission believes that it is neither appropriate nor practical for the intervention order system available under the Crimes (Family Violence) Act to be used as a mechanism for addressing community-based interpersonal disputes. It is apparent that the multiple function of the legislation is having an adverse impact on the capacity of police, courts and legal service agencies to provide remedies for family violence victims. To address this issue, the commission recommends that the Crimes (Family Violence) Act be repealed and a new Family Violence Act be enacted which is confined to behaviour defined as ‘family violence’ and persons defined as ‘family members’. To continue to provide a remedy for other forms of violence, legislation providing for intervention orders currently available under section 21A of the Crimes Act would need to be enacted.

RECOMMENDATION

1. The *Crimes (Family Violence) Act 1987* should be repealed and new legislation, entitled the Family Violence Act, should be enacted.

INCLUSION OF OBJECTS AND PRINCIPLES CLAUSES

It is the view of Victoria Police that the current Act is not clear in its purpose.²³³

3.78 The current Crimes (Family Violence) Act has no aims, objectives or principles. Its sole purpose is to ‘provide for intervention orders in cases of family violence’.²³⁴ Submissions that directly addressed this point stated that they believed an objects clause was necessary.

233 Submission 72 (Victoria Police).

234 *Crimes (Family Violence) Act 1987* s 1.

The Federation strongly believes that it is essential to identify the purpose behind the justice system's response to family violence before any real solutions can be properly tabled and addressed.²³⁵

3.79 Some went as far as to add that defining the purpose of the Act must be the first priority for family violence law reform:

[A]ny consideration of changes required to the justice system's response to family violence must take place within a clearly articulated vision for and understanding about the purpose of the Crimes (Family Violence) Act, within a broader systems and community response.²³⁶

3.80 Submissions suggested that principles and purposes would improve consistency in decision making by magistrates and the police: '[We] believe that a clear philosophy is necessary to underpin a consistent approach to family violence'.²³⁷

The Federation of Community Legal Centres stated that the current lack of guiding principles and aims 'allows for subjective decision-making based on opinions about family violence' which can be unfair and unjust, as well as inconsistent.

OTHER JURISDICTIONS

3.81 Family violence legislation in other Australian jurisdictions include principles about the protection²³⁸ and safety of victims.²³⁹ For example, in the Australian Capital Territory's (ACT) *Domestic Violence and Protection Orders Act 2001*, the second object and principle is 'to facilitate the safety and protection of people who fear or experience violence',²⁴⁰ while in the New South Wales (NSW) *Crimes Act 1900*, the first object is 'to ensure the safety and protection of all persons who experience domestic violence'.²⁴¹ In Queensland, legislation was amended in 2002 to include the main purpose 'to provide for the safety and protection of a person in the case of domestic violence'.²⁴² Similarly, in South Australia, in determining whether or not to make a restraining order the court must consider 'the need to ensure that family members are protected

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

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

237 Submission 57 (Victorian Aboriginal Legal Service).

238 *Domestic Violence and Protection Orders Act 2001* (ACT) s 6; *Crimes Act 1900* (NSW) s 562AC; *Domestic and Family Violence Protection Act 1989* (Qld) s 3A; *Restraining Orders Act 1997* (WA) s 12.

239 *Domestic Violence and Protection Orders Act 2001* (ACT) s 5; *Crimes Act 1900* (NSW) s 562AC; *Domestic and Family Violence Protection Act 1989* (Qld) s 3A; *Family Violence Act 2004* (Tas) s 3.

240 *Domestic Violence and Protection Orders Act 2001* (ACT) s 5.

241 *Crimes Act 1900* (NSW) s 562AC.

242 *Domestic and Family Violence Protection Act 1989* (Qld) s 3A.

from domestic violence'.²⁴³ Finally, in Western Australia the court must consider 'the need to ensure that the person seeking to be protected is protected from acts of abuse' in deciding whether to make a restraining order.²⁴⁴

3.82 Tasmania is the only state that does not mention 'protection', instead its main focus is on 'safety'—its objects clause consists entirely of the statement that the 'safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations'.²⁴⁵

3.83 Reference is made to prevention and reduction of family violence in the ACT, NSW and Western Australian legislation.²⁴⁶ Western Australia requires the court to consider 'the need to prevent behaviour that could reasonably be expected to cause fear that the person seeking to be protected will have committed against him or her an act of abuse'.²⁴⁷

3.84 Some jurisdictions emphasise the effect of violence on children. For instance, in Western Australia the court must consider 'the need to ensure that children are not exposed to acts of family and domestic violence',²⁴⁸ and in South Australia it must take account of 'the welfare of any children affected, or likely to be affected, by the defendant's conduct'.²⁴⁹

The **defendant** is the accused person in criminal proceedings.

COMMISSION'S VIEW

3.85 The commission recommends that a new Family Violence Act include a statement of objects and principles. This will serve both symbolic and practical purposes. At a symbolic level, it will explain the aspirations of the legislation and provide the basis for changes in the attitudes of police, courts and the community. This is particularly important in the context of family violence, which the law has traditionally failed to treat seriously.

243 *Domestic Violence Act 1994* (SA) s 6.

244 *Restraining Orders Act 1997* (WA) s 12.

245 *Family Violence Act 2004* (Tas) s 3.

246 *Domestic Violence and Protection Orders Act 2001* (ACT) s 6; *Crimes Act 1900* (NSW) s 562AC; *Restraining Orders Act 1997* (WA) s 12.

247 *Restraining Orders Act 1997* (WA) s 12(1)(b).

248 *Restraining Orders Act 1997* (WA) s 12(1)(ba).

249 *Domestic Violence Act 1994* (SA) s 6(1)(b).

3.86 At a practical level, a principles clause will provide guidance to police, magistrates and family violence victims about how the Act should be interpreted²⁵⁰ and applied²⁵¹ and contribute to greater consistency in decision making.

! RECOMMENDATION

2. The new Family Violence Act should contain clear purposes and guiding principles.

PURPOSES AND PRINCIPLES FOR A NEW FAMILY VIOLENCE ACT

3.87 In our Consultation Paper we asked what the primary purpose of the Crimes (Family Violence) Act should be. Many submissions responded to this question. Protection of victims was seen as a primary goal but reference was also made to other matters:

(T)he Act should first and foremost aim to protect people from family violence ... (I)f offenders in family cases are rarely punished through the criminal justice system the effect is to limit the protection that an intervention order can offer an individual.²⁵²

I feel that the primary purpose of [the Act] should be protection, and hopefully rehabilitation.²⁵³

Protection comes first and that implies support and empowerment too.²⁵⁴

Protection should be the main focus, because to provide protection the law must be strong, definite and upheld; these laws and their strength must in turn encompass the aspects of rehabilitation and punishment that is required to protect.²⁵⁵

The primary purpose of the Act should be protection. The Act and criminal law system already adequately address punishment. However, including some rehabilitative strategies ... at early stages of the civil process may support protection goals.²⁵⁶

250 *Interpretation of Legislation Act 1984* s 35(a).

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

252 Submission 8 (Werribee Legal Service).

253 Submission 20 (Mrs EF Belsten).

254 Submission 25 (Barbara Roberts).

255 Submission 27 (Robinson House BBWR).

256 Submission 41 (Victoria Legal Aid).

[I]f the primary purpose of the Act is restricted to protection, then the purpose of the Act is clear and unambiguous to those interpreting and applying it. However, [we] also note that if the purposes of the Act were expanded, then it may meet a range of aims which are meaningful within the context of the Act and its ultimate purpose, to prevent family violence. An Act with a number of purposes allows for a comprehensive, un-fragmented approach to family violence prevention, protection and crisis response. Punishment and rehabilitation may be necessary to ensure protection is achieved.²⁵⁷

[We] support the Act having multiple purposes, including protection, punishment and rehabilitation. The Women's Safety Strategy, reinforced by the work of the SSCRFV, identifies ensuring the safety of women and children as the primary purpose. Multiple purposes also provide recognition that a range of responses is required.²⁵⁸

3.88 Some submissions articulated additional purposes. These included holding perpetrators accountable and making them responsible, empowering victims and recognising the gendered nature of violence. For example:

Making men accountable for their own behaviour is paramount to changes in the legal system.²⁵⁹

This Act should rest in a legal approach that encourages those who perpetrate violence to take responsibility for their violent actions and the impact of their violent behaviour on others. There should also be explicit encouragement for those who perpetrate violence to make lasting changes in their behaviour. The re-victimization of victims should be avoided. Addressing issues such as gender disparity, disempowerment and the invalidation of self and experience need to be a priority.²⁶⁰

The primary purpose of [the Act] is supporting and empowering women subjected to family violence, fairness and consistency regarding action.²⁶¹

257 Submission 69 (Victorian Community Council Against Violence).

258 Submission 78 (Department for Victorian Communities).

259 Submission 40 (Whittlesea Domestic Violence Network).

260 Submission 46 (Royal Children's Hospital, Melbourne).

261 Submission 40 (Whittlesea Domestic Violence Network).

The importance of ensuring that the system supports the agency of victims in planning for their own safety cannot be stressed too strongly. Because of the nature of domestic violence, and the systematic disempowerment of victims at the hands of the perpetrator, a system response that does not respect the wishes of the person seeking safety and support can further disempower the victim.²⁶²

3.89 The Statewide Steering Committee to Reduce Family Violence formulated the following principles to guide systems reform in its report *Reforming the Family Violence System in Victoria*:

- Family violence is a fundamental violation of human rights and unacceptable in any form.
- Physical or sexual violence within the family is a crime which warrants a strong and effective justice response.
- Responses to family violence must recognise and address the power imbalance and gender inequality between those using violence (predominantly men) and those experiencing violence (predominantly women and children).
- The safety of women and children who have experienced, or are experiencing family violence, is of paramount consideration in any response.
- The voices of women and children who have experienced violence must be heard and represented at all levels of decision making, to help assist in reform.
- Men who use violence should be held accountable and challenged to take responsibility for their actions.
- Family violence affects the entire community and occurs in all areas of society regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion. Responses to family violence must take into account the needs and experiences of people from these diverse backgrounds and communities. Family violence is not acceptable in any community or culture.
- Responses to family violence can be improved through the development of a multifaceted approach in which responses are integrated and specifically designed to protect women and children.
- Preventing family violence is the responsibility of the whole community and requires a shared understanding that family violence is unacceptable.

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

- The prevention of family violence requires changing community attitudes and behaviour, responding to people at risk at the earliest possible stage and improving responses to women and children who experience violence and the men who perpetrate it.
- Responses to family violence can be improved through increased recognition and greater coordination of services in responding to the independent rights and needs of the child.²⁶³

3.90 Several submissions supported these purposes:

[W]e believe the primary purposes of the [Act] should be increased safety for women and children; improved accountability for those who use violence; recognising and encouraging women's right to have control and agency over their own lives and future (and participate in decisions about their safety).²⁶⁴

The primary purpose of the Act should be in line with the proposed statewide model for responding to family violence, namely to: ensure the safety of people who have experienced family violence (primary aim); hold people who use or have used violence accountable; and support the agency of people who have experienced family violence.²⁶⁵

COMMISSION'S RECOMMENDATIONS

3.91 Having considered legislation in other jurisdictions, the work of the Statewide Steering Committee and the suggestions in submissions, the commission believes that a new Family Violence Act should include an objects clause and a statement of principles to guide courts in their application of the Act.

PURPOSES

3.92 The commission recommends that the paramount purpose of the legislation should be to ensure the safety of all people who experience family violence. The commission believes the Act should also aim to prevent family violence and provide victims with effective and accessible remedies. The Act should also reflect the aspiration to promote non-violence as a fundamental social value.

263 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria: Report of the Statewide Steering Committee to Reduce Family Violence* (2005) 8.

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

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

! RECOMMENDATION

3. The purposes of a new Family Violence Act should be:
- to ensure the safety of all people who experience family violence;
 - to prevent family violence between people to the greatest extent possible;
 - to provide victims of family violence with effective and accessible remedies;
 - to promote non-violence as a fundamental social value.

PRINCIPLES

3.93 The commission agrees with submissions that the Act should also set out principles to guide the way that courts apply family violence legislation. In Chapter 1, the commission outlined the values that have guided our work on family violence and provided the framework for our recommendations. The commission believes that some of these principles are appropriate to guide decision making under the new Act. The commission recommends that the following principles be enshrined in a new Family Violence Act.

! RECOMMENDATION

4. In making decisions, courts should treat the safety of victims of family violence as paramount and should also have regard to the following matters:
- the particular characteristics and dynamics of family violence, including that family violence is predominantly perpetrated by men against women and children;
 - the promotion of non-violence as a fundamental social value between family members, within the legal system and in the wider community;
 - the need to ensure that victims of family violence are treated with dignity and respect; and



RECOMMENDATION

- the need to ensure that perpetrators of family violence are held properly accountable for their actions.

ALTERNATIVES TO THE JUSTICE SYSTEM—RESTORATIVE JUSTICE?

3.94 In formulating the most effective legal response to family violence, the commission considered a range of options and possibilities. Restorative justice was an option discussed in consultations and advocated by the Victorian Aboriginal Legal Service as offering an appropriate alternative to traditional justice responses to family violence. The commission believes that it is particularly important to examine restorative justice options, as some people suggested this could be an appropriate means of dealing with family violence in Indigenous communities.

WHAT IS RESTORATIVE JUSTICE?

3.95 Restorative justice refers to diverse practices and models developed as alternatives to dealing with criminal offences through the mainstream justice system.

These ‘restorative justice’ practices have no single agreed definition, however, we use the expression to describe a process that brings together people who have a stake in a specific crime or wrongdoing to resolve how to deal with its consequences.²⁶⁶ Instead of focusing on punishment, restorative justice has a focus on ‘healing rather than hurting, respectful dialogue, making amends, caring and participatory community, taking responsibility, remorse, apology and forgiveness’.²⁶⁷

Common models of restorative justice are family conferencing,²⁶⁸ victim–offender mediation and circle sentencing.

Family conferencing involves family members who have used or experienced violence using a mediator to discuss their experiences and coming up with solutions to stop the violence.

Circle sentencing involves the defendant’s community and the victim making recommendations to the judge for sentencing.

Victim–offender mediation involves the victim, perpetrator and mediator coming up with solutions to stop the violence.

266 Kathleen Daly and Hennessey Hayes, *Restorative Justice and Conferencing in Australia* (2001) 2; Home Office, Research Development and Statistics Directorate, *Restorative Justice: An Overview* (1999) 5; Heather Strang and John Braithwaite, ‘Restorative Justice and Family Violence’ in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 1, 4.

267 John Braithwaite, ‘Shame and Criminal Justice’ (2000) *Canadian Journal of Criminology* 281, 293.

268 Rob White and Fiona Haines, *Crime and Criminology* (2nd ed, 2000) 180.

3.96 There is some experience in Australia in using restorative justice practices for property offences, substance abuse and some violent crimes committed against strangers.²⁶⁹ Restorative justice practices are less frequently applied to civil matters. Broad philosophical and theoretical approaches are adopted by different models and programs which have been embraced in a process which attempts to:

(r)emedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and the community.²⁷⁰

INDIGENOUS COMMUNITIES, RESTORATIVE JUSTICE AND FAMILY VIOLENCE

3.97 Traditional Indigenous methods of dealing with conflict are cited as providing possible alternatives to the criminal or civil justice system. This is based on the understanding that there are longstanding problems experienced by Indigenous Australians in using the criminal justice system, which are compounded by the complexities of extended family and other family links. As a result, it is argued that there needs to be an effective criminal justice response to family violence as well as effective diversion and prevention strategies.²⁷¹ ‘Ownership’ over family violence issues and the importance of a community-led approach is a consistent theme throughout the *Victorian Indigenous Family Violence Taskforce Final Report*.²⁷²

3.98 Although formal involvement of Indigenous communities in sentencing occurs in some courts, such as Victoria’s Koori Courts, family violence offences are usually excluded. A variation of the Canadian model of circle sentencing is being piloted in NSW for family violence, as well as other offences. It has been operating for three years in Nowra and for two years in Dubbo, and is soon to be implemented in Sydney, Lismore, Kempsey, Walgett, Armidale and Bourke. The defendant is sentenced by a small selected group of Indigenous elders, following a detailed group discussion of the case with a magistrate, police prosecutor, defence lawyer, victim and defendant.²⁷³

269 For a discussion of alternative resolution approaches, see Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) above n 8, 45–59.

270 *R v Proulx* (2000) SCC 5.

271 Submission 57 (Victorian Aboriginal Legal Service).

272 Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003).

273 ABC Television, ‘Inside the Circle’, *Four Corners*, 10 October 2005 <www.abc.net.au/4corners/content/2005/51479031.htm> at 12 January 2006.

3.99 In Victoria there is qualified support in Indigenous communities for the introduction of alternative responses to deal with family violence incidents. The Victorian Aboriginal Legal Service²⁷⁴ strongly supports the use of restorative justice practices as appropriate intervention for Indigenous Australians involved in family violence matters. The Aboriginal Family Violence Prevention and Legal Service (Victoria) urges caution in its use.²⁷⁵

3.100 Indigenous communities need significant continuing support for existing and new Indigenous-specific justice system programs for victims and perpetrators of family violence. These programs include Indigenous-specific men's behaviour change programs; court support services; community workers to support victims and perpetrators when police are involved, Indigenous women's accommodation and refuge services, and healing services specific to family violence.²⁷⁶ Specific resources directed towards capacity building within Indigenous communities is required if restorative justice alternatives are to be developed by these communities.

3.101 There is more emphasis on community mediation among Indigenous than non-Indigenous communities. Use of the formal criminal or civil justice system to punish a violent intimate partner may result in an Indigenous woman being isolated within her community. Research into using restorative justice practices to deal with family violence produced opposing views between Indigenous women and non-Indigenous women in Queensland, with Indigenous women favouring its use and ambivalence being expressed by the non-Indigenous women. However, both groups believed that the criminal justice system fails to deliver identified key justice objectives and that restorative justice practices offer some hope in addressing shortfalls in the traditional justice system.²⁷⁷

APPLICATION OF RESTORATIVE JUSTICE PRACTICES TO FAMILY VIOLENCE

3.102 It remains highly contested whether restorative justice practices should be applied to family violence matters.²⁷⁸ Concerns about its use focus on the possibility of

274 Submission 57 (Victorian Aboriginal Legal Service).

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

276 See paras 5.64–5.68.

277 Heather Nancarrow, *In Search of Justice in Domestic and Family Violence* (Unpublished MA Thesis, Griffith University, 2003).

278 Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?' in Strang and Braithwaite (2002) above n 266, 223, 236–7; Sarah Curtis-Fawley and Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates* 20; Julie Stubbs, 'Domestic

failure to sufficiently address the power imbalance between the victim and perpetrator. There is also concern that restorative justice may be contrary to efforts to make family violence a public matter and to focus on the serious, unacceptable nature of violence against women and children.²⁷⁹ There are also concerns that restorative justice may not be able to respond to various characteristics and dynamics of family violence, such as the fact that it usually occurs between people in intimate relationships and typically involves multiple incidents over an extended period.²⁸⁰

3.103 At the centre of this debate is an understanding of power dynamics in family violence matters. Power imbalances present formidable challenges in developing appropriate models and ensuring that re-victimisation does not occur. Restorative justice models which can be appropriately applied to family violence matters have not yet been resourced or established in Victoria.

VIEWS FROM SUBMISSIONS

3.104 The contested and contentious views apparent in the research about the appropriateness of using restorative justice practices as an alternative to the criminal or civil justice system for family violence were also reflected in the submissions received by the commission. Submissions referred to different concepts and practices which could or should be used as alternatives, including diversion, holistic centres, cooling-off periods, time-out centres and healing services, particularly for first offences.²⁸¹ It was also stated that a modern view of punishment is the encouragement of reformed behaviour and a return to the family unit.²⁸²

3.105 However, none of the submissions gave unqualified support for alternative responses. Most submissions commented on the importance of alternatives not being seen as a 'soft option' for offenders and said that there ought to be a focus on developing the existing criminal and civil justice system responses.²⁸³ While support was given to further consideration of this issue, it was recognised that alternatives are 'in their infancy' and that appropriate diversion programs would need to be developed,

Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Strang and Braithwaite (2002) above n 266, 42.

279 Busch (2002) above n 278, 232; Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in Strang and Braithwaite (2002) above n 266, 128–9.

280 Stubbs (2002) above n 278, 43–4.

281 Submissions 20 (Mrs EF Belsten), 64 (Federation of Community Legal Centres (Vic)).

282 Submission 23 (Zonta Club of Frankston).

283 Eg, submission 64 (Federation of Community Legal Centres (Vic)).

particularly in rural and regional areas.²⁸⁴ The power imbalance between the parties in family violence matters means that, as one submission put it, it is difficult to ‘envisage a fair and equal mediation without extensive supports and monitoring’.²⁸⁵

3.106 Prerequisites for any development of restorative justice and/or diversionary programs were identified as:

- a focus on the effect upon the victim;²⁸⁶
- a clear consent to participation by the protected person;²⁸⁷
- improved accountability for those who use violence;²⁸⁸
- recognition and encouragement of women’s right to have control and agency over their own lives.²⁸⁹

3.107 Diversion was viewed as a possible approach for breaches of intervention orders,²⁹⁰ but not in circumstances where the police would be the gatekeepers for access to diversion programs. Rather, a court should retain this role.²⁹¹ We discuss diversion for breaches in more detail in Chapter 10.

3.108 Caution in the introduction and use of restorative justice or diversionary programs was urged for cases where families are marginalised and isolated because the children are especially vulnerable.²⁹² Diversionary programs were seen to be appropriate where the defendant is a child or where the aggrieved family member is a child. These children may find the traditional criminal law process difficult in these cases because they perceive they ‘caused’ a family member to be punished.²⁹³ Less punitive alternatives to jail were considered to be possibly useful in preventing a recurrence of violence but not at the expense of condemning violent actions.²⁹⁴

284 Ibid.

285 Submission 69 (Victorian Community Council Against Violence).

286 Submission 30 (Violence Against Women Integrated Services).

287 Ibid.

288 Submission 69 (Victorian Community Council Against Violence).

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

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

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

292 Submissions 36 (Paediatric Division, Royal Australasian College of Physicians), 46 (Royal Children’s Hospital).

293 Submission 41 (Victorian Legal Aid).

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

3.109 In contrast to this position, there were negative responses in some submissions to the question ‘is diversion ever an appropriate way to deal with breaches?’²⁹⁵

COMMISSION’S VIEW

3.110 Establishing any restorative justice model for family violence matters depends on the development of appropriate models based on rigorous research. The commission’s position is that there is insufficient clarity in the research to support the adoption of restorative justice practices for use in family violence matters and little experience in using such practices. Common standards of practice have not been developed and it would be necessary to train practitioners to use these practices in family violence matters.²⁹⁶

3.111 However, among some Indigenous communities there are calls for the establishment of restorative justice models in family violence matters in place of or as a supplement to the criminal or civil justice system. The development of these models, standards of practice and training of practitioners is properly placed in the hands of Victoria’s Indigenous communities and Indigenous non-government organisations.²⁹⁷

3.112 Alternative models such as family group conferencing, Koori family violence courts, victim–offender mediation and circle sentencing may be able to be adapted by Victorian Indigenous communities to deal with some family violence incidents. In 2004 principles underpinning the development of Indigenous Dispute Resolution models were canvassed by the National Alternative Dispute Resolution Advisory Council with Indigenous community representatives.²⁹⁸ These practices could be used as interventions in, alternatives to, or a diversion from the criminal and civil justice systems.

295 Eg, submission 62 (Eastern Community Legal Centre).

296 The Victorian Association for Restorative Justice was launched on 22 June 2005 and seeks to address some of these issues by exploring and disseminating the principles of restorative justice and practices within the Victorian community: Australian Lawyers for Human Rights, *Newsletter–June 2005*, <www.alhr.asn.au/html/main/NewsletterJune2005.htm> at 6 December 2005.

297 Victorian Indigenous Family Violence Taskforce, above n 13, 233. These structures include but are not limited to: the Indigenous Family Violence Partnership Forum, Indigenous Family Violence Policy Workers (DHS), Indigenous Family Violence Working Group, Regional Action Plans; nine Regional Indigenous Family Violence Action Groups, as well as key non-government organisations such as the Aboriginal Family Violence Prevention Legal Service and the Victorian Aboriginal Legal Service.

298 The council conducted a Forum on Indigenous Dispute Resolution in March 2004. The council is an independent expert body that was established in 1995 and provides policy advice to the Commonwealth Attorney-General on alternative dispute resolution, including suitability of these processes for particular client groups and the development of standards for dispute resolution processes.



RECOMMENDATIONS

5. Further research should be conducted before restorative justice practices are considered for use in family violence matters in Victoria.
6. If restorative justice practices are introduced, standards should be established for particular processes, practitioners should be trained and programs should be monitored and evaluated.

Chapter 4

Defining Family Violence and Family Member

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INTRODUCTION

4.1 In this chapter we discuss the definition of ‘family violence’ which should be included in the new Family Violence Act. The definition is based on recognition of the broad nature of family violence discussed in Chapter 2.

4.2 The chapter also discusses the definition of ‘family member’ in the Crimes (Family Violence) Act and proposes its expansion to ensure a broader range of family relationships, particularly those in Indigenous and CALD communities, are covered by the new legislation. Because research shows that people with disabilities are particularly vulnerable to abuse by their carers, we propose an extended definition of family member to cover these relationships. The overall objective of these recommendations is to increase the protection provided by the family violence legislation.

DEFINING FAMILY VIOLENCE

4.3 The Crimes (Family Violence) Act does not include a definition of family violence. Instead, section 4 of the Act sets out three main areas of behaviour which constitute grounds to obtain an intervention order:

- the respondent has assaulted a family member or caused damage to his or her property and is likely to do so again;
- the respondent has threatened to assault a family member, or to cause damage to his or her property and is likely to carry out the threat; or
- the respondent has harassed, molested or behaved in an offensive manner towards a family member and is likely to do so again.

PROBLEMS WITH THE CURRENT GROUNDS AS A DEFINITION

TOO VAGUE

4.4 These grounds for obtaining an order have been criticised for several reasons, but particularly for their lack of clarity and overall lack of effectiveness in providing protection from a wide range of violent behaviours. Many people and organisations find the grounds simply ‘too vague’ to be of sufficient use in deciding whether an intervention order should be made or if a person can apply for such an order.

Some of the provisions [of the current definition] are arguably undesirable because of their

vagueness—specifically the terms ‘molest’ and ‘behave in an offensive manner’. I do not know what is, or is meant to be, encompassed by these expressions.²⁹⁹

This leads to confusion about the scope of protection provided by the Act.

NARROW APPLICATION

4.5 Although the Crimes (Family Violence) Act provides that an order may be made for non-physical violence, including threats and verbal harassment, victims and support workers have found that the legislation is applied restrictively by some magistrates and police so that, in practice, protection is only provided against a narrow range of violent behaviour. In particular, many submissions mentioned that the courts and police apply the Act only to physical forms of family violence. The commission was told that it is common for some police, registrars and other court staff to tell victims they cannot obtain an order unless they are at risk of physical violence. When victims do apply for an intervention order for protection from non-physical violence, some magistrates refuse to make an order.

In our experience, many magistrates hearing matters will not consider the provisions of the CFVA [Crimes (Family Violence) Act] to be enlivened in situations where there is no evidence of physical harm.³⁰⁰

The CFVA currently provides that an order may be made on the basis of non-physical violence, including threats and verbal harassment. Despite this, there has arisen a process of gate keeping which results in very few applications in relation to non-physical forms of family violence. It is very rare for Police to pursue orders where there has been no serious criminal assault or for them to recommend to people experiencing non-physical violence to apply for an intervention order ... There is often an implied precondition of at least one incident of physical violence or property damage. This gate keeping results from an insufficient and incomplete understanding of the spectrum of behaviours that combine in relationships where people experience violence.³⁰¹

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

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

301 Submission 28 (Murray Mallee Community Legal Service).

REASONS FOR A NEW DEFINITION

GREATER CLARITY

4.6 Submissions and consultations supported inclusion of a definition of family violence in the Act to clarify the behaviour which is covered. A definition of family violence could provide the basis for training of police and court staff about the dynamics of family violence and could assist people seeking intervention orders.

Defining family violence in legislation should assist court staff, lawyers and police to have a better understanding of the nature of family violence and should make it clearer for them to understand in what situation the legislation should apply.³⁰²

If terms such as ‘family violence’ are defined, there is a lesser likelihood of a victim’s application being struck out or rejected on the basis of a magistrate’s restricted, artificially narrow or outdated view of what constitutes ‘family violence’.³⁰³

The definition we propose also includes behaviour not adequately covered in the current legislation.

GREATER ACCESS

4.7 Defining family violence in the legislation could also encourage people to seek orders. We were told that making it clear what family violence is and what behaviour the Act provides protection against, could encourage greater use of the Act by certain marginalised groups, including Indigenous Australians.³⁰⁴

SYMBOLIC AND EDUCATIVE ROLES

4.8 Explicitly defining family violence would educate those using and administering the Act about the range of behaviour included in family violence. It could also have a preventative effect by educating potential perpetrators and the public about the nature of family violence.

302 Submission 30 (Violence Against Women Integrated Services).

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

304 Submission 75 (National Network of Indigenous Women’s Legal Services).

4.9 Defining family violence rather than simply listing the specific forms of behaviour which constitute grounds for an intervention order³⁰⁵ also has a symbolic purpose. As submissions put it:

We believe that it is preferable to define ‘family violence’ *for the purposes of the Act* [their emphasis] ... It is important symbolically to say that a person who has been subjected to ‘family violence’ can apply for an intervention order. Currently, when explaining the entitlement to seek intervention order protection, the formulation of the Act is meaningless to lay people—essentially that a person can seek an intervention order if they have been subjected to the ‘conduct in s 4 of the Act’.³⁰⁶

The grounds for obtaining an intervention order should recognise the damage that psychological, emotional and verbal abuse can cause.³⁰⁷

4.10 Legislation in Queensland, the ACT and New Zealand contains various definitions of ‘family violence’ or ‘domestic violence’.³⁰⁸ Explicitly defining family violence in the Act was almost unanimously supported in submissions:

We believe that it is essential to define family violence in legislation.³⁰⁹

[We] support the inclusion of a definition of ‘family violence’. We believe that clarity and certainty about the parameters of unacceptable behaviour is essential for applicants, respondents, the Courts and police.³¹⁰

The grounds for obtaining an intervention order are not adequate, and, further, the definition of family violence should be expanded.³¹¹

In conclusion, the commission believes that a section defining family violence should be included in a reformed Crimes (Family Violence) Act.

305 This is the case in the South Australian legislation. However, it should be noted that as well as listing various types of behaviour constituting grounds for a restraining order, it also includes ‘other conduct, so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear’: *Domestic Violence Act 1994* (SA) s 4(2).

306 Submission 75 (National Network of Indigenous Women’s Legal Services).

307 Submission 79 (Department of Human Services).

308 See paras 4.44–4.46.

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

310 Submission 41 (Victoria Legal Aid).

311 Submission 69 (Victorian Community Council Against Violence).

! RECOMMENDATION

7. 'Family violence' should be defined in the new legislation.

NEW DEFINITION

NON-PHYSICAL FORMS OF FAMILY VIOLENCE

4.11 The current grounds for obtaining an intervention order do not adequately recognise non-physical forms of family violence. As we have already mentioned in this report,³¹² non-physical forms of family violence are often not perceived by the community as family violence, although they may be the cause of severe and long-lasting harm. As one submission pointed out:

Many of the respondents to our study did not report physical violence, or occasional instances of it. But all of them reported on-going emotional and psychological abuse as the background to the financial abuse, and this continued, in many cases, long after the relationship ended:

'A lot of times there is hardly any marks on you. The physical marks are not really as bad as the emotional. The physical, you get used to it, emotionally it takes away from yourself. Financial is tied to the emotional. The physical parts stops [sic] at a certain point—they won't hit you for a week or so—emotional and financial goes on, it doesn't let up'.³¹³

4.12 The definition of family violence should clearly extend to non-physical forms of abuse, particularly because non-physical family violence is rarely a crime. Emotional violence can include extreme acts of control, yet it may not come within the behaviour covered by the current legislation:

I worked with a woman who had been in a relationship where she was threatened and physically abused. In addition she was not allowed to look sideways, and had to have her head down, (because she might be looking at another man). He changed his name to hers so he could open her mail, he then disappeared for one year without a word, only to reappear and take her to court for child contact saying she had stopped him from seeing his child (and won the usual contact). Even now the relationship has ended, he rings her five times a day, and if she doesn't comply by speaking to him, he threatens to see his child, in who he otherwise shows no interest. Was this a crime? What could he possibly be charged

312 See paras 2.3, 2.6–2.17.

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

with that begins to meet the devastation that he has caused in the lives of this woman and her child.³¹⁴

4.13 As submissions have pointed out, not including non-physical forms of family violence in legislation perpetuates community views that it is not as serious as physical violence, despite research consistently showing it can have severe effects on victims (see paragraph 2.6–2.17).

There is mounting evidence to demonstrate the significant negative impact on women and children of not only physical violence, but also psychological, emotional and verbal abuse. There is a perception in the community that these forms of violence are not ‘real’ or ‘serious’, and if legislation does not include them then it is also perpetuating that perception.³¹⁵

4.14 Non-physical forms of family violence can also be a prelude to, as well as a part of, physical violence. It is particularly important for people who recognise the ‘warning signs’ of emotional violence, such as service providers, to be able to ensure a victim gets protection before physical or other harm occurs:

Protection should be available to them *before* there has been [physical] violence.³¹⁶

Property damage is also another signal to us that a woman is in danger from the violent perpetrator even though he may not have physically attacked her.³¹⁷

4.15 The most strongly expressed view in submissions was that non-physical forms of family violence should be explicitly included in a definition.

It needs to be made clear that non physical violence is covered by the Act.³¹⁸

Family violence ... should include assaults on the integrity of the person. Verbal, emotional, financial, spiritual, social and mental abuse need to be recognised as forms of family violence and the law should develop ways to address these, including the use of IO’s.³¹⁹

[T]he definition] should include reference to forms of abuse other than threatened or physical abuse.³²⁰

314 Submission 22 (Kim Robinson, social worker).

315 Submission 45 (Rochelle Campbell, women’s health resource worker).

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

317 Submission 33 (Women’s Domestic Violence Crisis Service).

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

319 Submission 63 (Darebin Family Violence Working Group).

320 Submission 46 (Royal Children’s Hospital).

[We] support the New Zealand definition, which includes non-physical abuse.³²¹

[The definition] should be expanded to encompass more than physical assault, ie emotional, financial, verbal, social and/or psychological violence should be added.³²²

The grounds for obtaining an intervention order should include non-physical violence. On our assessment we include social abuse (being discouraged or stopped from seeing other people eg family or friends), and verbal, emotional, financial and sexual abuse.³²³

Consideration should be given to including ‘intimidation’ as in the NSW and South Australian legislation that recognises the impact of threatening and violent behaviour on ‘any family member’ (including children). The definition should contain references to non-physical forms of violence including but not limited to verbal abuse (threats and insults), financial abuse (controlling money and work), psychological abuse (eroding self esteem), and isolation from community and family. The New Zealand definition is our preferred comparator model.³²⁴

4.16 One submission objected to the inclusion of non-physical forms of family violence in the legislation:

greater emphasis ... on preventing non-physical violence ... will ... expand the amount of police and Court work. These consequences will possibly occur at the cost of responding quickly to calls from women who face immediate danger and require their safety needs to be met. VALS believes that there is a problem in trying to extend the reach of the Act further in the direction of non-physical violence when there is so much that remains to be done in terms of reducing the incidence of physical violence.³²⁵

4.17 The commission disagrees with this view. Given the extent of the harm that non-physical forms of family violence can cause, we believe such behaviour should be included in the Act, even if it will expand the amount of police and court work. Responding to non-physical violence may also help to reduce the incidence of physical violence and cannot be disconnected from it.

4.18 We recommend that non-physical violence, including psychological, emotional, verbal and financial, should be included in the definition of family violence.

321 Submission 41 (Victoria Legal Aid).

322 Submission 40 (Whittlesea Domestic Violence Network).

323 Submission 33 (Women’s Domestic Violence Crisis Service).

324 Submission 28 (Murray Mallee Community Legal Service).

325 Submission 57 (Victorian Aboriginal Legal Service). The original comment was primarily concerned with criminalisation of non-violent behaviour.

! RECOMMENDATION

8. The new definition of family violence should explicitly include non-physical forms of family violence.

RECOGNISING THE NATURE, TIMING AND PATTERN OF FAMILY VIOLENCE

4.19 There is also a need for greater recognition in the legislation of the nature, timing and pattern of family violence. In applying the law, police and judicial officers need to be aware that seemingly ‘minor’ or ‘trivial’ behaviour can constitute an important part of the dynamics of family violence; that a regular pattern or repeated behaviour does not have to be established, a single incident is ‘enough’; and, that if violence has not recently happened, victims may still have a justifiable fear it will occur again. These three points are based on our understanding of the dynamics of family violence and were frequently raised in submissions.

4.20 Under the current Act, it is difficult to gain protection from behaviour which appears to be ‘minor’ or ‘trivial’ but, viewed in the context of a pattern of abusive behaviour, may be extremely controlling and harmful. As one submission said: ‘A client’s partner was carrying out daily checks on the odometer on her car as a means of monitoring her movements’.³²⁶

4.21 Submissions suggested the inclusion of provisions about such behaviour be included in the Act:

We consider that there should be a provision specifying, in accordance with the New Zealand *Domestic Violence Act 1995* that ‘apparently minor conduct’ can be taken into consideration as grounds for an order if it is part of a pattern of abuse from which the applicant requires protection. In our experience magistrates’ lack of understanding of the significance of apparently minor events as part of the pattern of power and control in violent relationships is a significant contributor to bad decisions in cases mainly involving non-physical violence.³²⁷

Victoria Police would support the broadening or expansion of the grounds for applying for an intervention order, specifically to address issues that may demonstrate patterns of

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

327 Submission 74 (Women’s Legal Service Victoria). Submission 78 (Department of Victorian Communities) also supported the New Zealand legislation.

behaviour. Such patterns of behaviour may be seen in pet abuse, social isolation, and severe economic control.³²⁸

4.22 This issue has been effectively addressed in the New Zealand legislation, which states:

[A] number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some of those acts, when viewed in isolation, may appear to be minor or trivial.³²⁹

The dynamics of family violence discussed in Chapter 2 support the need to follow the New Zealand legislative approach. Some submissions explicitly supported the New Zealand definition.

4.23 The legislation should also make it clear that abusive behaviour does not necessarily have to happen repeatedly to amount to family violence. As one submission put it:

[We] oppose the suggestion, given some credence in the current legislation, that ‘if it has only happened once, it is unlikely to happen again’. This is not in accordance with community expectations and is not a sound principle of law. It needs to be made clear in the legislation that one incident is one too many, and that there need not be evidence of repeated past behaviour for a person to have the benefit of legislative protection.³³⁰

Each incident of family violence is unacceptable, and this needs to be made clear in the legislation.

4.24 It is important that the legislation shows an understanding of the nature and dynamics of family violence, which can occur in a disjointed and unpredictable way, as well as in a ‘regular pattern’. For example:

‘We also believe that 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. In our experience, magistrates have little understanding of the potential for lulls in violent behaviour’.³³¹

A magistrate tried to discourage our client, Stephanie, from proceeding with her application for an intervention order because her partner John had left the home 10 days

328 Submission 72 (Victoria Police).

329 *Domestic Violence Act 1995* (NZ) s 3(4b).

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

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

earlier and had not made contact with her since then. This was despite allegations of very serious violence and the threat John made on leaving that he would ‘come back with a bunch of mates and bash’ Stephanie.³³²

4.25 It is essential that victims can be protected from threatened violence from a family member who has previously been violent, even if they have not recently experienced violence. This is important where the victim has had an intervention order and wishes to renew it. A person should not have to prove a breach of an intervention order to renew it.

! RECOMMENDATION

9. The legislation should allow an intervention order to be renewed without the applicant having to prove that further family violence occurred during the period of an intervention order.

4.26 Similarly, if perpetrators have been prevented from causing violent behaviour because they have been in jail, it should be possible for victims to obtain an intervention order on the perpetrators’ release from jail if they still fear for their safety. As one submission commented:

These changes could also address the issues that sometimes arise in cases where the respondent has actually been unable to access the person in need of protection for some time, eg because they have been in prison, and that is the real reason there have not been recent [violent] incidents.³³³

EXPOSURE OF CHILDREN TO FAMILY VIOLENCE

4.27 The close correlation between child abuse and family violence has already been discussed at paras 2.23–2.29. It is now recognised that even if a child has not been the specific target of violence, indirect exposure to family violence is so harmful that it may constitute a form of child abuse in its own right.³³⁴ A large body of research has

³³² Ibid.

³³³ Submission 74 (Women’s Legal Service Victoria).

³³⁴ Partnerships Against Domestic Violence (2003) above n 121, 42, 44; John Fantuzzo and Wanda Mohr, ‘Prevalence and Effects of Child Exposure to Domestic Violence’ (1999) 9 (3) *The Future of Children* 21,

documented the detrimental effects on children who are exposed to family violence, including poor health, difficulty sleeping, diminished self esteem, aggressive behaviour, anxiety and depression. In adolescents the effects can include fear and trauma akin to post-traumatic stress disorder, adjustment difficulties such as health problems, cognitive deficits and aggression, as well as injury resulting from attempts to intervene to protect the non-violent parent.³³⁵

4.28 The Crimes (Family Violence) Act allows children to be included on another person's intervention order, or have an order made to protect them, if the court is satisfied that they are a family member of the defendant or the victim and have been subjected to, heard or witnessed violence by the defendant and are likely again to be subjected to, hear or witness such violence.³³⁶

4.29 The commission received a particularly strong response from submissions endorsing the increased protection of children from exposure to family violence through legislation.³³⁷ Some submissions pointed out that the Act's current provisions are not being taken into account sufficiently or are being interpreted too narrowly by some magistrates. For example, some magistrates are not willing to make an order where a child has 'only' witnessed violence,³³⁸ orders are not granted for children unless there was physical violence against them,³³⁹ and some magistrates believed that orders for children were only sought by mothers 'to gain a family law advantage'.³⁴⁰ Submissions also pointed out inconsistent decision making in protecting children from exposure to family violence through intervention orders.

26–28; Joy Osofsky, 'The Impact of Violence on Children' (1999) 9 (3) *The Future of Children* 33; World Health Organisation, *World Report on Violence and Health* (2002) 103.

335 World Health Organisation (2002) above n 334, 89.

336 *Crimes (Family Violence) Act 1987* s 4A(3).

337 See, eg, submissions 58 (Family Court of Australia), 46 (Royal Children's Hospital), 36 (Paediatric Division, Australasian College of Physicians), 53 (Women's Electoral Lobby, Victoria), 69 (Victorian Community Council Against Violence), 27 (Robinson House BBWR).

338 Submission 8 (Werribee Legal Service).

339 Submission 30 (Violence Against Women Integrated Services).

340 *Ibid.* Recent research has found that this is largely a myth. Certainly, Family Court proceedings are often accompanied by allegations of domestic violence and the use of protection orders. However, research has found that this reflects the fact that family violence often escalates at the time of separation: Michael Flood, *Fact Sheet #2: The Myth of Women's False Accusations of Domestic Violence and Misuse of Protection Orders* (March 2005) <www.ncsmc.org.au/docs/False%20Accusations%20DV.pdf> at 21 December 2005. The reality is that women living with family violence often do not take out intervention orders and often do so only as a last resort after being subjected to repeated and serious victimisation: Angela Melville and Rosemary Hunter, 'As Everybody Knows: Countering Myths of Gender Bias in Family Law' (2001) *Griffith Law Review* 10(1) 124–38.

! RECOMMENDATION

10. Provisions should be included in the new legislation to enable an intervention order to be made for a child who has been subjected to, heard, witnessed or otherwise been exposed to family violence.

INCLUDING VIOLENCE AND ABUSE SPECIFIC TO CERTAIN GROUPS

4.30 In defining family violence it is important to recognise forms of family violence which are peculiar to particular groups in the community. For example, as mentioned in Chapter 2, homosexual people can suffer specific forms of family violence:

Threatening to or ‘outing’ their partner to friends, family, employer, police, church or others in the wider community; Telling a partner that no-one will help because the police and the justice system are homophobic; Telling a partner they deserve it because they are homosexual—this type of behaviour is indicative of internalised homophobia or self hatred by an abuser; Telling a partner that they are not a ‘real’ homosexual because they used to relate to men or women, have male or female friends, or prefer certain sexual practises or behaviours.³⁴¹

4.31 Family violence towards Indigenous Australians could include the regular denigration of their spiritual beliefs. A person with a disability could be threatened with removal of their physical aids. Similarly, elderly people may have the withdrawal of their care or removal of their accommodation continually threatened, as one submission notes:

There is also a need to reflect the diverse experiences of particular population groups ... Equivalent legislation in Queensland refers to the inclusion of specific examples of violence which includes ‘threatening an aged parent with the withdrawal of informal care’.³⁴²

! RECOMMENDATION

11. The new definition of family violence should be broad enough to include abuses specific to certain groups in the community.

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

342 Submission 78 (Department of Victorian Communities).

INCLUDING VIOLENCE TOWARDS PETS AND OTHER ANIMALS

4.32 The use of animal abuse as a form of family violence has been acknowledged in recent years. A Victorian study compared female pet owners who had experienced family violence with those who had not. Of women who had experienced family violence, 46% reported that their abusive partner had threatened pet abuse and 53% reported that their partner had hurt or killed a pet. This compared with 6% and 0% respectively in the community sample.³⁴³

4.33 Research has found that victims of family violence may be particularly affected by pet abuse:

The importance of these human–animal relationships for people is often increased by social isolation or the onset of physical and emotional distress, as these relationships tend to improve people’s physical or emotional well-being and assist them in dealing with stress and adjusting to life transitions. Thus, threats of animal abuse and killing of favourite pets are powerful tools by which abusers can perpetuate the context of terror for victims and their children even after they have left the relationship.³⁴⁴

4.34 Abuse of animals needs to be seen as a form of violence, and a form of control, in family violence situations. It can literally prevent a victim from leaving a violent relationship and cause great trauma to all involved:

We have seen many situations both where women will stay with a partner who is violent because of fear of revenge against their pets, or where women and children have been extremely traumatised because of violence towards a pet.³⁴⁵

Actual or threatened abuse to animals should be included in the grounds for obtaining an intervention order. The purpose of family violence is to maintain power and control over family members. Abusing animals or threatening to is another mechanism for control just as is other forms of family violence. Harming animals or threats to harm animals could be included in the definition of family violence.³⁴⁶

343 Eleonora Gullone, Judy Johnson and Ann Volant, *The Link Between Animal Abuse and Family Violence* (2004) 7–8.

344 Nicholas R Fawcett, Eleonora Gullone and Judy Johnson, ‘Domestic Violence and Animal Abuse: Encouraging Collaborative Relations between Animal Welfare and Human Welfare Agencies in Australia’ (April 2002) *InPsych* 37.

345 Submission 39 (Royal Women’s Hospital).

346 Submission 30 (Violence Against Women Integrated Services).

Other abusive, controlling behaviours other than physical or threatened physical abuse must be recognised. Many abuses of family members and pets are discounted and must be given equal standing as the effects of other forms of abuse can be long lasting and affect people's ability to function adequately.³⁴⁷

4.35 Other states have included injury to pets in their legislation. ACT legislation includes in its definition of 'domestic violence' conduct which:

is directed at a pet of a relevant person and is an animal violence offence; or is a threat, made to a relevant person, to do anything to a pet of the person or another relevant person that, if done, would be an animal violence offence.³⁴⁸

4.36 The Western Australia legislation states that an 'act of family and domestic violence' and 'act of personal violence' includes: 'Damaging the person's property, including the injury or death of an animal that is the person's property'.³⁴⁹

4.37 Under the Crimes (Family Violence) Act, pet abuse will sometimes provide a ground for obtaining an intervention order. If the pet is owned by the family violence victim, threatened injury to the pet will come within section 4, which refers to 'damage to a family member's property'. However, it should not be necessary for victims to show that the pet is their property if the perpetrator is threatening to kill, injure or torture it as the following example demonstrates:

Mary J shot her husband as he entered their trailer, in fact blew the top of his head off. Why? Not because he hit her. He did. Not because he was mean to the children. He was. Not because he had isolated her from her family and friends in a small trailer miles from anything. He had. No, she killed him because he told her he was going to bring home another puppy for her to hold down while he had intercourse with the animal.³⁵⁰

4.38 This view is supported by the Model Domestic Violence Laws,³⁵¹ which specifically state that pet abuse should be included as a form of family violence, even if the pet or animal does not belong to the victim: 'Causing or threatening to cause the

347 Submission 14 (Anonymous).

348 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 9(f),(g).

349 *Restraining Orders Act 1997* (WA) s 6(c).

350 Eleonora Gullone, Judy Johnson and Ann Volant, 'The Relationship between Animal Abuse and Family Violence' (2002) *Winter DVIRC Newsletter*, 4.

351 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws Report* (1999). This report was prepared by a working group of Commonwealth, state and territory officials and details a model for domestic violence legislation to improve consistency in laws across Australia.

death of, or injury to, an animal, even if the animal is not the protected person's property'.³⁵² Our recommendation reflects a similar view.

RECOMMENDATION

12. Causing or threatening the death, torture or injury of an animal should be included in a definition of family violence, even if that animal is not the property of the family violence victim.

EXPLICITLY INCLUDING SEXUAL VIOLENCE

4.39 As was pointed out in Chapter 2, sexual forms of family violence are an unrecognised form of family violence. Victims report that sexual forms of family violence, such as rape or other forced sexual acts, are particularly difficult to talk about, even when other violence has been disclosed.

4.40 There is relatively little research on intimate partner sexual violence and social norms do not yet regard it as unacceptable or as a crime.³⁵³ A community attitudes study conducted in Australia in 1995 shows that few respondents spontaneously identified sexual assault or rape as an element of domestic violence.³⁵⁴ Verbal, emotional, psychological, and child abuse, which are under-recognised by the community, policy makers and legislators as family violence, were still recognised to a greater extent in this study than sexual forms of family violence:

Ultimately, people surveyed were more likely to describe domestic violence as being constituted by verbal abuse, mental abuse and violence against children before they turned their minds to the possibility of sexual assault.³⁵⁵

4.41 Sexual assault and family violence service providers are generally separated, making it difficult for service providers to recognise and respond adequately to the needs of victims who experience sexual forms of family violence. Victims report that this form of family violence can be the most damaging and harmful:

352 Ibid 18–23.

353 Melanie Heenan, *Just 'Keeping the Peace': A Reluctance to Respond to Male Partner Violence* (March 2004).

354 Office of the Status of Women, *Community Attitudes to Violence Against Women: Detailed Report*, in Melanie Heenan *Just 'Keeping the Peace': A Reluctance to Respond to Male Partner Violence* (March 2004).

355 Ibid.

The physical abuse was horrible, but it was something I could get over. It was like a sore that heals. When he forced me to have sex with him, that was more than just physical. It went all the way down to my soul. He abused every part of me—my soul, my feelings, my mind ... and I don't think there is anything worse than that.³⁵⁶

4.42 Current family violence legislation tends to mimic dominant community norms about sexual forms of family violence. Tasmania is the only state which explicitly mentions sexual forms of family violence in its legislation. Including sexual violence would ensure that victims can be protected by an intervention order. Tasmanian legislation defines 'family violence' as including assault, including sexual assault.³⁵⁷ New Zealand legislation also includes sexual abuse in its family violence definition.³⁵⁸

4.43 Including sexual forms of family violence in the definition serves two main purposes. First, it makes it clear to family violence victims that they do not have to endure sexual assault, that it is not considered acceptable in our society and that legal protection is available. Secondly, it educates the community about sexual violence within family relationships and that it is unacceptable. Sexual forms of family violence should be explicitly recognised in the definition of family violence.



RECOMMENDATION

13. The new definition of family violence should include specific reference to sexual forms of family violence.

EXAMPLES OF DEFINITIONS

4.44 Australian states have taken a variety of approaches to defining 'family violence' or 'domestic violence'. Generally, the most recent legislation lists specific behaviour and also includes a broader provision to cover behaviour not included in the specific list which causes 'apprehension' or 'fear'.³⁵⁹ South Australia's legislation states at the end of a list:

356 Heenan (2004) above n 353.

357 *Family Violence Act 2004* (Tas) s 7(a)(i).

358 *Domestic Violence Act 1995* (NZ) s 3(2)(c).

359 *Domestic Violence Act 1994* (SA) s 4(vi).

The defendant engages in other conduct, so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear.³⁶⁰

4.45 Queensland's legislation sets out broad categories of conduct and includes examples of forms of family violence under some of these categories, including abuse specific to particular groups. The definition of 'domestic violence' includes:

(c) intimidation or harassment of the other person;

Examples of paragraph (c)—

1. Following an estranged spouse when the spouse is out in public, either by car or on foot.
2. Positioning oneself outside a relative's residence or place of work.
3. Repeatedly telephoning an ex-boyfriend at home or work without consent (whether during the day or night).
4. Regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque.

4.46 Some definitions of family violence emphasise apprehension or fear but do not mention unreasonable control or domination. This approach ignores the fact that the exercise of power and control is central to family violence. It could also result in excessive emphasis being placed on threats of physical violence. By contrast, Tasmania's legislation specifically mentions a 'course of conduct' that is likely to have the effect of 'unreasonably controlling or intimidating, or causing mental harm, apprehension or fear, in his or her spouse or partner' under a definition of 'emotional abuse'.³⁶¹ Western Australia's legislation also includes 'emotional abuse'. In our view, the exercise of domination and control over the victim should be mentioned in the legislation.

RECOMMENDING A DEFINITION

4.47 Finally, in recommending a definition of family violence we have taken account of the definitions which have been adopted by key policy groups in Victoria.

4.48 The Women's Safety Strategy (2002) uses the following definition:

360 *Domestic Violence Act 1994* (SA) s 4(vi).

361 *Family Violence Act 2004* (Tas) s 9(1).

Violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships is called family violence. This encompasses not only physical injury but direct or indirect threats, sexual assault, emotional and psychological torment, economic control, property damage, social isolation and behaviour which causes a person to live in fear.³⁶²

4.49 The Victorian Indigenous Task Force uses the following definition:

An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers, as well as self-harm, injury and suicide.³⁶³

This is sometimes supplemented by the following phrase:

Domestic violence is the patterned and repeated use of coercive and controlling behaviour to limit, direct and shape a partner's thoughts, feelings and actions. An array of power and control tactics is used along a continuum in concert with one another.³⁶⁴

We endorse both of these definitions and believe they should be incorporated as far as possible in a definition of family violence in Victorian legislation.

! RECOMMENDATIONS

14. The new legislative definition of family violence should be:

- Family violence is violent or threatening behaviour or any other form of behaviour which coerces, controls and/or dominates a family member/s and/or causes them to be fearful.
- Family violence includes causing a child to see or hear or be otherwise exposed to such behaviour.

15. The definition of family violence may include, but is not limited to:

362 Office of Women's Policy [Victoria] (2002) above n 5.

363 Victorian Indigenous Family Violence Task Force (2003) above n 13, 123.

364 Rhea V Almeida and Tracy Durkin, 'The Cultural Context Model: Therapy for Couples with Domestic Violence' (1999) 25(3) *Journal of Marital and Family Therapy* 313.

! RECOMMENDATIONS

- assault or personal injury to a person;
- sexual assault and other forms of sexually coercive behaviour;
- damage to a person's property;
- kidnapping or depriving a person of her or his liberty (eg forced social isolation);
- emotional, psychological and verbal abuse (see definition of 'emotional abuse');
- economic abuse (see definition of 'economic abuse').

16. 'Emotional abuse' and 'economic abuse' should be defined as follows:

- emotional abuse includes:
 - (i) behaving in a manner that is intimidating or offensive or harassing towards a person;
 - (ii) causing or threatening to cause the death of, or injury to, an animal whether or not the animal is the applicant's property;
 - (iii) repeatedly using other coercive or controlling behaviour not included in (i–iii) including verbal abuse;
 - (iv) using other incidents of emotional and psychological torment not covered by (i–iii) above. For example: threatening to 'out' homosexual partners to their friends and/or family when they do not wish to be 'outed'; threatening to withdraw the care of an elderly person; or threatening to withdraw a visa application to coerce a person.
- economic abuse includes:
 - (i) coercing a person to relinquish control over assets or income;
 - (ii) disposing of property owned by a person or owned jointly with a person against that person's wishes;

! RECOMMENDATIONS

- (iii) preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses, or withholding or threatening to withhold the financial support reasonably necessary for meeting normal living expenses for a person or a person's and their children;
- (iv) coercing a family member to claim social security payments; or
- (v) coercing a family member to sign a contract for the purchase of goods and services, for the provision of finance, loans and/or credit, for a contract of guarantee, or any legal documents for the establishment and operation of businesses.
- (vi) otherwise controlling access to money or finances.

DEFINING FAMILY MEMBER

4.50 Whether someone is able to obtain an intervention order to protect themselves from family violence depends on whether they have been subjected to the violence by someone who falls under the definition of a 'family member'. 'Family member' is currently defined in the Act in the following way:

'family member' in relation to another person means—

- (a) the spouse or domestic partner of that person;
- (ab) a person who has or has had an intimate personal relationship with that person;
- (b) a person who is or has been a relative of that person; or
- (ba) a child who normally or regularly resides with that person; or
- (cc) a child of whom that person is a guardian; or
- (c) another person who is or has been ordinarily a member of the household of that person.³⁶⁵

4.51 Relatives include parents, grandparents, step-parents, children, grandchildren, stepchildren, siblings, half-siblings, uncles, aunts, nephews, nieces and cousins.

365 *Crimes (Family Violence Act) 1987* pt 1, 3(1).

Relatives also include people who are relatives through past and present marriages as well as past and present same-sex and opposite-sex domestic relationships.

4.52 This definition is broad, and consultations and submissions support its continued use because of its inclusiveness. It is important to ensure, however, that everyone needing protection from family violence is able to obtain an order under this definition. Some victims of violent relationships in a family or domestic setting are not covered under the Act. This has led to calls for an expanded definition, to encompass a broader range of relationships.

It is important that the issue of eligibility under the Act is addressed as a matter of urgency, and amended so that all forms of intimate domestic relationships are covered, and so that the Act is indeed accessible to everyone who needs protection within their domestic situation.³⁶⁶

The definition of family member is not currently broad enough. Clients come to us who would not fit this definition. We agree that for aboriginal and non-English speaking women the definition is not inclusive enough ... Although we generally like the Northern Territory definition of 'a relative according to ... contemporary social practice' we also caution against 'de-genderising' family violence, almost all of which is committed by men against women.³⁶⁷

For example, a person's new de facto partner and some other extended relationship and cultural family members are required to use the stalking provisions (s21A of the Crimes Act) as adopted into the Crimes (Family Violence) Act to seek an intervention order based on the same set of circumstances or conduct as a family member uses.³⁶⁸

We are aware of court staff opinion that a relationship between teenage boyfriend and girlfriend is not covered by the legislation and that an ex boyfriend constantly text messaging his ex girlfriend is not family violence and therefore an intervention order is not appropriate. More detailed definitions about the kind of relationships and behaviours covered by the legislation would assist women to obtain an intervention order in these circumstances.³⁶⁹

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

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

368 Submission 86 (Magistrates' Court of Victoria).

369 Submission 30 (Violence Against Women Integrated Services).

INCLUDING BROADER KINSHIP AND FAMILY RELATIONSHIPS

4.53 The definition in its current form does not reflect the extent of kinship and family relationships within Indigenous communities and therefore prevents some Indigenous people who experience family violence from accessing protection under the Act.³⁷⁰ Similar issues also apply in certain CALD communities,³⁷¹ where situations of extended family, clans or tribe may mean that someone not directly related by marriage or blood is still nonetheless considered to be a member of the family.

4.54 To address this situation submissions generally supported the Northern Territory definition of family relationship, which includes: ‘a relative according to Aboriginal tradition or contemporary social practice’.³⁷²

4.55 Legislation in other states leaves it open for other people to be defined as family members, in accordance with victims’ cultural backgrounds. For example, the ACT legislation states that a ‘relative’ includes: ‘anyone else who could reasonably be considered to be a relative of the original person’.³⁷³

4.56 The legislation then includes the following ‘examples’:

1. if the original person is an Aboriginal and Torres Strait Islander, the following people:
 - (a) a person the original person has responsibility for, or an interest in, in accordance with the traditions and customs of the original person’s Aboriginal and Torres Strait Islander community;
 - (b) a person who has responsibility for, or an interest in, the original person in accordance with the traditions and customs of the original person’s Aboriginal or Torres Strait Islander Community
2. a person regarded and treated by the original person as a relative, for example, as an uncle or aunt.³⁷⁴

4.57 Legislation in Queensland also has a provision that takes account of the broader conception of ‘family’ which exists in some CALD communities:

- (a) a person whom the relevant person regards or regarded as a relative;

370 Consultations 22 (Indigenous Family Violence Action Group, Murray Mallee), 24 (legal workers, Murray Mallee), 28 (Indigenous Family Violence Action Group, Grampians).

371 Consultations 12 (service providers and legal workers, Melbourne), 32 (service providers, police, legal workers and court personnel, Melbourne East).

372 *Domestic Violence Act (NT) s 3(2)(vii)*.

373 *Domestic Violence and Protection Orders Act 2001 (ACT) s 10A(c)(ii)*.

374 *Domestic Violence and Protection Orders Act 2001 (ACT) s 10A(c)(ii)*.

(b) a person who regards or regarded himself or herself as a relative of the relevant person.

Examples of people who may have a wider concept of relative—

1. Aboriginal people;
2. Torres Strait Islanders;
3. Members of certain communities with non-English speaking backgrounds; and
4. People with particular religious beliefs.³⁷⁵

4.58 The Victorian Act should include a definition of ‘family member’ which is broad enough to provide protection under the Act to people of diverse cultural backgrounds.

INCLUDING CARERS OF PEOPLE WITH DISABILITIES

4.59 In Chapter 2 we discussed the heightened vulnerability of people with disabilities to abuse by family members. In addition to partners and other family members, people with disabilities may have paid and unpaid carers on whom they depend for intimate physical care, practical and emotional support, and social interaction.

4.60 Research has found that an unacceptably high proportion of women with disabilities experience violence and abuse by carers, both in institutionalised and domestic settings.³⁷⁶ Many people with intellectual disabilities, for example, live in institutions, group homes or other forms of supported accommodation where they experience violence.³⁷⁷ Similarly, many women with physical disabilities have experienced abuse by carers and personal assistance attendants:³⁷⁸

It is clear that violence against women with disabilities may be perpetrated not just by an intimate partner or spouse but by relatives, caregivers (paid and unpaid), co-residents, residential and institutional staff, other service providers. For some women with

375 *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(4)(a)(b).

376 Carolyn Frohmader, *There’s No Justice—There’s Just Us: The Status of Women with Disabilities in Australia* (2002) 22; Laurie Powers et al, ‘Barriers and Strategies in Addressing Abuse: A Survey of Disabled Women’s Experiences—PAS Abuse Survey’ (2002) 68 (1) *Journal of Rehabilitation* 10.

377 Anne Lawrence and Sally Robinson, ‘Access to Injustice? Domestic Violence and Women with Intellectual Disabilities in Australia’ 8(1) *Polemic* 34.

378 Mary Ellen Young et al, ‘Prevalence of Abuse of Women with Physical Disabilities’ (1997) 78 *Archives of Physical Medicine and Rehabilitation* S34, S37; Powers et al, above n 376.

disabilities, their ‘place of residence’ may be a community based group home or residential institution, a boarding house, psychiatric ward, or nursing home.³⁷⁹

Women with disabilities, who live in group homes and other similar ‘domestic’ settings, have a right to be protected from violence and abuse. Women with disabilities have a right to the same protection by domestic/family violence laws against the violence perpetrated in their domestic situations as much as the rest of the community.³⁸⁰

The Royal Women’s Hospital supports the expansion of definition of family members to include carers, paid and unpaid, in homes and institutions, where a woman is dependent on a carer, for example in cases of a physical or intellectual disability.³⁸¹

4.61 Men with disabilities are also vulnerable to violence from their carers and other people. Formal and informal care arrangements may make people with disabilities particularly vulnerable to violence from carers, with the violence forming a dynamic identical or very similar to family violence. As one submission put it: ‘People with disabilities may not be living in a ‘traditional’ family situation, but their home and carers are as a “family” for them’.³⁸²

Their disability and care arrangements may also make it difficult for people to leave the care situation, making it particularly important for legislation to cover them.

4.62 Other Australian jurisdictions have provided for protection from violence by carers. Queensland’s legislation contains a detailed section on ‘what is an informal care relationship’ which includes examples of these activities. The NSW legislation refers to a person who: ‘has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person’.³⁸³

OTHER RELATIONSHIPS

4.63 A person affected by violence may wish to obtain an order against the new partner or an associate of the respondent. We discuss this at paragraphs 8.30–8.38.

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

380 Ibid.

381 Submission 39 (Royal Women’s Hospital).

382 Submission 46 (Royal Children’s Hospital).

383 *Crimes Act 1900* (NSW) s 562A(3)(e).

! RECOMMENDATION(S)

17. The current definition of ‘family member’ should be amended to include the following relationships:
- ‘a relative according to Aboriginal tradition or contemporary social practice’;
 - ‘a relative according to any other traditional or contemporary social practice’;
 - ‘a person who has or has had a relationship with the original person involving the original person’s dependence or partial dependence on that person for paid or unpaid care’.
18. Examples of specific family relationships should be added to the legislation to clarify its scope.

GROUNDS FOR GETTING AN ORDER

4.64 Following recommendations 14–17 regarding definitions of ‘family violence’ and ‘family member’, we also recommend changed grounds for getting an order. In the current Act, the grounds for obtaining an order are:

- (1) The Court may make an intervention order in respect of a person if satisfied on the balance of probabilities that—
- (a) the person has assaulted a family member or caused damage to property of a family member and is likely to again assault the family member or cause damage to property of the family member; or
 - (b) the person has threatened to assault a family member or cause damage to property of a family member and is likely to assault the family member or cause damage to property of the family member; or
 - (c) the person has harassed or molested a family member or has behaved in an offensive manner towards a family member and is likely to do so again.³⁸⁴

4.65 If an explicit definition of family violence is included in a new Act, as recommended, there will need to be a corresponding change to the grounds for getting

³⁸⁴ *Crimes (Family Violence) Act 1987* pt 2, 4(1).

an order. The commission recommends the following grounds for an intervention order be included in a new Family Violence Act.

! RECOMMENDATION(S)

19. The grounds for getting an intervention order should be:

- the respondent has committed family violence against a family member and is likely to do so again;
- the respondent has threatened to commit family violence against a family member and is likely to do so again.

Chapter 5

Police Response

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INTRODUCTION

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

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

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

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

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

! RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

IMPORTANCE OF A CRIMINAL RESPONSE

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

387 Submission 9 (Cindy Smith, social worker).

388 Interview with Kate, 21 April 2005.

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

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

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

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

IMPACT OF INCREASED CRIMINAL RESPONSE ON MARGINALISED GROUPS

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

389 Submissions 8 (Werribee Legal Service); 22 (Kim Robinson, social worker); 27 (Robinson House BBWR); 30 (Violence Against Women Integrated Services); 33 (Women's Domestic Violence Crisis Service); 64 (Federation of Community Legal Centres (Vic)); 74 (Women's Legal Service Victoria).

390 United Nations Division for the Advancement of Women, *Good Practices in Combating and Eliminating Violence against Women: Report of the Expert Group Meeting* (2005) 16; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(r)(i); Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, UN Doc E/CN.4/2003/75 (2003) para 29; Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc E/CN.4/1995/42 (1994) para 125; United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 124(d).

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

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

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

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

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

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

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

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

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

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

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

CRIMINAL POLICE RESPONSE TO FAMILY VIOLENCE INCIDENTS

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

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

PROACTIVE AND PRO-ARREST RESPONSE

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

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

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

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

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

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

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

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

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

General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 8(a) (emphasis added).

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

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

403 Ibid para 4.2.1.

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

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

406 See paras 3.63–3.66. The importance of a collaborative approach between law enforcement agencies and women’s support organisations has been recognised as crucial at the international level: *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the field of Crime Prevention and Criminal Justice, para 14(b); Coomaraswamy (2003) above n 390, para 33.

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

408 Submission 44 (Anonymous).

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

OTHER JURISDICTIONS—MANDATORY ARREST

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

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

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

409 Holder (2001) above n 167, 4.

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

411 Mills (1999) above n 393, 588.

412 Ibid 588–9.

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

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

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

COMMISSION'S VIEW

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

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

IMPROVING EVIDENCE GATHERING

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

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

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

416 Young (2000) above n 415, 65.

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

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

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

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

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

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

418 Holder (2001) above n 167, 14.

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

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

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

422 Ibid paras 4.2.5.1–4.2.5.2.

IMPROVING CRIMINAL PROSECUTIONS OF FAMILY VIOLENCE OFFENCES

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

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

CASE CONFERENCING FOR THE VICTIM UNDER THE POLICE CODE

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

423 *Crimes Act 1958* s 400.

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

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

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

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

OTHER JURISDICTIONS

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

COMMISSION'S VIEW

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

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

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

427 Ibid para 4.3.4.4.

428 The UN Model Strategies recognise the importance of taking the decision about whether to prosecute out of the hands of the victim, by urging States to review, evaluate and revise their criminal procedure to ensure '[t]he primary responsibility for initiating prosecutions lies with prosecution authorities and *does not rest with women subjected to violence*' [emphasis added]: *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 7(b).

429 Hanna (1996) above n 395, 1862.

430 Ibid 1863.

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

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

SPECIALIST POLICE PROSECUTION UNIT WITH VICTIM SUPPORT

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

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

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

431 See Recommendations 31, 32.

432 Young (2000) above n 415, 72.

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

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

VIEWS FROM SUBMISSIONS

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

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

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

OTHER JURISDICTIONS

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

Specialist Prosecutors

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

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

434 Stewart (2005) above n 420, 9.

435 Ibid 14.

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

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

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

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

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

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

438 Ursel (1997) above n 437, 272.

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

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

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

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

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

Victim Support and Assistance

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

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

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

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

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

445 Stewart (2005) above n 420, 14.

446 Young (2000) above n 415, 71.

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

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

449 Stewart (2005) above n 420, 21.

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

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

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

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

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

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

PROVIDING ADEQUATE SUPPORT TO VICTIMS AS A STATE RESPONSIBILITY

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

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

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

453 Young (2000) above n 415, 79.

454 Stewart (2005) above n 420, 15.

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

456 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on

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

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

COMMISSION'S RECOMMENDATIONS

Specialist Prosecutors

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

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

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

Assistance for Victims

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

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

457 *General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN Doc A/RES/40/34 (1985) para 6.

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

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

! RECOMMENDATIONS

23. Victoria Police should establish a specialist family violence prosecution unit to deal with intervention order applications, prosecutions of a breach of an intervention order and criminal charges arising in situations of family violence.

24. A specialist prosecution unit should include the provision of appropriate support and advice to victims and witnesses.

REDUCING POLICE COSTS OF PROSECUTING FAMILY VIOLENCE OFFENCES

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

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

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

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

OTHER JURISDICTIONS

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

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

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

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

460 Submission 72 (Victoria Police).

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

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

COMMISSION'S RECOMMENDATION

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

! RECOMMENDATIONS

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

CIVIL POLICE RESPONSE TO FAMILY VIOLENCE INCIDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POLICE RESPONSE TO PARTICULAR GROUPS

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

POLICE RESPONSE TO INDIGENOUS AUSTRALIANS

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

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

469 This issue is discussed in detail in Chapter 7.

470 Submission 57 (Victorian Aboriginal Legal Service).

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

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

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

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

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

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

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

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

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

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

475 Ibid.

476 Ibid.

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

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

! RECOMMENDATION

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

POLICE RESPONSE TO MIGRANT COMMUNITIES

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

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

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

478 Ruth Gordon and Munira Adam, *Family Harmony: Understanding Family Violence in Somali and Eritrean Communities in the Western Region of Melbourne* (2005) 7; submissions 2 (Vietnamese Community in Australia—Vic Chapter), 68 (Statewide Steering Committee to Reduce Family Violence), 70 (Asylum Seeker Resource Centre).

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

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

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

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

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

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

481 Ibid.

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

483 Submission 70 (Asylum Seeker Resource Centre).

POLICE RESPONSE TO PEOPLE WITH DISABILITIES

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

5.75 The Police Code of Practice states:

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

POLICE RESPONSE TO PEOPLE IN SAME-SEX RELATIONSHIPS

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

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

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

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

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

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

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

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

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

ADEQUATE TRAINING AS A STATE RESPONSIBILITY

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

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

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

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

492 Ibid.

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

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

495 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(b).

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

COMMISSION'S RECOMMENDATION

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

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

IMPROVING POLICE INTERVENTION ORDER APPLICATIONS

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

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

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

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

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

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

POLICE APPLICATIONS FOR INTERVENTION ORDERS

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

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

OTHER JURISDICTIONS

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

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

499 Ibid para 5.3.3.

500 Submission 86 (Magistrates' Court of Victoria).

501 Ibid.

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

506 Submissions 8 (Werribee Legal Service), 22 (Kim Robinson, social worker), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres), 74 (Women's Legal Service Victoria).

507 Submission 44 (Anonymous).

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

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

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

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

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

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

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

511 Submission 8 (Werribee Legal Service).

512 Submission 27 (Robinson House BBWR).

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

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

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

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

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

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

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

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

COMMISSION'S VIEW

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

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

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

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

520 See paras 6.42–6.70.

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

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

POLICE APPLICATIONS WITHOUT THE VICTIM'S CONSENT

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

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

521 See Recommendation 26.

522 Patton (2003) above n 94, 56.

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

527 Submission 14 (Anonymous).

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

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

COMMISSION'S RECOMMENDATIONS

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

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

529 Submission 41 (Victoria Legal Aid).

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

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

532 Ibid.

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

534 See paras 3.57–3.66.

535 See recommendations 46, 49, 53

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

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

! RECOMMENDATIONS

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

POLICE PROVISION OF EVIDENCE IN INTERVENTION ORDER PROCEEDINGS

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

VIEWS FROM SUBMISSIONS

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

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

536 Hanna (1996) above n 395, 1897.

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

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

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

COMMISSION'S VIEW

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

POLICE APPLICATIONS FOR VARIATIONS/REVOCATIONS OF ORDERS

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

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

OTHER JURISDICTIONS

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

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

540 See Recommendations 23, 24.

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

COMMISSION'S RECOMMENDATION

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

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

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

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

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

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

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

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



RECOMMENDATION

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

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

POLICE ROLE IN ENFORCING BREACHES OF INTERVENTION ORDERS

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

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

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

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

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

548 Interview with Kate, 21 April 2005.

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

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

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

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

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

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

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

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

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

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

553 Ibid para 4.6.3.1.

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

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

CASE COORDINATION AND SUPPORT FOR VICTIMS OF MULTIPLE BREACHES

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

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

5.120 The Department of Human Services noted:

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

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

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

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

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

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

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

! RECOMMENDATIONS

31. A case management program for victims of multiple breaches should be established by Victoria Police to monitor the safety of the victim and behaviour of the offender.
32. A victim of multiple breaches should be given a choice whether or not to accept support through a case management program and may choose to terminate participation in the program at any time.

ACTION ON BREACHES WITHOUT VICTIMS' CONSENT

5.123 The Police Code of Practice states:

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

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

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

557 See Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria: Report of the Statewide Steering Committee to Reduce Family Violence* (2005).

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

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

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

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

BREACHES WITH THE VICTIM'S CONSENT

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

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

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

OTHER JURISDICTIONS

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

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

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

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

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

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

COMMISSION'S VIEW

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

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

AIDING AND ABETTING BREACH OF AN INTERVENTION ORDER

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

OTHER JURISDICTIONS

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

COMMISSION'S RECOMMENDATION

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

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

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

572 See paras 5.104–5.112; Recommendation 30.

FALSE CLAIMS OF CONSENT

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

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

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

573 Interview with Julie, 27 April 2005.

Chapter 6

Access to the Magistrates' Court

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INTRODUCTION

6.1 For the intervention order system to be effective, it is essential that it is accessible for every person in need of protection from family violence. This chapter outlines ways that access to the Magistrates' Court can be improved for all Victorians and for marginalised groups which have specific difficulties in accessing justice. It starts by outlining the need for cultural change in the Magistrates' Court, involving all people who work in the court, to make the system fair, consistent and responsive to the needs of people experiencing violence. We highlight the need for a specialist approach to family violence within the court, and for better information and support to be provided for people applying for orders. This includes the critical need for improved access to legal advice. This chapter also outlines necessary changes to improve the physical features of courts to ensure a safe environment for intervention order applicants.

6.2 A constant theme in the commission's consultations on family violence has been the need for fundamental changes in attitudes and approaches to family violence within the Magistrates' Court. Family violence is taken seriously by many people in the court system, however, the response is uneven. This leads to unpredictable outcomes for both applicants and respondents and to a minimisation of family violence and women's safety. The first section of this chapter outlines the commission's recommendations for change for registrars and magistrates. As registrars are the first point of contact with the court, they will be discussed first.

CULTURAL CHANGE IN COURT—REGISTRARS

6.3 Most people who apply for intervention orders do not have access to legal advice or any other form of assistance before attending court.⁵⁷⁴ Therefore, the court registrar is the first—and possibly the only—person they will have contact with who can explain the process and information necessary for their application. Registrars perform an essential task in difficult circumstances, and many registrars provide a high level of support to those dealing with family violence.

6.4 A registrar's role in the application process is outlined in the Magistrates' Court Family Violence and Stalking Protocols.⁵⁷⁵ These protocols refer to the Magistrates' Court Service Standards about registrars' behaviour: '[c]ourt personnel will be courteous and responsive to the public and accord respect to those with whom

574 See paras 6.42–6.50.

575 Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (2003).

they come into contact'.⁵⁷⁶ The protocols provide that registrars should serve applicants promptly and that applicants should appear before a magistrate on the same day if the complaint involves imminent violence or property damage, or the applicant is suffering a high level of distress.⁵⁷⁷ The protocols also guide what information registrars should include in the application, including the incident that brought the applicant to court, a brief description of the past relationship and what concerns the applicant has for future behaviour.⁵⁷⁸

VIEWS FROM SUBMISSIONS

6.5 Submissions received by the commission highlighted similar problems with registrars to those the commission outlined in the Consultation Paper. While submissions acknowledged that some Victorian registrars provide an effective level of service to people experiencing family violence, practice and approach vary considerably from registrar to registrar. The main problems raised by submissions were registrars:

- acting as gatekeepers to the intervention order system;
- acting as advisers;
- using inappropriate stereotypes or judgments in their work with family violence victims.

REGISTRARS AS GATEKEEPERS

6.6 A common concern raised in the commission's consultations and in submissions was that registrars act as gatekeepers to the intervention order system.⁵⁷⁹ This may happen because many court staff feel frustrated by the large number of intervention order applications that they consider 'trivial' or a misuse of the Act. Registrars may fail to distinguish between family violence intervention orders and stalking intervention orders (which are mainly used in neighbour disputes) and therefore feel that all applicants for all types of intervention orders are likely to be wasting the court's time.⁵⁸⁰ Some registrars assess whether an applicant is 'genuine'

576 Ibid 27.

577 Ibid paras 2.1, 2.3.

578 Ibid para 4.6.

579 Submissions 39 (Royal Women's Hospital), 44 (Anonymous), 52 (Gippsland Community Legal Service), 74 (Women's Legal Service Victoria), 77 (Anonymous), 81 (Anonymous); Interview with Julie, 27 April 2005.

580 Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) above n 8, para 4.36–4.37.

based on their own beliefs about the nature of family violence and how a 'real' victim would behave. If registrars believe an applicant is not genuine, they may refuse to provide an application form; refuse to allow an application for an interim order; or try to dissuade the person from applying because the case is not serious enough.⁵⁸¹ One woman who had experienced family violence told the commission:

You go into the clerk's room and you give a brief run down of your situation. The clerks seem to be more concerned with how much they can actually fit onto the order. It is they who make the decision whether you can go into court there and then and apply for an interim order or whether you have to come back a couple of days later. I remember sitting there and sweating and thinking 'If I go home we're dead. We're dead. I really need this' and hoping that this person will say, 'Yes I can get you in to see the judge today'. I found that really hard, that a clerk had the right to decide on my life and the protection of my children. That wasn't how I thought it would be when I went to court. I thought you would go before the judge.⁵⁸²

6.7 Another woman told the commission:

I requested that my son be included on the intervention order I sought. I was promptly told by the registrar, not only what information on my application was going to make the cut onto the official application, but that if he had shown more physical violence against my son, then my son would be included. I complained that witnessing the violence was in my belief the main cause of much of the infant's distress, and was told that it did not matter. Because the application typed by the registrar did not include my son, when the court date two weeks later arrived, I was told I could no longer apply for my son and to deal with it.⁵⁸³

REGISTRARS AS ADVISERS

6.8 A related problem is the role of registrars in providing advice to intervention order applicants. A registrar's role is to provide information and assistance, but is not to be an advocate for either side to an application. However, in the absence of a police application or any legal advice, a registrar may be an applicant's sole source of information about the system. Therefore, the content of an application may depend heavily on the registrar's skills in eliciting information from the applicant, completing the application form or providing guidance to the applicant on how the form should

581 Submissions 9 (Cindy Smith, social worker), 39 (Royal Women's Hospital), 52 (Gippsland Community Legal Service), 74 (Women's Legal Service Victoria), 81 (Anonymous).

582 Interview with Julie, 27 April 2005.

583 Submission 44 (Anonymous).

be completed. Submissions mentioned the following examples where registrars have provided incorrect or inappropriate advice to applicants:

- Informing applicants they had no grounds for an order when it was clearly not the case.⁵⁸⁴ This included telling applicants that there must be severe physical or sexual violence to justify an intervention order application.⁵⁸⁵
- Informing applicants that their children could not be included on the application form, despite clear evidence that children had witnessed or heard family violence or where registrars had been specifically requested to include children.⁵⁸⁶
- Informing a potential applicant that she could not apply for an intervention order as she did not know her ex-partner's official address, even though he was attending her house daily to stalk and harass her.⁵⁸⁷

6.9 In addition to the problem of incorrect or inappropriate advice, submissions also mentioned instances where insufficient or no advice is given to applicants. This included: not informing applicants they can apply for an interim order on the day if they are in need of immediate protection;⁵⁸⁸ not informing applicants of the availability of legal or other support services at the court; not providing any assistance with filling out the application form; or filling out the form on behalf of the woman and leaving out crucial information.⁵⁸⁹ The Federation of Community Legal Centres believes this is often because registrars have insufficient time and resources to perform their role effectively, and that an increase in court staff may address this issue in some cases. The Magistrates' Court highlighted Victoria's magistrate to registrar ratio, which is the lowest in Australia, and the significant strain this places on registrars trying to complete their duties under the Magistrates' Court Protocols.⁵⁹⁰

584 Submissions 52 (Gippsland Community Legal Service), 74 (Women's Legal Service Victoria).

585 Submissions 39 (Royal Women's Hospital), 77 (Anonymous), 81 (Anonymous).

586 Submissions 44 (Anonymous), 74 (Women's Legal Service Victoria), 77 (Anonymous).

587 Submission 9 (Cindy Smith, social worker).

588 This issue is addressed in paras 7.23–7.28 (interim applications in court hours).

589 Submissions 74 (Women's Legal Service Victoria), 77 (Anonymous). Registrars are required under the court's protocols to inform applicants of 'any court support services that are available for emotional and practical support at Court and assist with or contact these sources': Magistrates' Court of Victoria (2003) above n 575, para 3.1(b).

590 The Magistrates' Court also highlighted physical constraints in complying with the protocols. Eg, the protocols provide that applicants must be interviewed in a private room, however, some courts do not have the facilities available for this to occur.

JUDGMENTAL REGISTRARS

6.10 A further problem raised in submissions is the attitude and approach of some registrars to family violence.⁵⁹¹ Some were described as very helpful, however, others were said to be 'rude', 'judgmental', 'dismissive', 'racist' and 'unhelpful'.⁵⁹²

6.11 Judgmental attitudes were a particular concern, especially about women who may have attended court on many occasions for family violence.⁵⁹³ In this situation, registrars may appear frustrated with applicants, blame them for the violence or feel they are 'deserving' of the violence.⁵⁹⁴ The Victorian Community Council Against Violence noted that these judgmental attitudes reveal a misunderstanding of the nature of family violence and its impact on the individual experiencing it.

6.12 Submissions noted that some registrars also demonstrate a lack of awareness of the nature of family violence by, for example, not appreciating the impact of family violence on children.⁵⁹⁵ Some registrars do not appreciate the impact of non-physical violence, such as economic or emotional abuse, on people experiencing family violence.⁵⁹⁶ Registrars may not see non-physical forms of violence as grounds for an intervention order and try to discourage people in these situations from applying.

6.13 One woman who was physically, sexually, emotionally and financially abused by her husband over many years and who sought an intervention order told the commission:

The Registrar at the Magistrates Court was most reluctant to grant me an application for an Intervention Order. He told me that Intervention Orders were for serious matters and that he felt I was wasting the court's time—he said it was unlikely that a Magistrate would grant me an Interim Order. The Registrar explained that people turn up at the court with broken arms and noses—Intervention Orders are for these people, not people like me.⁵⁹⁷

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- 591 Submissions 9 (Cindy Smith, social worker), 39 (Royal Women's Hospital), 44 (Anonymous), 69 (Victorian Community Council Against Violence), 74 (Women's Legal Service Victoria), 77 (Anonymous), 81 (Anonymous).
- 592 Submissions 9 (Cindy Smith, social worker), 69 (Victorian Community Council Against Violence), 77 (Anonymous); Victorian Law Reform Commission (2004) above n 8, para 7.24.
- 593 Submission 69 (Victorian Community Council Against Violence).
- 594 Ibid.
- 595 Submissions 44 (Anonymous), 69 (Victorian Community Council Against Violence), 74 (Women's Legal Service Victoria), 77 (Anonymous).
- 596 Submissions 69 (Victorian Community Council Against Violence), 77 (Anonymous), 81 (Anonymous).
- 597 Submission 81 (Anonymous).

SUGGESTIONS FOR CHANGE

6.14 Submissions contained recommendations for improving the service provided by registrars. The most common recommendation was that registrars should undertake thorough education and training about family violence.⁵⁹⁸ Submissions from people who have experienced family violence, the Gippsland Community Legal Service, the Royal Women’s Hospital, the Federation of Community Legal Centres, the Victorian Community Council Against Violence and the Magistrates’ Court all highlighted the importance of better training for registrars. The Magistrates’ Court noted that sufficient resources are not available for comprehensive family violence training of all registrars in family violence, and that training has been provided ‘inconsistently and invariably by other staff’. The Victorian Community Council Against Violence noted:

It is important that court staff are aware of the considerable strength it can take for a client to get to court, and that clients can be disempowered by court staff through their response to them.

6.15 Other suggestions included:

- increased availability of legal advice at courts, so applicants are not relying only on the registrar to make their application;⁵⁹⁹
- more registrars so they have time to provide information and assistance to applicants in a private location;⁶⁰⁰
- establishment of a complaints procedure so applicants can complain about service received from registrars.⁶⁰¹

ADEQUATE TRAINING AS A STATE RESPONSIBILITY

6.16 As outlined in chapters 3 and 5, combating violence against women is an international obligation of all States which are parties to CEDAW. Many international instruments recognise the importance of adequate training and education of people working in the justice system as part of this obligation. The committee in charge of

598 Submissions 25 (Barbara Roberts), 39 (Royal Women’s Hospital), 52 (Gippsland Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 69 (Victorian Community Council Against Violence), 86 (Magistrates’ Court of Victoria).

599 Submission 74 (Women’s Legal Service Victoria). The commission has recommended improved access to legal advice for applicants at recommendations 39–41.

600 Submission 64 (Federation of Community Legal Centres (Vic)). Eg, the Federation of Community Legal Centres mentioned that the guideline for interviews to be conducted in a separate interview room is very rarely adhered to because there were too few counter staff.

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

monitoring the implementation of CEDAW has held that '[g]ender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention'.⁶⁰² The General Assembly Declaration on the Elimination of Violence Against Women also provides that States should:

[t]ake measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women.⁶⁰³

COMMISSION'S RECOMMENDATIONS

6.17 The commission agrees that registrars can sometimes create an inappropriate barrier to the intervention order system for applicants. Thorough training and education for all registrars who work with applicants for intervention orders is essential. Many of the problems experienced by applicants relate to a lack of understanding by registrars of the impact and nature of family violence. The commission acknowledges that family violence training will be provided to registrars completing the new Certificate IV Traineeship in Government (Court Services) at Victoria University. However, the numbers of trainee registrars undertaking this course is relatively small. Registrars working in the specialist Family Violence Court Division have also received specialist training, but again, only a small number of registrars are involved. Clearly, a more comprehensive training and education program for all registrars dealing with family violence must be provided.

6.18 Any training provided must cover:

- the effects of family violence, especially non-physical violence, on people experiencing it;
- the impact of family violence on children;
- the purposes and principles of a new Family Violence Act;⁶⁰⁴
- issues facing Indigenous Australians, migrant women and people with disabilities when experiencing family violence and seeking access to justice;
- clarification of the registrar's role, that is, registrars cannot refuse to allow a person to make an application, they must inform all applicants of the

602 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(b).

603 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) art 4(i).

604 We have recommended purposes and principles in recommendations 3, 4.

possibility of getting an interim order and they must inform applicants of support services available at courts;

- strategies for obtaining information from applicants and ensuring all relevant information is provided on the application form.

6.19 The commission has also recommended that registrars working in family violence receive specific training on safety at courts for applicants.⁶⁰⁵

6.20 It is also essential that registrars are provided with the time and resources they need to perform their role effectively. In any family violence list system,⁶⁰⁶ the court must provide an adequate number of registrars to perform the role that is required in this jurisdiction. This may involve an increase in the ratio of court staff to magistrates for the family violence jurisdiction. Registrars should also be provided with appropriate on-the-job support to deal with people experiencing and using violence. This should include peer support programs, debriefing, access to counselling and schemes for performance reviews and recognition. The potential for burnout and the need for counselling and debriefing has been recognised in some jurisdictions that operate specialist family violence courts or specialist days within a court.⁶⁰⁷

! RECOMMENDATION(S)
<p>34. All registrars who come into contact with family violence cases, including all those working in the specialist family violence list, should receive specialised training. This training should include:</p> <ul style="list-style-type: none"> • the effects of family violence, especially non-physical violence, on people experiencing family violence; • the impact of family violence on children; • the purposes and principles of a new Family Violence Act; • issues facing Indigenous women, migrant women and women with disabilities when experiencing family violence and seeking access to justice;

⁶⁰⁵ See Recommendation 61.

⁶⁰⁶ Recommendation 37 recommends a family violence list system for all Magistrates' Courts.

⁶⁰⁷ Julie Stewart, *Specialist Domestic/Family Violence Courts within the Australian Context* (2005) above n 420, 18–19.

! RECOMMENDATION(S)

- clarification of the registrar's role, that is, that registrars cannot refuse to allow a person to make an application for an order, should inform all applicants of the possibility of getting an interim order, and inform applicants and respondents of support services available in court;
 - strategies for obtaining information from applicants and ensuring all relevant information is provided on the application form.
35. The family violence Magistrates' Court list should include adequate numbers of registrars.
36. Registrars working in the family violence list should be provided with adequate support, including peer support programs, access to debriefing and counselling and schemes for performance review and recognition which take into account their specialist status.

CULTURAL CHANGE IN COURT—MAGISTRATES

He's been rough with you in the past. He says he's sorry. I assume that means he's not going to do it again. He's going to try and keep his temper. He's only human and he's a bloke. You've got to be tolerant of that you see. Blokes need tolerance.⁶⁰⁸

6.21 There is a significant variation in the attitudes and approach of Victorian magistrates to family violence. This can be partly attributed to the lack of guidance provided in the Crimes (Family Violence) Act on matters that should be taken into account when deciding on an intervention order application. However, this variation in approach is also due to the differing levels of understanding that magistrates have about family violence. Both of these factors may lead to magistrates refusing to make orders or making inappropriate orders. Examples provided to the commission in consultations include:

- refusal to grant intervention orders where there has been no physical violence but constant harassing behaviour or psychological abuse;

608 Magistrate to a woman applying for a change in contact handover arrangements: Submission 74 (Women's Legal Service Victoria).

- refusal to grant an order because an applicant was in a refuge and was therefore considered safe and not in need of an order;
- refusal to grant an order to a woman whose application was based on the fact that her partner had sexually assaulted her—the rationale given was that the parties had separated and that the woman was therefore no longer at risk because the respondent would be unlikely to sexually assault her on the street.

VIEWS FROM SUBMISSIONS

6.22 Submissions received by the commission wanted magistrates to be made aware of the nature and effects of family violence on people applying for intervention orders.⁶⁰⁹ Many service providers had experience of inappropriate and dangerous decisions being made by magistrates who had little understanding of the nature of family violence. The Women’s Legal Service Victoria told the commission:

Inconsistent decision making and poor treatment by magistrates of people in need of protection is probably the single worst problem with the current intervention order system ... Currently, the factor that is most likely to determine whether a person in need of protection will obtain an intervention order, and whether they will leave court with a belief that the justice system can and will protect them, is which magistrate hears their case.

6.23 An illustration of the lack of awareness of the impact of family violence was provided to the commission by one woman:

I remember [the magistrate] asked me about a specific date and I asked him whether it was ok if I checked my notes, because I had written everything down, times, dates, everything. He said ‘No’ in a raised voice, ‘I just want you to answer the question now’. It was like being stood over again, that sort of intimidation. I could have just sunk back into a hole.⁶¹⁰

6.24 Submissions were overwhelmingly in support of thorough, regular and compulsory family violence training for magistrates.⁶¹¹ Areas of particular concern

609 Submissions 12 (Sergeant Paul Evans, Victoria Police), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women’s Domestic Violence Crisis Service), 40 (Whittlesea Domestic Violence Network), 49 (Domestic Violence and Incest Resource Centre), 69 (Victorian Community Council Against Violence), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services).

610 Interview with Julie, 27 April 2005.

611 Submissions 12 (Sergeant Paul Evans, Victoria Police), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women’s Domestic Violence Crisis Centre), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 46 (Royal Children’s Hospital), 49 (Domestic Violence and Incest Resource Centre), 58 (Family Court of Australia), 61 (Broadmeadows Community Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 65 (Associate Professor John Willis, La Trobe University), 66 (Aboriginal Family Violence Prevention and

included: the nature, dynamics and effects of family violence;⁶¹² the impact of family violence on children;⁶¹³ the nature of family violence in Indigenous communities and the barriers experienced in accessing the legal system;⁶¹⁴ and the issues that women with disabilities face when trying to apply for an intervention order.⁶¹⁵

6.25 Sergeant Paul Evans suggested that one way to ensure more consistent decision making would be to have designated family violence hearings. The Broadmeadows Community Legal Service suggested that only those magistrates who have completed family violence training should sit on family violence cases.

6.26 Other suggestions for improvements from submissions included:

- appointing court staff and magistrates who can empathise with those experiencing family violence;⁶¹⁶
- appointing more female magistrates and more magistrates from diverse backgrounds;⁶¹⁷
- including guiding principles in the Act, as well as factors for magistrates to take into account when deciding on an application;⁶¹⁸
- monitoring the effectiveness of any training,⁶¹⁹ including by conducting an attitudinal survey of Victorian magistrates to determine current views to measure any training outcomes;⁶²⁰

Legal Service (Victoria)), 69 (Victorian Community Council Against Violence), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

612 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre), 69 (Victorian Community Council Against Violence).

613 Submissions 30 (Violence Against Women Integrated Services), 63 (Darebin Family Violence Working Group), 69 (Victorian Community Council Against Violence).

614 Submissions 57 (Victorian Aboriginal Legal Service), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

615 Submission 79 (Department of Human Services).

616 Submission 27 (Robinson House BBWR).

617 Submission 40 (Whittlesea Domestic Violence Network). The commission acknowledges the efforts being made by the Attorney-General to promote more diversity in Victoria's judiciary, including the Magistrates' Court. These efforts have included changing the selection process for judicial officers to receive suggestions and expressions of interest from a wider range of organisations and individuals, creating the office of part-time magistrate and requesting the Judicial Remuneration Tribunal to examine judicial working conditions to create more flexibility and a more family friendly workplace: the Hon Rob Hulls, 'Speech' (Paper presented at the 'Women at the Bench Forum', 2 August 2005).

618 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)). The commission has recommended principles and purposes for the Act at recommendations 3, 4.

- magistrates who deal with family violence matters meeting with each other regularly to discuss the way they interpret the Act and deal with particular issues.⁶²¹

JUDICIAL EDUCATION AS A STATE RESPONSIBILITY

6.27 As noted, education and training of people who work in the justice system is essential to uphold Australia's obligations under the CEDAW.⁶²² The UN Model Strategies provide more detailed guidance on the convention, stating that all governments, in cooperation with organisations seeking women's equality and relevant professional associations, should:

provide for or to encourage mandatory cross-cultural and gender-sensitivity training modules for police, criminal justice officials, practitioners and professionals involved in the criminal justice system that deal with the unacceptability of violence against women, its impact and consequences and that promote an adequate response to the issue of violence against women.⁶²³

6.28 The UN Beijing Platform for Action also notes the importance of measures and programs aimed at increasing the knowledge of judicial officers of the causes, consequences and mechanisms of violence against women.⁶²⁴ The Platform for Action provides that all governments should 'develop strategies to ensure that the re-victimisation of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices'.⁶²⁵

SPECIALISATION IN OTHER JURISDICTIONS

6.29 Over the past 15 years, several jurisdictions have developed specialist courts to deal with family violence. In the United States there are over 200 family violence

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

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

621 Submission 30 (Violence Against Women Integrated Services).

622 Refer to para 6.16 in this report.

623 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 12(a).

624 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 124(g).

625 Ibid.

courts, all with different practices and procedures.⁶²⁶ Many focus on treatment programs for offenders, as well as improved outcomes for victims.⁶²⁷ There are also many specialised family violence courts in Canada and the UK.⁶²⁸ Some Australian jurisdictions have also experimented with pilot family violence courts.⁶²⁹ A common feature of these specialist courts is that judicial officers have specialised training or expertise in the area of family violence.⁶³⁰ A US study on models for family violence courts has found that ongoing training and education of court personnel is one of nine core principles that should underpin a specialist approach to family violence.⁶³¹ However, some jurisdictions have also recognised the need to rotate judicial and other staff working in this jurisdiction to avoid burnout.⁶³²

6.30 Many of these trials and experiments with specialised family violence courts involve an integrated system that is quite different to the court system a person will experience in an ordinary court. They involve high levels of additional resources and are therefore not usually implemented in all courts across the jurisdiction concerned. In a review of specialist courts in Australia and overseas, Julie Stewart concludes:

Legal and academic research ... has exposed shortcomings in the delivery of justice to victims of domestic violence and it is this research that has informed the resort to establish specialist court programs. The initiative of specialist domestic violence courts in their many forms merely requires participants in the delivery of justice ... to execute their roles and

626 Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (Paper presented at the AIJA Magistrates Conference, Melbourne, 20–21 July 2001) 17–18; Stewart (2005) above n 420, 20; Judge Amy Karan, et al, 'Domestic Violence Courts: What Are They and How Should We Manage Them?' (1999) *Juvenile and Family Court Journal* 75.

627 See, eg, Tony Newman, 'Family Violence Court—Adelaide Magistrates' Court' (Paper presented at the Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System, Canberra, 23–24 October 2003); Stewart (2005) above n 420, 2; Freiberg (2001) above n 626, 18; Betsy Tsai, 'The Trend Towards Specialized Domestic Violence Courts: Improvements on an Effective Innovation' (2000) 68 *Fordham Law Review* 1285.

628 Freiberg (2001) above n 626, 18; Jane Ursel, 'The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study' (1997) 8 (3) *Current Issues in Criminal Justice* 263.

629 Eg, in Western Australia the Joondalup Family Violence Court in outer Perth has been operating since 1999. In 2005 two trial family violence courts were set up in New South Wales, in Campbelltown and Wagga Wagga: Stewart (2005) above n 420, 29. The Adelaide Magistrates' Court also operates a specialist Family Violence Court on particular days: Newman (2003) above n 627, 2–3; Freiberg (2001) above n 626, 18. The commission describes the more comprehensive and statewide programs operating in the ACT and Tasmania at paras 5.44–5.55.

630 Stewart (2005) above n 420, 9, 21; Freiberg (2001) above n 626, 18; Karan et al (1999) above n 626, 76.

631 Sack (2002) above n 447, 7, 19–20.

632 Stewart (2005) above n 420, 19; Young (2001) above n 444, 67.

tasks more appropriately and effectively. What is ‘new’ about the initiative is an intended vast improvement in the delivery of justice for victims.⁶³³

6.31 Julie Stewart also noted in her review that:

Insofar as the literature has explored different approaches, it seems likely that dedicated presiding judges/magistrates provide the most consistent and committed approach to the specialist court, possibly because they have elected to undertake the role and have an understanding of their purpose and role.⁶³⁴

SPECIALISATION IN VICTORIA

6.32 On 14 June 2005, the Family Violence Court Division of the Magistrates’ Court began sitting in two locations: Ballarat and Heidelberg. These locations will act as a pilot for specialist family violence courts in Victoria until June 2007. The aims of the division are to simplify access to the justice system for people who have experienced family violence, promote their safety and increase the accountability of people who have used violence.⁶³⁵

6.33 The key features of the division include:

- Special support services in the court, including information, advocacy, referral, legal services and links to family violence organisations in the community.⁶³⁶
- Better supports for applicants and respondents, including applicant workers, respondent workers, family violence outreach workers, additional Victoria Legal Aid and community legal centre services, dedicated police prosecutors and additional security staff.⁶³⁷
- Expanded court jurisdiction to hear a range of matters relating to family violence, including interim or final intervention order applications, applications to vary or revoke an order, criminal offences including breaching an order or assault, applications for victims of crime assistance, reviews of child support assessment and civil proceedings for damages for personal injury.⁶³⁸

633 Stewart (2005) above n 420, 7.

634 Ibid 10–11.

635 *Magistrates’ Court (Family Violence) Act 2004* s 1(1).

636 Family Violence Court Division, Magistrates’ Court of Victoria, *Applying for an Intervention Order* (2005) 23.

637 Ibid.

638 *Magistrates’ Court Act 1989* s 41.

This expanded jurisdiction seeks to reduce the number of court appearances for people experiencing violence.

- Magistrates assigned to sit on the Family Violence Court Division by the Chief Magistrate.⁶³⁹ In assigning a magistrate, the Chief Magistrate must consider the magistrate's relevant knowledge and experience in dealing with family violence matters.⁶⁴⁰

6.34 The Magistrates' Court will also be implementing a Specialist Family Violence Service at three other court locations: Melbourne, Sunshine and Frankston.⁶⁴¹ These sites will provide additional police prosecutors, magistrates and registrars and will also provide a specialist worker to support people applying for orders. More court time will be devoted to intervention order applications where necessary.⁶⁴²

6.35 As the division only began operation in June 2005, the commission has not sought to review its operation or approach. The commission understands that a comprehensive evaluation will be conducted by the Department of Justice, starting in 2006 and covering the two-year demonstration period until June 2007.

COMMISSION'S RECOMMENDATIONS

6.36 The commission agrees that a fundamental change in approach is required by Victoria's magistrates to provide a fair and effective intervention order system. The commission recommends the Family Violence Court Division be extended beyond the two pilot courts in Ballarat and Heidelberg. While it may be too resource intensive to establish a specialised court in every region, each Magistrates' Court should operate a family violence specialist list. This would ensure that people living in regional or rural areas would still have access to the specialist expertise of magistrates who would be receiving continuing professional development and education in the field. The Magistrates' Court has informed the commission that it is considering the establishment of a 'specialist group of Magistrates and registrars across the state who manage the [family violence] matters in each Magistrates' Court'. This would involve imposing a requirement on magistrates and registrars to undertake professional development and education and is being considered in conjunction with the development of sexual offence and VOCAT lists.

639 *Magistrates' Court Act 1989* s 4H(3).

640 *Magistrates' Court Act 1989* s 4H(4).

641 Attorney-General Rob Hulls, 'Sites Chosen for Specialist Family Violence Service' (Media Release, 2 December 2005).

642 *Ibid.*

6.37 The commission has also recommended a specialist police prosecution unit to operate in the specialist list, along with some form of victim and witness assistance, at recommendations 23 and 24.

6.38 The benefits of a specialist approach to family violence cases include:

- Legal issues relating to family violence can be dealt with in the one court and possibly in the one hearing.
- Magistrates can be required to undertake family violence training in order to sit on family violence matters.
- A specialist list means that other staff in the courtroom can also be specialised, such as police prosecutors, Victoria Legal Aid and community legal centre lawyers, and registrars.⁶⁴³
- Cases can be resolved more quickly and efficiently as a result of specialist staff.⁶⁴⁴

6.39 Through the adoption of a specialist family violence list, a thorough program for judicial education and training can be developed for magistrates who hear family violence matters.⁶⁴⁵ It is essential that this training cover at a minimum:

- the effects of family violence, especially non-physical violence;
- the principles and purposes of a new Family Violence Act;⁶⁴⁶
- issues facing Indigenous women, migrant women and women with disabilities when experiencing family violence and seeking access to justice;
- the types of information that should be provided to applicants and respondents once an intervention order is made (ie clear explanation of the order's terms).

6.40 As recommended in this report, magistrates should also receive training on:

- the impact of family violence on children and matters to consider when deciding on conditions about children and child contact;⁶⁴⁷

643 We have recommended a specialist police prosecution unit and registrar training in recommendations 23, 34.

644 Efficiency gains have been a major benefit of the special family violence list in the ACT Magistrates' Court, operating as part of the Family Violence Intervention Program: Young (2000) above n 415, 78.

645 Enhanced understanding of the dynamics of family violence by key participants was found to be a major benefit of specialist courts operating in California: Judicial Council of California, Administrative Office of the Courts, *Domestic Violence Courts: A Descriptive Study* (2000) 21.

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

- awareness of court safety issues;⁶⁴⁸
- awareness of the impact of breaches that may seem 'minor' or 'trivial' on victims.⁶⁴⁹

6.41 It is also essential that any judicial education and training is constantly reviewed and evaluated to ensure its effectiveness. The operation of a specialist list should also be regularly reviewed.

! RECOMMENDATION(S)

37. The Magistrates' Court should establish a specialist list for family violence matters, including intervention order applications, criminal charges relating to family violence and victims of crime compensation.

38. All magistrates who sit on the specialist family violence list should complete training on family violence issues. This training should cover:

- the effects of family violence, especially non-physical violence;
- the principles and purposes of a new Family Violence Act;
- issues facing Indigenous women, migrant women and women with disabilities when experiencing family violence and seeking access to justice;
- the types of information that should be provided to applicants and respondents once an intervention order is made (eg a clear explanation of the terms of the order).

LEGAL INFORMATION, ADVICE AND ASSISTANCE

6.42 The intervention order system was developed with the intention of providing an accessible legal remedy for victims seeking protection from family violence. During the commission's consultations, we were frequently told that most victims apply for

647 See Recommendation 116.

648 See Recommendation 61.

649 See Recommendation 135.

intervention orders in person and do not access legal advice or assistance.⁶⁵⁰ It is difficult to obtain legal assistance in family violence intervention order applications and many applicants are told that lawyers are unnecessary. The cost of legal assistance provided by private practitioners remains a significant barrier to many in the community.

6.43 Since the introduction of the Crimes (Family Violence) Act, community legal centres and women's services have focused on the production of plain language legal information and other education resources and activities for victims and perpetrators involved in intervention order applications. Community education performs an essential role in developing awareness and understanding of the law and contributes to the empowerment of individuals in their engagement with the legal system.

6.44 In support of the empowering potential of legal information, the Eastern Domestic Violence Outreach Service reported the following case where a victim wanted her partner to leave the family home:

In one instance, a woman gained information and legal advice about exclusion orders. She attended at the local Magistrates court to observe and familiarise herself with the court process. She presented this information to her husband as well as the evidence of the assault that she intended to present to the Magistrate in court. The husband was friends with a number of the local police and, worried that they would discover his use of violence, agreed to leave voluntarily. I believe that this demonstrates that in some instances, information about exclusion orders can be as valuable and effective as the order itself.⁶⁵¹

6.45 However, applying for intervention orders may raise a number of important legal issues for both applicants and respondents where the availability of legal advice and/or assistance would also benefit both the parties and the court.

6.46 Some submissions pointed out that many people find it difficult to exercise their legal rights or options because they have limited access to information about the legal remedies available to address family violence.⁶⁵² Where this is the case, applying for protection through the court can become bewildering and applicants may omit important information from the complaint form, the information may be insufficient or it may lack appropriate detail.⁶⁵³ Orders which are not understood by respondents or

650 See Victorian Law Reform Commission (2004) above n 8, para 10.27.

651 Submission 4 (Eastern Domestic Violence Outreach Service).

652 Submissions 8 (Werribee Legal Service); 44 (Anonymous); 52 (Gippsland Community Legal Service); 61 (Broadmeadows Community Legal Service).

653 Submissions 8 (Werribee Legal Service); 37 (County Court Law Reform Committee).

are not tailored to the circumstances may exacerbate or increase the incidence of order breaches.⁶⁵⁴ Obtaining legal advice can reduce confusion and enable parties to understand the orders' provisions.

6.47 Many intervention orders are generic. Legal advice can be useful to applicants who wish to tailor the terms of intervention orders to specific circumstances. Unrepresented applicants are much less likely to seek orders tailored to their needs.

6.48 Legal advice may also be relevant where the respondent wants to have contact with children before an agreement has been reached or orders for contact have been made. This is a source of great difficulty for police investigating and prosecuting allegations of breaches where the standard intervention order has been imposed which prohibits the defendant having contact with the applicant, except for the purpose of child contact.⁶⁵⁵

6.49 Where applications for intervention orders are contested, legal advice and assistance can be particularly useful to applicants to prepare the case and present appropriate evidence for the hearing.⁶⁵⁶ Submissions also pointed out that legal advice can be useful to respondents in making informed decisions about whether to contest orders⁶⁵⁷ and in ensuring compliance with the order.⁶⁵⁸ In contested cases, a failure to present a comprehensive statement of all the relevant incidents in the application means applicants may then be cross-examined about their credibility.⁶⁵⁹ Self-represented people may fail to provide appropriate evidence to the court, resulting in an inability to obtain protection.

6.50 People from migrant communities,⁶⁶⁰ Indigenous Australians,⁶⁶¹ and people with cognitive impairment all have specific needs. Access to legal advice and/or representation can help address language and communication issues, or lack of understanding of the Australian legal system.

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

655 This is discussed further in Chapter 9.

656 Domestic Violence and Incest Resource Centre, *Family Violence and Homelessness: Removing the Perpetrator from the Home*, Discussion Paper No 2 (2002) 67.

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

658 Submissions 41 (Victoria Legal Aid); 64 (Federation of Community Legal Centres (Vic)).

659 Submission 37 (County Court Law Reform Committee).

660 Submission 8 (Werribee Legal Service).

661 Partnerships Against Domestic Violence, *Home Safe Home: The Link Between Domestic and Family Violence and Women's Homelessness* (2000) 53–54; submission 57 (Victorian Aboriginal Legal Service).

PROVIDERS OF LEGAL ADVICE AND ASSISTANCE

6.51 Access to the intervention order system may be facilitated by police if they have attended a family violence incident and decide to apply for an intervention order on behalf of the victim.⁶⁶² In this situation, a police prosecutor will usually present the case to the court. If police have not attended or have not applied for an order, a victim of family violence who is seeking an intervention order may directly approach a registrar at the Magistrates' Court. Registrars should provide assistance to applicants to complete the necessary forms and provide them with information about the process.⁶⁶³

6.52 In some courts, community legal centres operate court support schemes to provide applicants for intervention orders with legal advice and assistance. Duty lawyer schemes run by community legal centres or Victoria Legal Aid are also in operation in some courts to provide legal advice and assistance to respondents who are contesting applications.⁶⁶⁴

COMMUNITY LEGAL CENTRES

6.53 Community legal centres in Victoria have been at the forefront of delivering legal support to applicants seeking intervention orders but lack of resources limits their reach. Some legal centres have developed models for the provision of legal advice and assistance in family violence matters, not only through volunteer duty lawyer schemes but also by coordinating local family violence services to provide additional support in courts for applicants. Through these initiatives, the community legal sector has developed expertise about the legal and social issues in family violence matters.

6.54 Some of the submissions received by the commission were from community legal centres. According to the Federation of Community Legal Centres, intervention order court support is currently provided by legal centres at 11 Magistrates' Courts on certain days and during limited hours, and is therefore available inconsistently across Victoria. This work is not directly funded but is undertaken by centres by drawing resources from their general budgets and sometimes relying on volunteer solicitors.

Even when a CLC [Community Legal Centre] lawyer is present at a court, CLCs can not assist all clients. Due to limited resources, the assistance is generally limited to advice only

662 The police obligation to apply for intervention orders on behalf of victims in specified circumstances is discussed at paras 5.83–5.94.

663 Problems with the role of registrars in the system are discussed at paras 6.3–6.20.

664 Victoria Legal Aid provides 36 duty lawyer services of which 15 are shared with the private profession, and 12 duty lawyer schemes are operated by private professionals under the Private Practitioner Scheme: email from Domenico Calabro to Judith Peirce, 1 December 2005.

or referrals and information. All courts have different procedures (ie some have contest mention systems and others do not) and therefore, depending upon the specific court process, the client may or may not get legal advice prior to the time that his or her matter is being called in the court. Legal representation is only available when there has been sufficient time to arrange for representation—a contest mention system or notice that a matter will be defended would assist this.⁶⁶⁵

6.55 Some community legal centres also participate in duty lawyer schemes at courts to provide advice and assistance on the day of the hearing for respondents who are contesting applications.

VICTORIA LEGAL AID

6.56 All assistance from Victoria Legal Aid is made subject to a strict means test. Unless the respondent is defending the application for an intervention order, Victoria Legal Aid does not assist applicants, except in specific circumstances.⁶⁶⁶ However, as the agency points out in its submission, applicants do not always know in advance whether the respondent is going to contest the application.

6.57 Duty lawyers are available on rosters in some courts on specific days to provide advice and/or assistance. Defendants who qualify for legal aid under the means test may obtain it for the hearing if they are a child, if an important legal right is at stake and the court may be persuaded to make a less restrictive or no order, or if they have been arrested and are still in custody.⁶⁶⁷

PRIVATE LAWYERS

6.58 Private legal advice usually involves the cost of obtaining advice from a solicitor and fees for representation in court by a barrister. Assisting applicants in family violence matters can be time intensive for lawyers and few applicants and respondents have the resources to engage private legal representation.

6.59 The Victorian Bar has a family violence sub-committee which has recently adopted resolutions to train, support and manage a specialist list of barristers in the

665 Submission 64 (Federation of Community Legal Centres (Vic)). We address the provision of a notice system at paras 8.66–8.80.

666 These specific circumstances are: if the applicant has a language literacy problem, an intellectual or psychiatric disability, or there is a prospect of benefit being gained not only by the applicant but also by the public or any section of the public.

667 This is interpreted to include situations where an order may be made excluding the respondent from the family home: Victoria Legal Aid, *Victoria Legal Aid Handbook* (12th ed, 2001) Appendix 2B, 6.2.

family violence area. The committee seeks to promote education and understanding of more members of the Victorian Bar in family violence issues, to improve participation and communication of barristers with the courts and legal service providers, assist intervention order programs run by community legal centres, and support advocacy training for community-based duty lawyers.⁶⁶⁸

INTERSTATE MODELS

6.60 In New South Wales, the Women's Domestic Violence Court Assistance Program has been operating since 1996. The program, administered by the NSW Legal Aid Commission, funds 33 domestic violence court support schemes across the state.⁶⁶⁹ A training and resource unit based at the Domestic Violence Advocacy Service provides training for the support workers and people who work with them, such as solicitors and community workers.⁶⁷⁰

VIEWS FROM SUBMISSIONS

6.61 In the commission's Consultation Paper, we asked four questions about legal representation and support in court for applicants and respondents in intervention order matters.⁶⁷¹ Submissions overwhelmingly supported the need for litigants in family violence matters to be able to access legal advice and/or representation.⁶⁷²

6.62 The Magistrates' Court of Victoria said:

668 Letter from Helen Symon SC, Chair—Victorian Bar Family Violence Sub-Committee, to Judith Peirce, 20 July 2005.

669 During 2003–04, 33 618 women were assisted: Legal Aid Commission of NSW, *Annual Report 2003–2004* (2004) 33.

670 Legal Aid New South Wales, *WDVCA Program* <www.legalaid.nsw.gov.au/asp/index.asp?pgid=611andcid=803andid=546> at 13 December 2005.

671 Victorian Law Reform Commission (2004) above n 8, questions 64–67, paras 10.26–10.36. Separate questions were asked about representation of children, where an application is being made on their behalf or where children are respondents.

672 Submissions 8 (Werribee Legal Service); 22 (Kim Robinson, social worker); 25 (Barbara Roberts); 27 (Robinson House BBWR); 30 (Violence Against Women Integrated Services); 37 (County Court Law Reform Committee); 39 (Royal Women's Hospital); 40 (Whittlesea Domestic Violence Network); 41 (Victoria Legal Aid); 44 (Anonymous); 46 (Royal Children's Hospital); 49 (Domestic Violence and Incest Resource Centre); 51 (Villamanta Legal Service); 52 (Gippsland Community Legal Service); 53 (Women's Electoral Lobby, Victoria); 57 (Victorian Aboriginal Legal Service); 61 (Broadmeadows Community Legal Service); 62 (Eastern Community Legal Centre); 64 (Federation of Community Legal Centres (Vic)); 65 (John Willis, Associate Professor, La Trobe University); 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)); 69 (Victorian Community Council Against Violence); 74 (Women's Legal Service Victoria); 79 (Department of Human Services); 85 (Deborah Weiner); 86 (Magistrates' Court of Victoria).

The Court considers legal advice to parties imperative and [it] should be appropriately funded ... The provision of legal advice is essential and fair—in our experience [it] invariably results in a better, more tailored outcome for the applicant and the defendant and ultimately their family. Issues that are important to each party have an opportunity to be ventilated at least in part in discussions between legal practitioners at court.

6.63 Pointing to the inconsistency of the current availability of legal advice and assistance across Victoria, the Women's Legal Service Victoria argues:

Legal advice and assistance and non-legal support should be available consistently across the state whenever and wherever intervention order applications are heard. The services provided should be consistent so that parties to proceedings know what help they will or will not be able to obtain. Legal assistance should include undertaking negotiations and appearing in court to have consent orders made or undertakings received. It may also be appropriate to provide that representation should be provided in interim matters for people who face particular difficulties, for example being unable to speak English. But it is important that realistic parameters are provided for the provision of legal assistance—for example, a duty lawyer service is not well placed to run full contested hearings, given the limited time available to obtain instructions and the demands of other clients. Where a final contested hearing is necessary, matters should be adjourned to allow full legal representation to be obtained.

6.64 The County Court notes in its submission that, with respect to appeals against intervention orders which would be heard in the County Court, a significant number of applicants and respondents are not represented in family violence matters and this:

potentially leads to unduly prolonged proceedings, an imbalance between parties' capacity to do their cause justice, and perhaps also the abandonment of appeals on grounds other than merit or prospect of success.

6.65 Victoria Legal Aid stressed the point in its submission that all child respondents should have access to legal representation. The agency also acknowledged that its guidelines may exclude many respondents from eligibility for legal aid, and that breaches may frequently result from respondents' failure to understand the effect and consequences of intervention orders.

CURRENT POLICY DIRECTIONS

6.66 The provision of legal information, advice and assistance to people is an important element in maintaining the community's confidence in the rule of law. In the *Justice Statement 2004–2014*, the Department of Justice identifies improvements that can be made to the provision of legal advice and assistance, along with legal aid

and victim support, and when alternative dispute resolution is necessary for building respect and protecting rights.⁶⁷³

6.67 The Magistrates' Court Family Violence Division provides legal and non-legal support services to applicants and defendants in family violence matters. The division may adjourn proceedings to give one or more of the parties a reasonable opportunity to obtain legal advice.⁶⁷⁴

SUPPORT SERVICES, LEGAL ADVICE AND INTERNATIONAL OBLIGATIONS

6.68 Various international standards have recognised the essential role that both government and non-government support services play in preventing and responding to violence against women.⁶⁷⁵ This includes the provision of legal advice. The Beijing Platform for Action states '[v]iolence against women is exacerbated by ... women's lack of access to legal information, aid or protection'.⁶⁷⁶ It provides that governments, including local governments, should:

Provide well-funded shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed.⁶⁷⁷

6.69 The UN Model Strategies and Practical Measures recognise the important role of 'partnerships between law enforcement officials and the services that are specialized in the protection of women victims of violence'.⁶⁷⁸ CEDAW General

673 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) above n 150, 69.

674 *Magistrates' Court Act 1989* s 4J. The Family Violence Court Division is discussed in more detail at paras 6.32–6.35.

675 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(k),(q); *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 14(b); United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 125(a).

676 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 118.

677 *Ibid* para 125(a).

678 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 14(b).

Recommendation 19 provides '[s]tates parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities'.⁶⁷⁹

COMMISSION'S RECOMMENDATIONS

6.70 It is essential for litigants in family violence matters to have access to legal advice and representation. This is particularly important for applicants who face barriers when applying for intervention orders, for example Indigenous women, women with disabilities and immigrant women. An efficient and effective way of delivering legal advice and assistance would be to provide resources to the community legal sector so it is able to develop and improve the coverage and consistency of legal service provision. Such schemes would also be able to provide leadership and encouragement to professional legal bodies such as the Law Institute of Victoria and the Victorian Bar to take an active role in encouraging members to volunteer their services.⁶⁸⁰

RECOMMENDATIONS

39. Applicants and respondents should have access to legal advice prior to applications for intervention orders being finalised in uncontested applications and legal representation in contested matters.
40. Community legal centres should be funded to provide court assistance services for applicants.
41. Policies and programs should be developed for such services, including standards and management practices to improve consistency of access to legal advice and representation for litigants and courts.

679 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(q).

680 This was a direction proposed by the Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report 69, Pt II (1994).

IMPROVING ACCESS TO INTERVENTION ORDERS

All governments are urged:

To make available to women who have been subjected to violence information on rights and remedies and on how to obtain them ...

To encourage and assist women subjected to violence in lodging and following through on formal complaints ...

To provide for court mechanisms and procedures that are accessible and sensitive to the needs of women subjected to violence and that ensure fair processing of cases.⁶⁸¹

6.71 The commission's Consultation Paper outlined the many barriers that people face when seeking to use the intervention order system. Some of these barriers apply to all people and others are specific to particular groups. This section will outline the commission's recommendations to make the intervention order system more accessible for everyone. The next section outlines changes that will benefit specific groups, including Indigenous people, people with disabilities and migrant women.

6.72 A key problem identified in the Consultation Paper was that people using the intervention order system often do not understand what is expected in applying for an order, what happens in court, or what the outcome of their case is. Consultation participants told the commission that this applies to people applying for orders, as well as those who have orders made against them. When people who have orders made against them do not understand the order, it increases the chances of it being breached. When people who have orders made for their protection do not understand the legal consequences of the order, it makes reporting of breaches less likely.

6.73 This section outlines the commission's recommendations in three areas to improve the understanding of all parties to the proceedings and therefore access to the system:

- increased availability of information on the intervention order system in a variety of formats, both at court and outside court;
- better explanations by magistrates of an order once it is made;
- clearer court forms, including application forms and intervention orders themselves.

681 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, paras 10(a),(b),(d).

6.74 In addition to these three areas, submissions consistently commented that legal representation for both parties would go a long way towards improving understanding of what happens at court and giving access to the system.⁶⁸² Legal representatives can prepare their clients for the hearing, and explain the outcome. The commission makes recommendations to increase the availability of legal representation for all parties at recommendations 39–41.

INFORMATION ABOUT INTERVENTION ORDERS

When little information on the process of court hearings, or likely outcome is conveyed to the applicant, it increases the stress, distress and worry of that person, in turn leading to an overwhelming feeling that can impede upon the understanding of what goes on in the courtroom. Such tremendous strain in participating in such proceedings may be largely lifted through some understanding and prior knowledge of the court process and possible outcomes.⁶⁸³

[All governments should] disseminate information on the assistance available to women and families who are victims of violence.⁶⁸⁴

6.75 A key way to improve people's understanding of the court processes would be to provide more information about how the system works, what to expect and the consequences of receiving an intervention order. This issue is particularly important for people with disabilities and those from migrant backgrounds. The information needs of these groups will be discussed separately in paragraphs 6.97–6.121.

6.76 Victoria Legal Aid and the Law Foundation provide two information booklets on intervention orders, one on applying for an intervention order and one on responding. These booklets provide relatively detailed information about the intervention order system and the court processes involved. However, they do not include any assistance in filling out an application form or understanding the conditions of an intervention order once it has been made.

682 Submissions 30 (Violence Against Women Integrated Services), 41 (Victoria Legal Aid), 44 (Anonymous), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

683 Submission 44 (Anonymous).

684 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex Beijing Declaration and Platform for Action, para 125(h).

VIEWS FROM SUBMISSIONS

6.77 The Magistrates' Court noted the need for the court itself to provide pamphlets and brochures, including 'how to' information on the intervention order system, which is not currently available.⁶⁸⁵ Other submissions contained suggestions for how information could be available to people affected by the intervention order system. Suggestions concerned information that should be available at the court at the time of the application, as well as information that should be available outside of court, for example, in community agencies or on the Internet.

6.78 Victoria Legal Aid, the Broadmeadows Community Legal Service, the Federation of Community Legal Centres, the Aboriginal Family Violence Prevention Legal Service and the Women's Legal Service Victoria suggested that an information sheet in plain English accompanying an intervention order when it is made would be useful. This sheet should explain the effects of the order, how to vary or revoke the order and how to report a breach.⁶⁸⁶

6.79 The Federation of Community Legal Centres suggested providing a video showing the intervention order process. The Aboriginal Family Violence Prevention Legal Service also supported the provision of visual information. A video could be made available for community education seminars and information programs run by community legal centres, and be available on the Magistrates' Court website. This type of video information is currently provided by the Victorian Civil and Administrative Appeals Tribunal and the Victoria Law Foundation in a video on mediation called 'Working it Out—Through Mediation'.⁶⁸⁷ The video clearly explains what happens at mediation, how to prepare, and what the process will look like.

COMMISSION'S RECOMMENDATIONS

6.80 It is essential for information to be made available in a range of formats to assist people using the intervention order system. The commission agrees that a short explanatory information source would be useful for people who obtain an intervention order. There may also be other forms of information that could improve people's understanding of the system. The commission therefore recommends the government

685 The court informed the commission that development of information for the Magistrates' Court website is underway, including the provision of downloadable forms. The commission welcomes this step as an important point of access to information on intervention orders.

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

687 Victorian Civil and Administrative Tribunal and the Victoria Law Foundation, *Mediation Video*, Victorian Civil and Administrative Appeals Tribunal <www.vcat.vic.gov.au> at 18 October 2005.

audit, update and coordinate delivery of information about the process of applying for or responding to an intervention order. This review should consider how an explanatory sheet accompanying an intervention order could be developed and distributed.

6.81 The commission also agrees that audio and video information on the intervention order system would be a useful resource for people preparing for an intervention order hearing. The commission recommends that any review into the information available considers the provision of audio and video information.

! RECOMMENDATION(S)

42. The Department of Justice should audit, update and coordinate delivery of information about the process of applying for or responding to an intervention order.

PLAIN ENGLISH APPLICATION FORMS AND INTERVENTION ORDERS

6.82 It is important that the documentation used in the intervention order system can be easily understood by people using it. Many applicants and respondents do not have any form of legal or other support or information on how to fill out the application form or read an intervention order if one is made.

6.83 There are two different forms used to gather information for a family violence application. These forms gather the information necessary for the registrar to fill out the formal 'complaint' that goes before the magistrate. We will refer to these forms as 'application forms'. The 'standard' application form is used in all Magistrates' Courts, apart from the Family Violence Court Division, and is two pages long.⁶⁸⁸ The division is using a revised application form that was developed with plain English principles in mind. The revised form provides more space and more 'tick the box' questions. The form is under continual review and some parts have already been modified based on the way questions have been answered by applicants at the division's courts. This form addresses some of the criticisms of the standard form.

688 The standard form is included as Form 1 in the Magistrates' Court Family Violence and Stalking Protocols: Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (2003) above n 575, 25–27.

VIEWS FROM SUBMISSIONS

Application Form

6.84 Various submissions, particularly those from people who have experienced family violence, referred to problems with the standard intervention order application form.⁶⁸⁹ The Magistrates' Court told the commission that it intends to undertake a comprehensive redraft of the standard application form once the commission has made its recommendations. The two key problems with the standard application form identified were:

- It is not written in plain English.⁶⁹⁰ It is difficult to understand what information to include, and old fashioned language makes the form unclear. For example, the Federation of Community Legal Centres noted that the term 'molesting' is misinterpreted by many applicants.
- The form includes a very small space for 'past incidents'.⁶⁹¹ As one woman told the commission 'you have such little space to put in a few years of abuse, it's really hard to work out which incidents are the worst ones'.⁶⁹²

6.85 Submissions suggested the following changes to the application form:

- the form should be rewritten in plain English;⁶⁹³
- more space should be provided to include information about previous incidents of abuse;⁶⁹⁴
- the form should provide prompts, such as 'has the family member ever ...?';⁶⁹⁵
- the form should ask whether the applicant needs immediate protection, so the magistrate can consider making an interim intervention order.⁶⁹⁶

689 Submissions 7 (Barbara Roberts), 64 (Federation of Community Legal Centres (Vic)), 69 (Victorian Community Council Against Violence); Interview with Julie, 27 April 2005; Interview with Lucy, 4 May 2005.

690 Submissions 7 (Barbara Roberts), 64 (Federation of Community Legal Centres (Vic)).

691 Submissions 7 (Barbara Roberts), 64 (Federation of Community Legal Centres (Vic)), Interview with Julie, 27 April 2005.

692 Interview with Julie, 27 April 2005.

693 Submissions 7 (Barbara Roberts), 64 (Federation of Community Legal Centres (Vic)).

694 Submissions 7 (Barbara Roberts), 64 (Federation of Community Legal Centres (Vic)).

695 Submission 7 (Barbara Roberts).

696 Submissions 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 46 ((Royal Children's Hospital), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria). This is discussed further at paras 7.23–7.28 and recommendations 68, 69.

Protection/Intervention Orders

6.86 Individuals who have received orders have also told the commission that the order itself was difficult to understand and the consequences of breaching it were not clearly outlined.⁶⁹⁷ One woman, when asked how she felt about intervention orders, told the commission:

I don't know how I feel about them. I don't even know how to read them, I had to get someone to go through and help me read them. I have two in my bag because I have to carry them with me, or at least I prefer to.⁶⁹⁸

6.87 The Women's Legal Service Victoria also noted that the text of intervention orders is difficult for people to understand. The service suggested how the text of the order could be improved, including:

- referring to the parties by name rather than as the aggrieved family member and the defendant;
- clarifying terms such as 'other orders' and 'liberty to apply'.

6.88 The Magistrates' Court also acknowledged that plain English terminology in intervention orders would help. The commission understands that the Magistrates' Court has begun a review of the terminology used for the conditions in intervention orders.

COMMISSION'S RECOMMENDATIONS

6.89 The commission agrees that the language used on the standard intervention order application form and the intervention order itself is inaccessible and creates difficulties for people using the system.

Application Form

6.90 Some of the suggestions to improve the standard application form have already been incorporated in the application form being used in the Family Violence Court Division. The commission therefore recommends that the form used in the division should be reviewed according to other suggestions made throughout this report, and be used in all venues of the Magistrates' Court. In particular, it would be useful if the question on past incidents included an illustrative list of types of behaviours that may be acts of family violence, in line with the expanded definition of family violence that the commission has recommended at recommendations 14–16. It would also be useful

697 Submission 7 (Barbara Roberts); Interview with Lucy, 4 May 2005.

698 Interview with Lucy, 4 May 2005.

if the application form was available on the court's website, so that applicants or their support workers could have the option of completing it before going to court.

6.91 The commission has also recommended specific changes to the application form in other parts of this report. These recommendations are:

- the question on the division's application form about whether an applicant needs an interim order should be reviewed to ensure its meaning is clear to those who do not have assistance with completing the form;⁶⁹⁹
- the questions on the division's application form about cross-applications should be included on all application forms, to help the magistrate determine whether it is a cross-application;⁷⁰⁰
- the questions on the division's application form about the length of the order should be included on all application forms, to help magistrates determine an appropriate length for the order;⁷⁰¹
- the application form should ask applicants whether they wish to remain in the family home and have the violent person removed.⁷⁰²

Protection/Intervention Orders

6.92 The commission also recommends that the Magistrates' Court continue its review of the text of orders to ensure they can be easily understood. In particular, conditions in the order should:

- be written in plain English;
- refer to the parties by their own names rather than as 'aggrieved family member' and 'defendant';
- provide examples of what particular terms of the order mean, such as, 'this means for example you cannot telephone [name], drive past her home or go to her workplace';
- provide information on consequences of breaching and how to apply for changes.

699 See Recommendation 69.

700 See para 8.94.

701 See Recommendation 105.

702 See Recommendation 114. This recommendation relies on other recommendations of the commission that exclusion orders be named and outlined in a new Family Violence Act: see recommendations 109–111.

! RECOMMENDATION(S)

43. The intervention order application form currently being used in the Family Violence Court Division should be used at all venues of the Magistrates' Court. The form should be available on the Internet for electronic use by services which support people applying for intervention orders. Future revisions of this form should include:
- all questions written in plain English;
 - more space for details of previous abusive behaviours;
 - an illustrative list of types of behaviours that may be acts of family violence at the question on past incidents, in line with an expanded definition of family violence;
 - making the application form available on the Internet for electronic use by services who are supporting people applying for intervention orders.
44. The intervention order received by applicants and respondents should be redrafted to:
- be written in plain English;
 - refer to the parties by name rather than as 'aggrieved family member' and 'defendant';
 - provide examples of what particular terms of the order mean (eg 'this means you cannot telephone [name], drive past her home or go to her workplace');
 - provide information on consequences of breaching an order and how to apply for a variation of an order.

REQUIRING A MAGISTRATE'S EXPLANATION TO BOTH PARTIES

6.93 Another suggestion to improve parties' understanding of the court process was that magistrates should be required to explain the intervention order to both parties. Under the Act, magistrates are required to explain to the defendant, if the defendant is present in court, the purpose, terms and effect of the order, the consequences of

breaching the order and the way an order can be varied or revoked.⁷⁰³ There is no obligation to provide a similar explanation to the applicant.

OTHER JURISDICTIONS

6.94 In other Australian jurisdictions magistrates have a similar but more extensive obligation. For example, in Western Australia, the ACT, NSW and Queensland an explanation of the order must be given to the applicant, as well as the respondent.⁷⁰⁴ In NSW the magistrate must also provide a written explanation,⁷⁰⁵ in Western Australia the magistrate must provide a written explanation for parties who are not in court⁷⁰⁶ and in Queensland explanatory notes may be given as a form of explanation.⁷⁰⁷

VIEWS FROM SUBMISSIONS

6.95 Various submissions highlighted the importance of a clear verbal explanation by the magistrate to both parties at the time the order is made.⁷⁰⁸ The Magistrates' Court acknowledged that while these explanations are given to respondents, they are often not understood and the police are required to 'interpret' the information given.

COMMISSION'S RECOMMENDATION

6.96 The commission supports a requirement that the magistrate give an explanation to both the protected person and the respondent, if either is present in court, rather than only to the respondent. A written information sheet accompanying the order should also be considered, as discussed at paragraphs 6.75–6.81.

703 *Crimes (Family Violence) Act 1987* s 15.

704 *Domestic and Family Violence Protection Act 1989* (Qld) s 50, *Crimes Act 1900* (NSW) s 562GC, *Domestic Violence and Protection Orders Act 2001* (ACT) s 25, *Restraining Orders Act 1997* (WA) s 8.

705 *Crimes Act 1900* (NSW) s 562GC.

706 *Restraining Orders Act 1997* (WA) s 8.

707 *Domestic and Family Violence Protection Act 1989* (Qld) s 50.

708 Submissions 41 (Victoria Legal Aid), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria).



RECOMMENDATION(S)

45. The new Family Violence Act should require magistrates to provide a clear verbal explanation to the respondent and the protected person where either is present in court. This explanation should include the matters outlined in section 15 of the *Crimes (Family Violence) Act 1987*.

IMPROVING ACCESS FOR MARGINALISED GROUPS

6.97 As we have discussed, all groups within Victoria experience barriers to using the intervention order system. However, there are some groups who face additional barriers to accessing justice and therefore require particular attention. The commission's terms of reference state that we should give particular attention to accessibility for Indigenous Australians, people with disabilities, and immigrant women (particularly recent immigrants). Consultations also highlighted problems faced by young people, people from rural areas and people in same-sex relationships.

INDIGENOUS AUSTRALIANS

6.98 Indigenous Australians experience unique barriers in accessing the protection of the intervention order system. As discussed at paragraphs 2.76–2.79, Indigenous Australians experience high rates of family violence, however, many victims are reluctant to use the intervention order system. Problems in involving the police in family violence have previously been discussed at paragraphs 5.65–5.69. Therefore, this section will discuss barriers to using the court to apply for an intervention order.

INTERNATIONAL STANDARDS

6.99 The rights of the world's indigenous women experiencing violence have been specifically recognised at the international level. The UN Declaration of the Elimination of Violence Against Women and the Beijing Platform for Action recognise that indigenous women are especially vulnerable to violence.⁷⁰⁹ The declaration provides that all States should '[a]dopt measures directed towards the elimination of violence against women who are especially vulnerable to violence'.⁷¹⁰ A

709 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) preamble; United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 116.

710 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) article 4(l).

UN working group is developing a draft declaration on the rights of indigenous peoples, which will further outline governments' obligations to indigenous people.⁷¹¹

VIEWS FROM SUBMISSIONS

6.100 Submissions received by the commission outlined many problems that Indigenous Australians experience in accessing the court system. The Federation of Community Legal Centres and the Aboriginal Family Violence Prevention Legal Service highlighted inappropriate and sometimes racist responses Indigenous Australians have experienced when attending court, from both magistrates and registrars. Indigenous Australians may also fear institutional racism from the court, based on previous experiences and the experiences of others in their community.⁷¹² The court itself is a foreign and intimidating environment, particularly for many Indigenous Australians, and court procedures and formalities can deter them from pursuing their application.⁷¹³

6.101 Some Indigenous Australians also have a generally low level of awareness about the legal system and the options that are available to them.⁷¹⁴ There is a lack of sufficient community education on family violence and people do not know what they can do to address the violence. Another serious problem is the lack of Indigenous-specific family violence support services.⁷¹⁵ A lack of legal assistance and emergency housing, particularly in rural areas, was highlighted as a key problem by the Federation of Community Legal Centres and the Aboriginal Family Violence Prevention Legal Service. For example, there is only one Indigenous refuge in Victoria and it has only three beds.⁷¹⁶ Both organisations also highlighted the need for emergency legal advice for Indigenous women about child protection.

6.102 Submissions also suggested changes that could be made to improve access to the court for Indigenous Australians:

711 Office of the United Nations High Commissioner for Human Rights, *Working group on the draft declaration on the rights of indigenous peoples* <www.ohchr.org/english/issues/indigenous/groups/groups-02.htm> at 21 November 2005.

712 Elizabeth Hoffman House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People*, Consultation Outcomes, Reports and Recommendations (2004) 31.

713 Submissions 57 (Victorian Aboriginal Legal Service), 64 (Federation of Community Legal Centres (Vic)).

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

715 Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003) 203.

716 Submissions 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)). This refuge is Elizabeth Hoffman House.

- an increase in the numbers of Indigenous court staff and magistrates to make the court environment less intimidating;⁷¹⁷
- education and awareness raising for magistrates and court staff about Indigenous family violence and barriers to taking action;⁷¹⁸
- availability of Indigenous support workers at courts;⁷¹⁹
- an increase in Indigenous-specific support services, especially legal assistance and emergency housing⁷²⁰—legal assistance should include assistance after hours and with child protection issues;⁷²¹
- increased provision of community education about family violence and the legal system;⁷²²
- provision of visual information for use in community education about family violence and the intervention order system;⁷²³
- allowing women to make applications away from their local court.⁷²⁴

COMMISSION'S RECOMMENDATIONS

6.103 The commission agrees that serious efforts need to be made by the Magistrates' Court to ensure that the intervention order system is accessible and available to Indigenous Australians. The commission has recommended that these efforts should include comprehensive training on Indigenous issues for police, magistrates and registrars. Magistrates' Courts should also provide Indigenous support workers at courts when family violence matters are heard. The commission notes that an

717 Submission 57 (Victorian Aboriginal Legal Service).

718 Submissions 63 (Darebin Family Violence Working Group), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services). The commission has recommended training for registrars and magistrates on Indigenous issues at recommendations 34, 38 and for police at Recommendation 27.

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

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

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

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

723 Ibid. —the commission has discussed the production of material in a range of formats at paras 6.77–6.81.

724 Ibid. The commission has recommended that all applicants should be able to apply away from their local court at recommendations 73, 75.

Indigenous support worker is available at Melbourne Magistrates' Court and suggests this service be expanded to other courts. The commission has also made general recommendations in other parts of this report that will improve access to courts for Indigenous people.⁷²⁵

6.104 The commission also agrees that community education, such as information sessions, are essential for increasing awareness and access to the intervention order system. The Aboriginal Family Violence Prevention Legal Service provides essential information through community education sessions in regional areas, however, these are limited.

6.105 The commission also agrees that an active policy to recruit more Indigenous staff at courts would help make the court a less intimidating environment for Indigenous Australians. The commission acknowledges the efforts being made by the Magistrates' Court to recruit court staff from diverse backgrounds. For example, the court advertises positions in Indigenous-specific media and conducts recruitment talks at a diverse range of schools and universities. The commission recommends that the government fund an initiative of the Magistrates' Court and Victoria University to provide preparatory training for Indigenous applicants for the Trainee Court Registrar positions at Victoria University. The preparatory training will be used to ensure that the applicants have the skills, knowledge and support necessary to complete the Certificate IV in Government (Court Services).

! RECOMMENDATION(S)
46. Indigenous community agencies should be resourced to provide services to people seeking intervention orders.
47. Community information sessions on family violence and the law should be more widely available for Indigenous Australians, particularly in regional and rural areas.

725 These recommendations include: Indigenous-specific training for registrars, magistrates and police—recommendations 27, 34, 38; changes to the physical court environment—recommendations 56–60; changes to the rules of evidence—recommendations 140–147 and allowing applications away from the local court of the applicant—recommendations 73, 75.

! RECOMMENDATION(S)

48. The Department of Justice should investigate the most effective means of supporting provision of preparatory training for Indigenous applicants seeking to undertake the Certificate IV in Government (Court Services).

PEOPLE WITH DISABILITIES

6.106 People with disabilities also face specific obstacles to accessing the court to apply for an intervention order. As discussed in paragraphs 2.84–2.87, women with disabilities suffer from high rates of family violence. Violence against people with disabilities is often perpetrated by a carer, who may not come within the current definition of 'family member' under the Act. The commission has therefore recommended a change to the definition of family member to include carers at Recommendation 17. Aside from this definitional issue, people with disabilities experience other serious obstacles to accessing the intervention order system.

6.107 As discussed in Chapter 2, people with a cognitive impairment face particular barriers when dealing with the justice system, which the commission has previously reported in the context of sexual assault.⁷²⁶ These include not understanding that what has happened to them is wrong;⁷²⁷ complaints not being taken seriously by officials due to doubts over memory or credibility;⁷²⁸ complex courtroom language which makes it difficult for the person to understand the legal process; and the difficulty of dealing with cross-examination.⁷²⁹

Cross examination is when a witness is questioned by the lawyer from the opposing side.

726 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) ch 6. In this report the commission recommended that the Attorney-General consider giving the commission a reference to consider a broader review of the treatment of people with cognitive impairment in the justice system, as victims, perpetrators and witnesses: para 6.8.

727 Moria Carmody and Joan Bratel, 'Vulnerability and Denial: Sexual Assault of People with Disabilities' in Jan Breckenridge and Moria Carmody (eds) *Crimes of Violence: Australian Responses to Rape and Child Sexual Abuse* (1992) 212–213; Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*, Final Report of Stage One of the Sexual Offences Project (2003) 21.

728 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) above n 485, paras 3.29–3.43; Frohmader (2002) above n 376, 23. The Department of Victorian Communities noted that people with dementia face particular misconceptions about their credibility when attempting to report abuse: submission 78.

729 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) 261.

INTERNATIONAL STANDARDS

6.108 The rights of women with disabilities experiencing violence have been specifically recognised at the international level by various international instruments. The UN Declaration of the Elimination of Violence Against Women recognises that women with disabilities are especially vulnerable to violence.⁷³⁰ The Beijing Declaration and Platform for Action states that governments should ‘[e]nsure that women with disabilities have access to information and services in the field of violence against women’.⁷³¹ A UN Committee is currently drafting an international Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. The draft convention includes articles on freedom from violence and abuse, women with disabilities, and access to information. The draft convention specifically recognises the need to provide official public information in accessible formats and technologies.⁷³²

VIEWS FROM SUBMISSIONS

6.109 Submissions received by the commission outlined many barriers that are specific to people with disabilities. As an initial barrier, people with disabilities find it difficult to obtain information about family violence and the intervention order system in an accessible format.⁷³³ For example, information in braille, large print, audio or video format is not available.

6.110 Even if people are aware of the possibility of applying for an intervention order, it may be impossible for them to access outside assistance because they would have to rely on the person who is abusing them to do so.⁷³⁴ A lack of access to suitable accommodation if they leave the abuser is another serious obstacle preventing people

730 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) preamble.

731 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Declaration and Platform for Action, para 124(m).

732 The draft convention is available on the United Nations Enable website: *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* <www.un.org/esa/socdev/enable/rights/adhoccom.htm> at 2 December 2005.

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

734 Frohmader (2002) above n 376, 22.

with disabilities leaving violent relationships.⁷³⁵ Parents with disabilities also fear that a child protection order may be made if they report violence.⁷³⁶

6.111 Submissions also included numerous suggestions for how the court can be made more accessible for people with disabilities. These suggestions included:

- information strategies targeted at people with disabilities (eg providing information on intervention orders in braille, large print, audio or video format);⁷³⁷
- help lines for people with disabilities experiencing violence, including help lines using fax, text and email;⁷³⁸
- training for court staff on disability issues;⁷³⁹
- disability support workers should be available at courts where family violence matters are heard;⁷⁴⁰
- increased availability of appropriate accommodation services for people with disabilities;⁷⁴¹
- increased availability of support services for people with disabilities, including legal support;⁷⁴²
- improved physical accessibility of courts.⁷⁴³

COMMISSION'S RECOMMENDATIONS

6.112 Measures must be taken to improve access to the intervention order system for people with disabilities. The commission agrees that training for magistrates and court

735 Stephen Gilson, et al, 'Redefining Abuse of Women with Disabilities: A Paradox of Limitation and Expansion' (2001) 16 (2) *AFFILIA* 220, 222; Submissions 41 (Victoria Legal Aid), 51 (Villamanta Legal Service), 79 (Department of Human Services).

736 Submission 51 (Villamanta Legal Service).

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

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

739 Submissions 51 (Villamanta Legal Service), 63 (Darebin Family Violence Working Group), 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services). The commission recommends training for magistrates and registrars on disability issues at recommendations 34, 38.

740 Submission 51 (Villamanta Legal Service).

741 Submissions 41 (Victoria Legal Aid), 51 (Villamanta Legal Service).

742 Submissions 41 (Victoria Legal Aid), 51 (Villamanta Legal Service), 74 (Women's Legal Service Victoria).

743 Submission 49 (Domestic Violence and Incest Resource Centre). The commission makes recommendations for improved physical accessibility of courts at Recommendation 63.

staff on disability issues is essential and has recommended that training for magistrates and registrars include disability issues at recommendations 34 and 38. It is also essential that specialist disability services have sufficient resources to provide support to people with disabilities who are applying for intervention orders.

6.113 The commission is also concerned that women with disabilities have limited access to information on family violence and the intervention order system. The commission therefore recommends that any information materials developed are also made available in braille, large print and audio tape. The commission has recommended at Recommendation 42 that the information provided by the Magistrates' Court is reviewed and provision of information in a range of formats is explored.

! RECOMMENDATION(S)

49. Specialist disability community agencies should be resourced to provide services to people seeking intervention orders.
50. Any materials developed about the intervention order system should be made available in braille, large print and audio tape formats. This information should be available in Magistrates' Courts, police stations and community agencies such as support services, libraries and health centres.

IMMIGRANT WOMEN

I don't know what's going on, I don't know the law ... I nearly have a nervous breakdown. There are so many courts. I had to go to court, but I just sat there and had to listen to [my partner who was representing himself] abuse me. I just don't know what it's all about and no-one can explain it to me.⁷⁴⁴

6.114 Immigrant women, particularly those who have recently arrived in Victoria, face specific obstacles in accessing the intervention order system. As an initial barrier, women from migrant backgrounds may have varied understandings about what behaviour constitutes family violence.⁷⁴⁵ There is also a lack of culturally specific and

⁷⁴⁴ Young (2000) above n 415, 71.

⁷⁴⁵ Partnerships Against Domestic Violence, *Attitudes to Domestic and Family Violence in the Diverse Australian Community: Cultural Perspectives* (2000) 36; Edna Erez, 'Immigration, Culture Conflict and Domestic

relevant community education about family violence and how to obtain assistance and support.⁷⁴⁶ This includes lack of awareness about legal options available to address family violence, including the visa regulations that are relevant where family violence has occurred and the victim is not a permanent resident of Australia.⁷⁴⁷

6.115 Migrant women may be further discouraged by the practical implications of accessing the system. For example, limited access to interpreters is a serious obstacle in accessing information and other forms of support.⁷⁴⁸ As the provision of interpreters is also relevant to those using non-verbal languages such as sign language, interpreters will be discussed separately in the next section. The Australian legal system in general, and the intervention order system in particular, are alien and unfamiliar to many migrant and refugee women.⁷⁴⁹ Issues relating to contact with the police have been outlined at paragraphs 5.70–5.74, therefore, this section will deal with access to the court directly.

INTERNATIONAL STANDARDS

6.116 The rights of immigrant women experiencing violence have been specifically recognised at the international level. The UN *Declaration of the Elimination of Violence Against Women* and the Beijing Platform for Action recognise that migrant women are especially vulnerable to violence.⁷⁵⁰ The Beijing Platform for Action provides that governments should '[e]stablish linguistically and culturally accessible services for migrant women and girls'.⁷⁵¹

Violence/Women Battering' (2000) 2 (1) *Crime Prevention and Community Safety: An International Journal* 27, 27–29; Department of Justice, *Cultural Diversity Project* (2003) 103–104.

746 Partnerships Against Domestic Violence (2000b) above n 745, 40, 41; Department of Justice, *Cultural Diversity Project* (2003) above n 745, 105.

747 Erez (2000) above n 745, 31; Anita Raj and Jay Silverman, 'Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence' (2002) 8 (3) *Violence Against Women* 367, 375.

748 Access to interpreters is discussed at paras 6.122–6.137.

749 Victorian Law Reform Commission (2004) above n 8, para 6.18.

750 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) preamble; United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 116.

751 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 125(b).

VIEWS FROM SUBMISSIONS

6.117 Submissions outlined a number of obstacles for women from migrant communities to accessing the intervention order system.⁷⁵² These obstacles include a lack of awareness about how the legal system deals with family violence, limited access to information,⁷⁵³ and a lack of culturally appropriate support services.⁷⁵⁴ Groups from some countries, particularly refugees, may fear authorities such as courts due to bad experiences in their home countries.⁷⁵⁵ Women who are not permanent residents of Australia may be threatened by their violent partner that if they take any action their visa application will be rejected.⁷⁵⁶ The Federation of Community Legal Centres told the commission ‘[s]ome court staff and magistrates lack insight and understanding of cultural issues resulting in women disengaging from the court process’.

6.118 Submissions made suggestions for how the intervention order system can be made more accessible to migrant women, particularly those from newly arrived communities:

- increasing the amount of information available about family violence and the intervention order system—this could include translated information brochures available at courts and community agencies⁷⁵⁷ and community education⁷⁵⁸ (this type of information is particularly crucial for those who have recently arrived in Victoria, including asylum seekers);⁷⁵⁹
- improved cultural awareness training for magistrates and court staff, in particular about barriers that immigrant women may face when attempting to access the intervention order system;⁷⁶⁰

752 Obstacles raised by submissions that relate to interpreters are discussed separately at paras 6.125–6.132.

753 Submissions 2 (Vietnamese Community in Australia), 64 (Federation of Community Legal Centres (Vic)).

754 Submission 41 (Victoria Legal Aid).

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

756 Submissions 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre).

757 Submissions 39 (Royal Women’s Hospital), 41 (Victoria Legal Aid), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities).

758 Submissions 41 (Victorian Legal Aid), 53 (Women’s Electoral Lobby, Victoria), 54 (Andrew Compton), 78 (Department for Victorian Communities).

759 Submission 39 (Royal Women’s Hospital).

760 Submissions 41 (Victorian Legal Aid), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services). This

- increasing culturally specific support services for victims of family violence, particularly housing services;⁷⁶¹
- access to specialist workers at courts for immigrants.⁷⁶²

COMMISSION'S RECOMMENDATIONS

6.119 It is essential that women from migrant backgrounds have access to information to explain the intervention order system. The commission recommends that information should be available in a range of languages. Aside from the translation of the English material, brochures in other languages should also include information on access to interpreters and access to immigration legal advice. These information brochures should be available at Magistrates' Courts and police stations, and should also be distributed widely to community organisations such as support services, libraries and health clinics.

6.120 To improve knowledge about the intervention order system, the commission recommends that a community education strategy be developed for specific migrant communities. This strategy could involve information sessions by community legal centres in conjunction with culturally specific services. This will ensure that people with limited literacy also have access to information about the system, and will assist service providers to advise on the legal options available.

6.121 The commission also agrees that cultural awareness training for magistrates and registrars is essential to improving migrant women's experience of court, and we have recommended this at recommendations 34, 38. It is also essential that culturally-specific support services are adequately funded in order to provide advice and support to immigrants seeking access to the intervention order system.

suggestion was also made by community participants and participants from within the court system in a 2003 study on diversity conducted by the Department of Justice: Department of Justice, *Cultural Diversity Project* (2003) above n 745, 83. The commission recommends training in migrant issues for magistrates and registrars at recommendations 34, 38.

761 Submissions 41 (Victorian Legal Aid), 74 (Women's Legal Service Victoria).

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

! RECOMMENDATION(S)

51. Any materials developed on the intervention order system should be made available in a variety of community languages. Written information in other languages should include extra information on access to interpreters and access to immigration legal advice for those who are not permanent residents. This information should be available in Magistrates' Courts, police stations and community agencies such as support services, libraries and health centres.
52. A community education strategy about the intervention order system, including the role of police, should be developed for migrant communities. This could involve education forums run by community legal centres and other community agencies, in conjunction with culturally specific services.
53. Specialist community agencies should be resourced to provide services to immigrants seeking intervention orders.

ADEQUATE INTERPRETER SERVICES IN COURTS

6.122 Access to interpreters is crucial for people who do not speak English or who communicate in a non-verbal language such as sign language. The Magistrates' Court of Victoria Family Violence and Stalking Protocols provide:

- If it is apparent that the person cannot speak English at the interview with the registrar, the registrar must 'attempt to obtain a qualified interpreter or utilise the services of the telephone interpreter service. Children must *not* be used as interpreters'.⁷⁶³
- Before the hearing, the registrar is responsible for organising an interpreter. The protocols state that 'if both parties require an interpreter it is usually preferable, especially in contested matters, that two are provided ... Where one interpreter is available, it must be explained to all parties and the interpreter, that the interpreter is an independent person responsible to the Court, not the parties'.⁷⁶⁴

763 Magistrates' Court of Victoria (2003) above n 575, para 4.2 (emphasis in original).

764 Ibid paras 16.1.1, 16.1.2.

6.123 There are significant problems with the provision of interpreters for family violence matters and this severely impacts on access to justice for people who do not speak English.

VIEWS FROM SUBMISSIONS

6.124 Submissions were overwhelmingly concerned about inadequate arrangements for interpreters in family violence matters. Problems experienced related to two main issues—the availability of interpreters and their professionalism and independence.

Availability of Interpreters

6.125 Access to interpreters was described by some organisations as ‘difficult’, ‘limited’ and ‘problematic’.⁷⁶⁵ Many submissions noted problems with access to interpreters.⁷⁶⁶ In some areas it is common practice for registrars to book an interpreter for only half the day.⁷⁶⁷ This means the interpreter sometimes needs to leave before the case is finished. It is also common for only one interpreter to be booked for both parties, despite the protocols stating that separate interpreters should be booked.⁷⁶⁸ In other areas, interpreters in the relevant languages are just not available, particularly in languages of the newly arrived communities.⁷⁶⁹ The Murray Mallee Community Legal Service told the commission that in its area approximately 8.5% of the population do not speak English at home, but there are no court interpreters in the area:

Locally there is only one Turkish interpreter available for court interpreting, and they are not qualified to the level required for legal interpreting. We have difficulty obtaining on-site qualified interpreters in all other languages, most frequently Arabic and Vietnamese. We regularly witness and experience great difficulty in securing on-site interpreters,

765 Submissions 28 (Murray Mallee Community Legal Service), 39 (Royal Women’s Hospital), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic), 72 (Victoria Police).

766 Submissions 28 (Murray Mallee Community Legal Service), 39 (Royal Women’s Hospital), 40 (Whittlesea Domestic Violence Network), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre), 72 (Victoria Police), 74 (Women’s Legal Service Victoria).

767 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre), 74 (Women’s Legal Service Victoria).

768 Submissions 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 70 (Asylum Seeker Resource Centre), 74 (Women’s Legal Service Victoria).

769 Submissions 61 (Broadmeadows Community Legal Service), 72 (Victoria Police).

resulting in significant stress and confusion for applicants and their families who do not speak English.

6.126 The limited availability of interpreters also means that sometimes applications are not made at all or are withdrawn;⁷⁷⁰ friends or family are used as interpreters instead of professionals;⁷⁷¹ people do not understand what has happened as the interpreter leaves early;⁷⁷² and people do not receive adequate legal advice before or after the case as there is no interpreter available to explain.⁷⁷³

6.127 The Murray Mallee Community Legal Centre provided the following example where the lack of availability of an interpreter led to the withdrawal of an application for an intervention order:

A Vietnamese-speaking applicant ... in a contested application was required to provide her own interpreter—an unqualified friend whose standard of English was not sufficient to conduct the hearing. Both the applicant and interpreter were sworn in, and this was so intimidating for the interpreting friend that she refused to return to assist after the matter was stood down.

6.128 Submissions also noted that interpreters are often not provided where the registrar thinks it is not necessary, despite the applicant requesting an interpreter.⁷⁷⁴ The Women's Legal Service Victoria told the commission that this is particularly common where there is no apparent dispute:

For example, we have had frequent experiences of non-English speaking women who attend court with the respondent to seek a variation or revocation of their intervention order, just being asked by the magistrate in a loud voice in the presence of the respondent, 'do you understand?' If they confirm that they understand, sometimes even via the

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

771 Submissions 28 (Murray Mallee Community Legal Service), 39 (Royal Women's Hospital), 74 (Women's Legal Service Victoria).

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

773 Submissions 61 (Broadmeadows Community Legal Service), 74 (Women's Legal Service Victoria).

774 Submissions 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria); CALD Advisory Committee Meeting, 19 October 2005. Participants in the Department of Justice cultural diversity project also commented on this issue. Its report states 'Anecdotal evidence from focus groups indicates that on numbers of occasions, individuals who were deemed to have 'enough' English were denied access to interpreting services in the courts. The decision about whether to have an interpreter was not vested with the client but with the courts themselves. The fear this inspires, both in the individuals who are left wondering what is happening to them and in the communities which they belong, is significant.' Department of Justice, *Cultural Diversity Project* (2003) above n 745, 52.

'interpretation' of the respondent, the order [for variation or revocation] is generally made without an interpreter being requested.

6.129 Victoria Legal Aid was the only organisation which did not believe that access to interpreters is a problem, unless there is late notice to the court.

6.130 Submissions suggested improvements to the availability of interpreters, such as:

- a notice system, so that the court knows whether a matter will be contested and can therefore book an interpreter for the whole day if necessary⁷⁷⁵—the commission recommends a notice system at recommendations 83–87;
- interpreter training programs in regional areas where there are non-English speaking communities, so that potential interpreters do not need to move to Melbourne to become qualified by the National Accreditation Authority for Translators and Interpreters;⁷⁷⁶
- a strategic plan for the provision of interpreters in family violence cases;⁷⁷⁷
- increased funding so that court interpreters can be booked for the whole day;⁷⁷⁸
- courts to have on-call interpreters, particularly those in areas with large non-English speaking communities;⁷⁷⁹
- recruitment of interpreters in less common languages.⁷⁸⁰

Professionalism and Independence of Interpreters

6.131 Submissions were also concerned about the quality of interpreting services. Organisations expressed concerns that interpreters do not interpret accurately, sometimes because they are trying to resolve the dispute between the parties.⁷⁸¹ Interpreters may be male leaders within their community who feel it is their role to

⁷⁷⁵ Submission 70 (Asylum Seeker Resource Centre).

⁷⁷⁶ Submission 28 (Murray Mallee Community Legal Service). The Victorian government funded Goulburn Ovens Institute of TAFE in Shepparton to provide an interpreting course for 18 Arabic–English speakers in 2002. A language accreditation training course will be offered in Geelong in 2005–06. The Department of Human Services and the Office of Multicultural Affairs may provide occasional training for interpreters in regional areas.

⁷⁷⁷ Submission 70 (Asylum Seeker Resource Centre); CALD Advisory Committee Meeting, 19 October 2005.

⁷⁷⁸ Submissions 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities).

⁷⁷⁹ Submission 79 (Department of Human Services).

⁷⁸⁰ Submission 74 (Women's Legal Service Victoria).

⁷⁸¹ Submissions 2 (Vietnamese Community in Australia), 27 (Robinson House BBWR), 74 (Women's Legal Service Victoria).

mediate the ‘dispute’ and encourage the woman to return to her partner.⁷⁸² This demonstrates a fundamental misunderstanding of the role of an interpreter in court. The Women’s Legal Service Victoria gave the following example:

Our client ... was from the Horn of Africa, attended court seeking an intervention order against her husband, who was from the same Horn of Africa country. Only one interpreter was booked. On several occasions when seeking instructions and giving advice to our client we became concerned that the interpreter was not directly interpreting. Upon questioning him in relation to this he informed us that he was an elder in the community and that it would be better if [she] resolved her concerns within the community and that he was trying to facilitate this. [She] ultimately withdrew her application for an intervention order despite a long history of violence.

6.132 Submissions were also concerned that where only one interpreter is provided for both parties, problems of perceived or actual bias of the interpreter are exacerbated.⁷⁸³ Particularly in small communities, the interpreter may know one or both of the parties.⁷⁸⁴ The Federation of Community Legal Centres noted that ‘many of the court interpreters that are used are of incorrect dialect, ethnicity or gender—resulting in mistrust and communication breakdown’.

6.133 Submissions made suggestions to improve the professionalism and independence of interpreters:

- mandatory provision of separate interpreters where both parties require one;⁷⁸⁵
- requiring interpreters to undergo family violence training;⁷⁸⁶

782 Submission 27 (Robinson House BBWR).

783 Submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services).

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

785 Submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 39 (Royal Women’s Hospital), 41 (Victoria Legal Aid), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services). The Magistrates’ Court told the commission that in theory it would support mandatory provision of separate interpreters, but that this would require a significant increase in budget.

786 Submissions 40 (Whittlesea Domestic Violence Network), 54 (Andrew Compton), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services), 86 (Magistrates’ Court of Victoria). Participants in the Department of Justice cultural diversity project also felt that specialised training was needed for interpreters working in technical fields such as the courts: Department of Justice [Victoria] (2003) above n 745, 47.

- training for court staff about interpreting issues so they are aware of the serious problems that can arise where inappropriate interpreting arrangements are made;⁷⁸⁷
- provision of independent interpreters from interstate by telephone or video who do not know the parties;⁷⁸⁸
- interpreters should be seated away from the parties to show independence;⁷⁸⁹
- interpreters should always be required to swear an oath or affirmation regarding their obligation to interpret accurately, particularly where one interpreter is provided for both parties;⁷⁹⁰
- greater capacity to provide female interpreters for women;⁷⁹¹
- employment of interpreters by a government agency or department, or the court itself, rather than obtaining interpreters through outside agencies;⁷⁹²
- an accreditation process for court interpreting that is not only about accredited level of language ability, but also an understanding of legal and ethical obligations in the area of court interpreting;⁷⁹³
- planning for the provision of legal interpreters from projected migration demographics.⁷⁹⁴

COMMISSION'S RECOMMENDATIONS

6.134 Inappropriate interpreting facilities are creating a serious barrier to accessing the protection of the intervention order system for people who do not speak English. This is a barrier to justice for a significant proportion of the Victorian population and must be urgently addressed.

6.135 Many of the useful suggestions for change made in submissions will be difficult to implement without an overall plan by the government for the provision of interpretation services in the Magistrates' Court. The commission therefore

787 Submission 70 (Asylum Seeker Resource Centre).

788 Submission 39 (Royal Women's Hospital).

789 Submission 30 (Violence Against Women Integrated Services).

790 Submission 74 (Women's Legal Service Victoria); CALD Advisory Committee Meeting, 19 October 2005.

791 Submission 41 (Victoria Legal Aid), 74 (Women's Legal Service Victoria).

792 CALD Advisory Committee Meeting, 19 October 2005.

793 CALD Advisory Committee Meeting, 19 October 2005. The Magistrates' Court also suggested that interpreters should receive training in court procedures.

794 CALD Advisory Committee Meeting, 19 October 2005.

recommends a broader review of the provision of interpreters be conducted, with a view to developing a plan for the provision of suitably qualified, professional and appropriate interpreters in courts. This review should consider:

- whether interpretation services should be provided by a government department or service rather than by outside, unregulated agencies;
- how the accreditation of court interpreters can be regulated to ensure appropriate ethical standards and knowledge of court processes, rather than simply language ability;⁷⁹⁵
- how to develop a strategy for the recruitment of a wider range of interpreters, particularly women, those from newly arrived communities and those living in regional areas with significant non-English speaking populations;
- how to ensure the availability of interpreters in Magistrates' Courts, including the possibility of in-house or on-call interpreters in particular languages for courts with a large population of non-English speakers from a particular language group.

6.136 In the absence of a plan by government for the provision of interpreters, the Magistrates' Court can also take measures to improve the situation. The commission recommends that the Magistrates' Court review its Family Violence and Stalking Protocols. In particular, the commission recommends that new provisions in the protocols should provide:

- that where both parties need interpreters, separate interpreters *must be* provided, unless they are not available—this is in contrast to the current provision which states that separate interpreters are 'preferable';
- that where only one interpreter is used for both parties, the interpreter should take all possible steps to demonstrate independence, such as not sitting with one of the parties;
- that interpreters must always be required to swear an oath or affirmation before the case commences, repeating their obligation to interpret accurately⁷⁹⁶ —

795 Some interpreters are members of the Australian Institute of Interpreters and Translators. Those who are members must abide by the Institute's Code of Ethics, which covers professional conduct, confidentiality and impartiality: Australian Institute of Interpreters and Translators, *AUSIT Code of Ethics* <<http://server.dream-fusion.net/ausit2/pics/ethics.pdf>> at 24 November 2005.

796 Although the requirement to swear an oath or affirmation is not included in legislation, the form of the oath or affirmation is set out in the *Evidence Act 1958* pt IV.

although this is a requirement under the common law in Victoria, it is not consistently adhered to.⁷⁹⁷

6.137 The commission also agrees that magistrates and registrars should receive training about the provision of interpreting services as part of their training on family violence issues.

! RECOMMENDATION(S)

54. The government should conduct a review of the provision of interpreting services in the Magistrates' Court, with a view to developing standards for legal interpreting in family violence matters and the provision of and availability of interpreting services.

55. The Magistrates' Court should consider revision of the Family Violence and Stalking Protocols on the provision of interpreters. Specifically, the protocols should provide:

- that where both parties need interpreters, separate interpreters must be provided unless they are not available;
- that where only one interpreter is used for both parties, the court should ensure that interpreters behave consistently with their obligation of independence (eg by not sitting with one of the parties);
- the court should ensure that interpreters always swear an oath or affirmation regarding their obligation to interpret accurately before they interpret in the court.

6.138 Aside from the obstacles discussed, the commission also believes that physical access to the Magistrates' Court should be improved.

⁷⁹⁷ The Uniform Evidence Act (applied in the Commonwealth, NSW, and Tasmania) includes a requirement for interpreters to act on oath or affirmation: *Evidence Act 1995* (Cth) s 22. The commission is currently conducting a review of the Uniform Evidence Act and will be making recommendations on how the Act can be implemented in Victoria. It is therefore possible that the requirement for interpreters to swear an oath or affirmation will soon be introduced in legislation in Victoria as a result of the implementation of the Uniform Evidence Act.

SAFETY IN COURTS

6.139 Safety in courts is an important issue in making sure that the justice system works effectively, but particularly for family violence matters. In consultations and submissions, many victims said they feared for their safety in the court building when seeking an intervention order. They reported feeling unsafe when entering or exiting the courtroom, when waiting for their matter to be heard, or in the courtroom itself. They may have also experienced high levels of discomfort when making an application for an intervention order in a public place. The courtroom environment can also be particularly unwelcoming for disabled and Indigenous applicants, and for children.

6.140 These safety fears and other environmental issues need to be taken seriously for several reasons. First, fears of experiencing violence in the courtroom environment are real. Submissions and other evidence report a wide range of violent and threatening behaviour which has occurred in courtrooms, indicating that perpetrators will and do use any opportunities to perpetuate violent and controlling behaviour. Workers in the courtroom, such as solicitors, can also be involved in this dynamic as active adjuncts of the perpetrator's violent or threatening behaviour, as targets of the perpetrator's behaviour, or through simply being exposed to this violence through being with their client:

Many times we have sat with a client waiting for an I.O. to be obtained (and this can be many hours sometimes in local courts) and we have loud comments, fingers pointed to the head, staring down, and other behaviours to try and intimidate the client and their workers.⁷⁹⁸

[The] [p]arties were called into the courtroom. Only the bench clerk, applicant, respondent and his barrister were in the courtroom. After waiting some minutes the bench clerk left the room to get the magistrate. During this time the respondent's barrister questioned her about family law matters. This barrister had been aggressive in his conduct towards her earlier and she had refused to discuss any issues with him. This intimidation in the courtroom had been very distressing. At a time when she was trying to muster up all her strength to cope with the court hearing this incident had totally unnerved the applicant. A support worker had come into the courtroom and saw her distress and suggested that she wait outside until the magistrate arrived.⁷⁹⁹

798 Submission 27 (Robinson House BBWR).

799 Submission 61 (Broadmeadows Community Legal Service).

I felt intimidated by his friends at the court. They were swearing at me in the hall. I told my barrister. Rod and his friends waited out the front. We were let out the back. It was me and the worker from the refuge and we were scared. Then the second day, another worker came with me. We were scared too. He was sitting out the front just out of jail with his friends. There were fifteen of them. There should be more protection. This time I'll ask for protection or I'm not going.⁸⁰⁰

6.141 Secondly, it is important to appreciate these safety issues from the perspective of the parties involved in the process, and with an appreciation of the dynamics of family violence. For some victims, fear of the perpetrator is so acute that the potential of being in close proximity to them when in the courtroom makes them extremely anxious. For example, one woman who had been in an abusive marriage for 20 years told us that, when finally seeking an intervention order, knowing the perpetrator was travelling to the courtroom and was then in the courtroom, made her so anxious that she was unable to function in court: 'I couldn't even remember my own name'.

6.142 Going to court is a daunting experience for anyone, but going to court to seek an intervention order against a perpetrator who may have threatened you with extreme harm, or even death on separation, can be terrifying. Also, doing something against the wishes of someone who has had an extreme degree of control over you can take great personal strength and energy, which will only be lessened in a court environment which is inimical to victims' perspectives and circumstances. The reality and seriousness of these safety issues must be sufficiently taken into account when arrangements are made for family violence matters to be heard in court.

6.143 Failing to consider these issues can mean that justice system processes can contribute to, rather than lessen, a victim's potential exposure to violence. As the above quote suggests, a lack of safety and fear of violence in court also means that victims, and other witnesses, may not be able to participate as effectively in the justice process. Finally, it is also unacceptable for solicitors and other court staff to be exposed to threats, harassment and violence when working. The safety of such workers was a concern in several submissions.

CURRENT SAFETY PROVISIONS

6.144 Safety provisions vary between courts. Some courts were said to provide excellent security and have facilities that maximise the sense of safety of people seeking

800 Debra Parkinson, et al (eds) *A Powerful Journey: Stories of Women Leaving Violent Situations* (2004) 47.

protection, but other courts do not. Consultation participants cited regional courts as being particularly poor.

6.145 The Family Violence Court Division has instituted a number of safety features. There was a suggestion in some submissions that the family violence courts could be seen as providing 'best practice' in minimum safety mechanisms, and thus a model for other courts' safety practices to be based upon.

The family violence courts ... should set the benchmark for access and security of women and children.⁸⁰¹

We recommend that the minimum standards for safety that are determined for the Family Violence Courts be accepted as essential across all courts.⁸⁰²

6.146 There are Magistrates' Court protocols which registrars can implement if they are aware that a party in a family violence matter has already been involved in an incident in court involving violence, or has prior orders for violence.⁸⁰³ These measures include contacting the local police and, if in metropolitan Melbourne, the Protective Security Group, and communicating the concern and any threat or act of violence within the court building to the chief executive officer and registrar in charge of the relevant court region.

SEPARATE WAITING AREAS

6.147 The most frequently raised concern was that a lack of separate waiting space in some courts exposes applicants to abuse by respondents, or by their family or friends, while they are waiting for their matter to be called. Many submissions commented on this:

It is important that separate facilities including exits are incorporated in all designs of new Magistrate Court Buildings and where feasible modification to existing courts should be undertaken.⁸⁰⁴

Courts should have provision of at least two waiting areas so that people seeking protection can wait in a separate space, free from intimidation.⁸⁰⁵

801 Submission 79 (Department of Human Services).

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

803 Magistrates' Court of Victoria (2003) above n 575, para 8.1.

804 Submission 79 (Department of Human Services).

805 Submission 45 (Rochelle Campbell, women's health resource worker).

Court waiting areas were considered inappropriate as there are not separate areas and it was not possible for parties to avoid each other there. Strategies used to attempt to deal with these situations included women waiting in the toilets or sitting in their car until going into court.⁸⁰⁶

Court safety and security were of major concern to those consulted. While some described the courts as 'uncomfortable', others stated that they were 'potentially dangerous'. It was noted that clients can be scared and intimidated when they come to court and its layout and provisions do not enhance feelings of safety and security ... Those consulted described scenes that they had witnessed at court including parties yelling at each other and brawls related to matters being dealt with in court, taking place in and around the courthouse.⁸⁰⁷

Applicants upon arriving at Court need to be immediately directed to a separate waiting area.⁸⁰⁸

Separate waiting areas or a designated 'safe area' must be allocated to ensure applicants feel safe at court.⁸⁰⁹

Have a room clearly labelled 'Waiting Room—for applicants for Intervention Orders—You may wait here if it will help you feel safe' ... Need private room or booth in which to see Clerk of Courts to fill out [application] form and have it explained.⁸¹⁰

It seems obvious that all courts should have facilities for separate waiting areas for the concerned parties.⁸¹¹

Any court environment is intimidating enough for those not used to it, without having to share spaces with those who have assaulted or bullied you in the past.⁸¹²

There were a limited number of interview rooms, most of which had been taken over for other purposes, and so there were few places that solicitors can consult their clients. The safety of solicitors dealing with family law matters was also noted as a concern.⁸¹³

806 Submission 69 (Victorian Community Council Against Violence).

807 Submission 69 (Victorian Community Council Against Violence).

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

809 Submission 61 (Broadmeadows Community Legal Service).

810 Submission 25 (Barbara Roberts).

811 Submission 20 (Mrs EF Belsten).

812 Submission 53 (Women's Electoral Lobby, Victoria).

813 Submission 69 (Victorian Community Council Against Violence).

Separate or 'safe' waiting areas received overwhelming support from users of the system. Such separate spaces also need to include places where victims can meet with their legal representatives.

! RECOMMENDATION(S)
<p>56. All courts dealing with family violence matters should have separate waiting areas in which it is possible to ensure the safety of an applicant waiting for a matter to be heard.</p> <p>57. The availability of separate and safe waiting areas should be brought to the attention of applicants wherever possible before they attend the courtroom, and immediately on their arrival at the courtroom.</p>

ENTERING AND EXITING COURTS

6.148 The desire for separate and safe waiting areas also extended to separate and safe entrances, and particularly exits, to the courtroom. This was mentioned in some of the submissions cited.

6.149 Separate and safe exits are in some circumstances created not only through the geography of the building but also by the helpful actions of court staff:

At the Shepparton Magistrate's Court, there existed an informal practice of alerting the court to potentially dangerous situations, and when alerted, court and police staff were considered to be helpful in such situations. The practice involved taking one party out an insecure back entrance through a car park while the other party was held up 'chatting with police officers'.⁸¹⁴

6.150 However, most submissions suggested a more formalised version of ensuring such safe exits of applicants, specifically through providing them with sufficient time and space to leave separately from the respondent. This could also be engineered in the way that orders are made.

814 Submission 69 (Victorian Community Council Against Violence).

The respondent should be required to remain within the court surroundings for at least 10 minutes after the finish of proceedings, enabling the applicant to leave without harassment.⁸¹⁵

When orders are finalised, Registrars must ensure that applicants receive their copy first and given adequate time to leave the court before serving the respondent with their copy.⁸¹⁶

! RECOMMENDATION(S)

58. Wherever possible, there should be at least one separate and safe entrance and exit from the courtroom for the use of applicants in fear of their safety.

SECURITY STAFF

6.151 Overall, there was a strong call in submissions for greater security measures in courts. Many of these measures included an extended commitment and engagement to safety measures by court staff. This included a greater visible and effective presence of security staff and/or police so they were not only at the entrance to the courthouse, but also spread within it. Sufficient security staff were seen to be needed to adequately respond to violent incidents when they occur. Scanning for weapons was also seen as important. A number of submissions mentioned the need for first aid facilities to be available on site for use in emergencies.

All courts should have [Protective Service Officers] specifically for intervention order matters who not only sit in the courtroom when matters are being heard but are visible in the waiting areas.⁸¹⁷

There should be a constant visible presence by protected [*sic*] services in foyers/waiting areas (not just in security rooms or at entry points). Remote waiting/interviewing facilities (such as those at the Melbourne Children's Court) would also be helpful.⁸¹⁸

Security systems, including equipment to scan for weapons should be available at all courts and an adequate number of security staff need to be provided. Even at Melbourne

815 Submission 27 (Robinson House BBWR).

816 Submission 61 (Broadmeadows Community Legal Service).

817 Submission 61 (Broadmeadows Community Legal Service).

818 Submission 41 (Victoria Legal Aid).

Magistrates' Court, which has one of the busiest intervention order lists in Victoria, security guards are often not readily available when incidents occur.⁸¹⁹

PRIVATE AREAS FOR APPLICATIONS

6.152 There were concerns about the safety of certain places in the courthouse, specifically the place that applications are made, and the courtroom itself. In many courts applications are made in a public place. This is not only unsafe, but the application requires victims to list the reasons they need an order, which will require the disclosure of the family violence they have suffered. For some people, this constitutes the disclosure of many years of abuse, some of which may be of a particularly sensitive nature (eg sexual violence). A public place is obviously not the most appropriate venue for such a process. This was supported in submissions:

The application process, conducted in public areas, is unsafe and inappropriate in this context.⁸²⁰

Details should not be taken at the general counter.⁸²¹

When an applicant is first being interviewed by a registrar, the interview should take place in a separate, private room. In the Federation's experience, it is extremely distressing and humiliating for victims of family violence to have to relive their experiences at the "Inquiries" counter.⁸²²

There needs to be a private area in all courthouses to apply for intervention orders. The commission has also recommended at recommendations 34, 38 and 61 that all court staff working with family violence cases have specialised training, which should cover safety issues.

! RECOMMENDATION(S)
59. Applications for intervention orders should not be required to be made at the inquiries desk or other public spaces in court buildings.

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

820 Submission 69 (Victorian Community Council Against Violence).

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

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



RECOMMENDATION(S)

60. A private space should be made available for inquiries and applications for intervention orders.

IN THE COURTROOM

6.153 The other space that gained particular attention was the courtroom itself. First, giving evidence can be a particularly stressful experience, as discussed in Chapter 11. Submissions criticised the way this is done in the traditional courtroom:

The court set up in taking evidence from extremely stressed applicants needs review—the witness box, its placement and its symbolism in our experience adds enormous stress to applicants as well as the manner in which the oath is explained and administered. Thought needs to be given as to the way evidence on oath is received without in any way diminishing the serious nature of witness evidence. More information needs to be readily available about remote witness facilities to applicants and to lawyers.⁸²³

The power given to the Family Violence Court Division to exclude certain people from the courtroom whilst witnesses are giving evidence ... may also assist in improving safety of people in need of protection and witnesses and this should be extended to the wider Magistrates' Court once evaluated.⁸²⁴

Applicants should not be required to give evidence before a full Court dealing with other matters.⁸²⁵

6.154 Secondly, it seems that sometimes the applicant and respondent are left in the courtroom unattended by anyone except their own legal representatives. This has been used as an opportunity to harass the applicant and can be the source of great fear:

For many women having to face the perpetrator of the violence and be in the same room as him is extremely stressful ... under no circumstances should parties be left in a courtroom on their own.⁸²⁶

6.155 Many submissions also raised the need for training of court staff about safety and family violence matters:

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

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

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

826 Submission 61 (Broadmeadows Community Legal Service).

[N]ew court staff are not always aware of procedures that have [been] put in place ... It is therefore paramount that *all* court staff have *ongoing* training relating to family violence, safety issues and court protocols.⁸²⁷

Courteous and helpful court staff can alleviate some anxiety and put people at ease in the formal environment and should possess a high level of interpersonal and communication skills.⁸²⁸

It seems that many of the safety recommendations suggested will be achieved not only through adjustments and additions to existing facilities, but also through a change in the knowledge, attitudes and behaviour of the people within those spaces. (We discuss training matters elsewhere). Clearly, the courtroom space can be transformed by the actions of staff. At the forefront of all action must be a prioritisation of victims' safety requirements.

! RECOMMENDATION(S)
<p>61. Training of court staff should include awareness raising about victims' experiences at court, and perceptions of the courthouse space and courthouse processes. Private security staff should also be included in this training process.</p>
<p>62. Awareness raising provides the basis for training on safety considerations in court.</p>

MARGINALISED GROUPS

6.156 Making the court safe will require different approaches for different people. Indigenous people may experience additional discomfort and anxiety in a courtroom where there are no Indigenous staff. The commission has recommended efforts to increase the number of Indigenous court staff at Recommendation 48. Existing court staff also need to have cultural awareness training,⁸²⁹ as recommended at recommendations 34 and 38.

827 Submission 61 (Broadmeadows Community Legal Service), emphasis in original.

828 Submission 45 (Rochelle Campbell, women's health resource worker).

829 Ibid.

PEOPLE WITH DISABILITIES

6.157 There also needs to be greater efforts to ensure the access of people with disabilities to the courts. Given the high levels of family violence suffered by people with disabilities, and the many barriers that prohibit them from accessing the justice system, it is simply not acceptable to still have court environments which do not provide sufficient access for them. Also, as we are recommending an expansion of the definition of family member to cover people with disabilities and their carers, there could well be an increase in people with disabilities accessing the courts, which will need to be adequately catered for.

As part of the Department of Justice, the courts should be responsible for the development and implementation of individual Disability Action Plans to ensure that people with a disability are not discriminated against within the court system. These plans should encompass all areas of accessibility from physical access, access to information through to employment issues. If the plans are well developed, it is hoped that the implementation of them would assist in eliminating barriers for people who have a disability. Villamanta further believes that there is a need for strong provisions to ensure such Disability Action Plans are implemented within reasonable time-frames.⁸³⁰

Disability access is imperative.⁸³¹

! RECOMMENDATION(S)

63. All courts dealing with family violence matters should ensure there is sufficient disability access. This could include the implementation of individual Disability Action Plans by the courts.

CHILDREN IN COURT

6.158 Sometimes applicants attend court with their children. As well as applicants often being stressed, traumatised and suffering the effects of family violence, their children may also be troubled. Lack of facilities for children can simply make the court process a lot more difficult for an applicant, as the following example demonstrates:

830 Submission 51 (Villamanta Legal Service).

831 Submission 45 (Rochelle Campbell, women's health resource worker).

I had direct experience of supporting a woman with two young children, to get an intervention order at Heidelberg court, both of us reasonably unfamiliar with court processes. She had no option but to bring her children to court, as the younger child refused to stay with anyone else but her mother. At court we had nowhere to go, and were not informed about the interview rooms. We ended up holed up under the stairs, in order to give the kids some room to play. When the kids play spilled out into the thoroughfare, we were eventually shown a room (by a court network volunteer). Surely this issue arises frequently enough for the court to designate specific space for women with young children.

It was extraordinarily stressful for the mother to try and keep a lid on things, not to mention if one of the children needed to go to the toilet!⁸³²

6.159 It is important that children are sufficiently accommodated within the courtroom. Doing so can substantially ease the burden and stress on an applicant of attending court and also make the stay more comfortable for children. Such measures could include: a separate play space for children, court network workers on hand to assist parents with children and a secure childcare facility.

Childcare facilities should also be provided.⁸³³

Courts need to accommodate children, and should respond to the needs of the most vulnerable members of our community who make up a significant proportion of court users.⁸³⁴

! RECOMMENDATION(S)

64. Measures should be taken to provide facilities for children attending court in the context of family violence matters.

CONCLUSION

6.160 The court environment must be ‘protective to the person seeking protection’.⁸³⁵ Consistent with our recommended aims for a new Family Violence Act, the justice system, in its everyday practice, must seek to model the respectful non-

832 Submission 22 (Kim Robinson, social worker).

833 Submission 79 (Department of Human Services).

834 Submission 45 (Rochelle Campbell, women’s health resource worker).

835 Submission 40 (Whittlesea Domestic Violence Network).

violent behaviour it wishes to implement. Making the court a safe and accessible space in the ways outlined is part of ensuring this happens. It is also essential to ensure that people gain the best access to justice and safety when they are seeking it through the legal system.

Chapter 7

Getting an Interim Order

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INTRODUCTION

7.1 An interim intervention order is available under the Crimes (Family Violence) Act during and outside court hours.⁸³⁶ Interim orders provide immediate protection for victims. This is because an interim order can be made ‘on the spot’, without the need to inform the defendant of the application.⁸³⁷ An interim order lasts for a maximum of 21 days and is usually made for a shorter period of about seven days.⁸³⁸ The defendant is informed of the interim order and the application for a final order. The parties return to court for the final hearing. The availability of interim orders is an essential aspect of the intervention order system. From 2002, at least half of the people who obtained final intervention orders had at least one interim order before getting the final order.⁸³⁹ This chapter will discuss ways that access to interim orders can be improved—both during court hours and outside court hours.

INTERIM ORDERS AFTER HOURS

7.2 It is essential that family violence victims have access to the protection of an intervention order when they do not have immediate access to a court. Access to emergency orders is particularly crucial given that most family violence incidents occur after 5pm during the week and on weekends.⁸⁴⁰ If a woman seeks protection from the legal system at this crisis moment, the system must be able to respond and offer an appropriate level of protection. Currently, however, final intervention orders are not available outside court business hours.

7.3 Between 1992 and 1997 police were able to make applications for intervention orders to an after-hours magistrate.⁸⁴¹ However, since 1997 changes to administrative procedures agreed to between Victoria Police and the Magistrates’ Court resulted in the police ceasing to apply for after-hours intervention orders and instead making applications for a complaint and warrant or a complaint and summons. A recent court review of

A **complaint and warrant** is an application for an intervention order that includes a power of arrest. A **complaint and summons** does not have a power of arrest.

836 *Crimes (Family Violence) Act 1987* s 8.

837 *Crimes (Family Violence) Act 1987* s 8(1).

838 The commission recommends an extension to the normal length of an interim order at Recommendation 84.

839 Submission 86 (Magistrates’ Court of Victoria).

840 Victoria Police, *Victoria Police Crime Statistics 2002/03* (2003); Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) 133.

841 *Crimes (Family Violence) Act 1987* s 8(4).

after-hours procedures for intervention orders has resulted in a decision to reintroduce an after-hours procedure for intervention order applications. Revised documentation, a review of the current fax procedure, and development of an ‘electronic interchange’ of all documents is under consideration by Victoria Police and the Magistrates’ Court.⁸⁴² If this is successfully implemented, it would significantly reduce the administrative duplication which exists and which unnecessarily extends the time it takes police to obtain protection for family violence victims after hours.

7.4 Where police attend a family violence incident and they are obliged under their Code of Practice to apply for an intervention order on behalf of the victim,⁸⁴³ they are only able to make an application to an on-duty registrar for a complaint and warrant or complaint and summons. This is an administrative process. If the registrar grants a complaint and warrant, police can arrest the perpetrator and set bail conditions with the same conditions as an intervention order (eg not approaching the victims) until the scheduled hearing at court. However, this is not an intervention order and does not carry the same consequences if the conditions are breached. Breach of an intervention order is a criminal offence, whereas breach of a bail condition is not.⁸⁴⁴ In some cases the victim is not informed of the granting of bail or conditions of bail and will not be given a copy of the bail conditions.⁸⁴⁵

7.5 If the registrar issues a complaint and summons rather than a complaint and warrant, police can only serve the summons on the perpetrator with directions to attend court on the date set. There are no conditions preventing the perpetrator from approaching the victim. This outcome therefore provides no protection for the victim and no accountability for the perpetrator. The power of registrars to decide to issue a summons rather than a warrant therefore has serious consequences for the safety of those involved. Anecdotally, the commission has also heard that registrars sometimes refuse to issue a warrant or a summons based on their own perception of the seriousness of the case. The commission has discussed the attitudes of registrars to family violence and made recommendations for change at paragraphs 6.3–6.20 and recommendations 34–36.

842 Submission 86 (Magistrates’ Court).

843 Police are obliged to apply for an intervention order whenever they determine that a family member’s safety, welfare or property appears to be endangered by another: Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) para 5.3.2.

844 Victorian Law Reform Commission (2005) above n 399, 114, 115.

845 Ibid 29.

OTHER JURISDICTIONS

Police Orders

7.6 Other Australian jurisdictions have dealt with the need to provide immediate protection to family violence victims by allowing police to grant emergency intervention orders without applying to a court. In Western Australia, amendments implemented in December 2004 to the Restraining Orders Act provide that police have the power to issue temporary orders that restrain the respondent in the same way as a court-imposed order. Orders can be made for either 24 hours or 72 hours, however, a 72 hour order can only be made with the consent of the person in need of protection.⁸⁴⁶

7.7 This power was introduced because the previous procedure of telephone applications to an on-duty magistrate was not being used by police.⁸⁴⁷ The reasons police were not making telephone applications were:

- the procedure was too time consuming, as police needed to leave the scene of the incident, fill out the paperwork and contact Police Communications in Perth who would then contact the duty magistrate;
- there was a perception among police officers that the procedure was a waste of time because the application would either fail at the Police Communications level or the magistrate would not grant the order.⁸⁴⁸

7.8 The ability to immediately remove the perpetrator was also seen as an important reason for introducing the power. The report that recommended the introduction of this new power noted:

A further advantage with police orders is that, in many domestic violence situations, the only option is for police to remove mother and children from the home, which is disruptive for the children and, in effect, punishes the apparent victims.⁸⁴⁹

7.9 Tasmanian police have recently been granted a very extensive power to make orders of up to 12 months duration where the violence is between intimate partners.⁸⁵⁰ The *Family Violence Act 2004* gives police officers of the rank of sergeant or above the

846 *Restraining Orders Act 1997* (WA) ss 30F–G.

847 Between 1999 and 2001, 144 telephone applications were made, which was less than 0.5% of all applications made: Department of Justice [Western Australia] (2004) above n 565, 38.

848 Ibid.

849 Ibid 39.

850 *Family Violence Act 2004* (Tas) s 14.

power to issue a Police Family Violence Order if they are satisfied that the person has committed or is likely to commit a family violence offence.⁸⁵¹ An order made by police can include a range of conditions, including an order excluding a person from the family home.⁸⁵² Magistrates' Courts continue to have the power to make family violence orders, both in and out of court hours, and police can apply to the court for an order rather than grant the order themselves.⁸⁵³ Police officers have received specialist family violence training to guide the use of their new powers under the Act.

7.10 In 2003 the NSW Law Reform Commission recommended that police have the power to make an order that lasts for up to 48 hours when an authorised justice cannot be contacted.⁸⁵⁴ The NSW commission found that there were often problems with contacting an authorised justice on telephone interim order duty. The commission noted:

It is not intended that police ought to be able to issue exclusion orders under a TIO [telephone interim order] without the approval of an authorised justice. While some may view this as a move to making such orders too easy to obtain, the Commission believes that the public and individual benefit from making an urgent order, outweighs any risk of a miscarriage of justice.⁸⁵⁵

7.11 The Northern Territory parliament passed the *Domestic Violence Amendment (Police Orders) Act 2005* in October 2005. This Act allows police to issue restraining orders outside normal court hours when the situation requires immediate action. Police orders may contain the same conditions as an order made by a magistrate.⁸⁵⁶ The order must be returned to court as soon as practicable after it is made.⁸⁵⁷ In town areas this will be within two to five working days and in remote areas from three to four weeks.⁸⁵⁸ An order can be made by a police officer of or above the rank of Senior Sergeant or an officer in charge of a police station.⁸⁵⁹ If the defendant wishes to apply

851 *Family Violence Act 2004* (Tas) s 14.

852 *Family Violence Act 2004* (Tas) s 14(3)(b).

853 *Family Violence Act 2004* (Tas) ss 15(2)(a), 16, 23.

854 New South Wales Law Reform Commission (2003) above n 504, 142.

855 *Ibid* 141–142.

856 *Domestic Violence Amendment (Police Orders) Act 2005* (NT), amending *Domestic Violence Act (NT)* s 6A(3).

857 *Domestic Violence Amendment (Police Orders) Act 2005* (NT) s 6A(7).

858 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 August 2005 (Dr Peter Toyne, Minister for Justice and Attorney-General).

859 *Domestic Violence Amendment (Police Orders) Act 2005* (NT) inserting s 6A(10) into the *Domestic Violence Act (NT)*.

for a variation or revocation of the police order it can be reviewed by a magistrate by telephone or fax.⁸⁶⁰ Magistrates retain the ability to make orders outside court hours, but it is envisaged that police will only apply to a magistrate in particularly complex or sensitive cases.⁸⁶¹ Police orders were introduced in the Northern Territory to give police greater flexibility in their response to family violence and reduce the amount of out-of-hours work for magistrates.⁸⁶² Demand for out-of-hours orders had risen from 39 a year in 1999 to 724 in 2004.⁸⁶³

VIEWS FROM SUBMISSIONS

7.12 Submissions from police officers, individuals, Robinson House, Women's Domestic Violence Service, the Whittlesea Domestic Violence Network and the Darebin Family Violence Working Group outlined problems with access to intervention orders in emergency situations and supported better access to emergency intervention orders.

7.13 The commission received mixed views on whether it is desirable for police to have the power to issue short-term orders. In favour of this power, Victoria Police provided a detailed submission outlining the benefits of this system in Western Australia. This power was also supported by submissions from individuals who have experienced family violence, the Royal Women's Hospital, the Domestic Violence and Incest Resource Centre and the Queensland Crime and Misconduct Commission. The Queensland Crime and Misconduct Commission stated:

This approach has a number of benefits: first, the police officer attending the incident has the immediate power to initiate protection for the victim; second, the offender can be immediately served with the order, and it is therefore not necessary to subsequently locate that person in order to serve an order on them; third, immediate police action sends a strong message to the community that domestic violence is not to be tolerated; and, finally, officers attending a scene are likely to feel a greater degree of job satisfaction at having the ability to undertake positive action on the spot.

7.14 The Police Association, which is the police union, stated that it opposes a police power to make short-term orders, due to the increased workload on police members and the possibility of exposure to litigation. The Police Association also

860 *Domestic Violence Amendment (Police Orders) Act 2005* (NT) s 6B(3)–(5).

861 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 August 2005 (Dr Peter Toyne, Minister for Justice and Attorney-General).

862 Ibid.

863 Ibid.

believes that a police power to issue temporary orders would violate the separation of powers between police and the courts. This is not the view of the submission from Victoria Police. The Women's Legal Service Victoria also expressed concern that interim orders will be perceived negatively if they are granted without the scrutiny of a judicial officer.

COMMISSION'S RECOMMENDATIONS

7.15 It is essential for the effective functioning of the system that the protection afforded by an intervention order is available at all times, particularly in emergency situations. This is clearly intended in the current provisions of the Crimes (Family Violence) Act. The commission therefore recommends that the Magistrates' Court implements a system to consider intervention order applications from police after hours. Any system must provide effective and efficient access to overcome the types of problems that have arisen in Western Australia as a result of police leaving the scene to undertake a time-consuming procedure to obtain an order. The commission notes that the Magistrates' Court is currently working with Victoria Police to develop a system for after-hours orders, and the commission encourages the court and Victoria Police to implement this as a matter of priority.

7.16 The commission believes that an interim intervention order provides better protection for victims and more accountability for perpetrators than a warrant and bail system. This is because:

- Breaching an interim order is a criminal offence. Breaching a bail condition is not. The only possible consequence of breaching a bail condition is revocation of bail.⁸⁶⁴
- A copy of an interim order will be given to the protected person which will list the types of behaviours prohibited by the order. If the perpetrator is bailed, police must inform the victim⁸⁶⁵ but there is no requirement that they inform the victim of the bail conditions.
- Assuming that the Crimes (Family Violence) (Police Holding Powers) Bill is enacted,⁸⁶⁶ police will have the power to hold a perpetrator while they apply for and serve an interim intervention order. Therefore, the major benefit of the power of arrest under a warrant and bail system would no longer be relevant.

864 Victorian Law Reform Commission (2005) above n 399, 115.

865 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) para 4.2.4.

866 As recommended by the commission in: Victorian Law Reform Commission (2005) above n 463. We have outlined the provisions of the Bill at para 5.62.

- An interim order will generally last for longer than the period until the court hearing date set on a warrant.⁸⁶⁷ This will give the parties time to prepare for a hearing of a final intervention order rather than needing to attend court a few days after an interim order has been made.

7.17 A complaint and warrant system may still be of use to police in some circumstances and should be retained as an option along with the possibility of applying for an interim order. For example, where police need to find the perpetrator, obtaining a complaint and warrant will give them a power of arrest.

7.18 The commission wants to ensure that police can take effective and immediate action when they attend a family violence incident. It is essential that police can take steps to protect family members and do not have to take them away from the home to do so. A holding power for police as outlined in the commission's Interim Report⁸⁶⁸ and the Crimes (Family Violence) (Holding Powers) Bill is an important and timely action that ensures a perpetrator can be removed from the home while an interim order is applied for.

7.19 The commission also seriously considered the option of police having the power to make an intervention order outside business hours as a way of improving after-hours protection. Some commissioners felt that this would be an appropriate response as there is currently no adequate system for obtaining after-hours orders. Other commissioners felt that the Magistrates' Court is the appropriate place for such applications to be made and it is therefore the court's responsibility to provide a system for hearing after-hours applications. The commission recommends that the government should monitor any system that the Magistrates' Court implements to ensure it is providing effective and efficient access to intervention orders after hours. If this is not occurring, the government should reconsider giving police the power to make intervention orders.

7.20 The commission also considered the relevant criteria for a police order. Although we are not recommending the introduction of police orders, the commission believes that if any police orders system is introduced in the future it should have the following features:

- Police orders should only last until the matter can be returned to court for consideration. An appropriate limit may be 72 hours. The commission does not believe that it is necessary to set a different time limit for orders obtained

867 The commission has recommended an extension to the normal length of interim intervention orders at Recommendation 84.

868 Victorian Law Reform Commission (2005) above n 463.

with or without the protected person's consent, as in Western Australia. In an emergency situation the police should be authorised to take action that will protect family members and it is therefore appropriate that an order that lasts until a court is available can be made.

- Police orders should be authorised by a sergeant or officer in charge of a police station. The commission believes it is appropriate for a police order to be authorised by a police officer in a relatively senior position, however, this may cause similar obstacles to those experienced in rural areas where there may not be a sergeant on duty. Police officers in charge of a police station are currently authorised to discharge a person on bail where it is not practicable to bring the person before a court.⁸⁶⁹ The commission therefore thinks it is appropriate for officers in charge to have the power to issue police orders, as well as sergeants or more senior officers.
- Police orders should not be available where the perpetrator is under 18 years of age. In these cases police should apply to a magistrate to make the decision.
- Police orders should be available wherever it is not possible to make an application to a magistrate, not only outside business hours. In regional and rural areas the Magistrates' Court is not available every weekday and many regional courts sit for less than one day a week.⁸⁷⁰ Therefore, police should have access to this procedure whenever it is not possible to apply for an order from the court.



RECOMMENDATION(S)

65. The Magistrates' Court should implement a system for determining intervention order applications outside business hours.

869 *Bail Act 1977* s 10.

870 There are 41 Magistrates' Courts in regional Victoria. In 2005 the following 19 Magistrates' Courts were scheduled to sit for less than one day a week: Ararat, Casterton, Cobram, Corryong, Dromana, Edenhope, Hopetoun, Kerang, Mansfield, Myrtleford, Nhill, Omeo, Orbost, Ouyen, Robinvale, St Arnaud, Stawell, Swan Hill, Wonthaggi. Only three regional Magistrates' Courts are open every weekday: Ballarat, Bendigo and Geelong: Department of Justice [Victoria], *Magistrates' Court of Victoria* <www.justice.vic.gov.au> at 29 November 2005.

! RECOMMENDATION(S)

66. Victoria Police should use the system implemented by the Magistrates' Court for after-hours intervention orders, rather than applying for complaint and warrants or complaint and summons from registrars.
67. The Department of Justice should establish a system to monitor any system implemented in the Magistrates' Court for granting after-hours intervention orders. If the Magistrates' Court is unable to provide quick and efficient access to intervention orders after hours, the government should consider giving police officers the power to make short-term intervention orders.

INTERIM ORDERS IN COURT HOURS

7.21 The Crimes (Family Violence) Act allows the court to make an interim intervention order until a final decision is made about the victim's application. The court may make an interim order, whether or not the respondent is present or knows about the application, if the court is satisfied that an interim order is necessary to ensure the victim's safety or to preserve their property.⁸⁷¹ The court can hear oral evidence or accept evidence by affidavit.⁸⁷² A victim can apply for an interim order in court and will be heard on the same day.

An **affidavit** is a written statement made under oath out of court.

7.22 There are two main issues with the granting of interim intervention orders in court: the lack of awareness among victims about the availability of interim intervention orders and the extension of interim intervention orders if the final hearing is postponed.

INCREASING THE AWARENESS OF INTERIM INTERVENTION ORDERS

7.23 Various groups have told the commission that many people who require the immediate protection of an interim intervention order are not aware they can apply for one. This occurs particularly where a victim has not received any support from community or legal services before attending court. The standard application form for an intervention order does not include a question about whether the applicant requires

871 *Crimes (Family Violence) Act 1987* s 8(1).

872 *Crimes (Family Violence) Act 1987* s 8(2).

urgent protection.⁸⁷³ Similarly, information provided to applicants in court does not alert them to the possibility of an interim order. However, the Family Violence Court Division application form does ask:

Do you want to apply for an interim order? (A temporary intervention order made pending the hearing of the application for an intervention order.)

VIEWS FROM SUBMISSIONS

7.24 All the submissions that addressed this issue agreed that interim intervention orders must be made more accessible for people experiencing family violence.⁸⁷⁴ The submissions contained practical suggestions of how awareness of and access to these types of orders could be improved:

- a requirement that registrars inform the applicant about the possibility of applying for an interim order⁸⁷⁵—registrars should not be able to decide whether an interim order is necessary, this decision should be made by a magistrate;⁸⁷⁶
- including a question on the standard intervention order application form asking if the applicant is in need of protection ‘today’⁸⁷⁷ or a question such as ‘Do you feel you need protection immediately, or are you prepared to wait a few days or weeks for the case to be heard?’;⁸⁷⁸
- changing the name of interim orders to ‘emergency protection order’⁸⁷⁹ or ‘urgent temporary order’⁸⁸⁰ to make it clearer what the orders are for;

873 Magistrates’ Court of Victoria (2003) above n 575, 25–26.

874 Submissions 20 (Mrs EF Belsten), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 46 (Royal Children’s Hospital), 49 (Domestic Violence and Incest Resource Centre), 53 (Women’s Electoral Lobby, Victoria), 62 (Eastern Community Legal Centre), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services).

875 Submissions 20 (Mrs EF Belsten), 30 (Violence Against Women Integrated Services), 46 (Royal Children’s Hospital), 53 (Women’s Electoral Lobby, Victoria), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women’s Legal Service Victoria).

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

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

878 Submissions 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 46 (Royal Children’s Hospital), 64 (Federation of Community Legal Centres (Vic)).

879 Submission 40 (Whittlesea Domestic Violence Network).

- better access to legal advice at court;⁸⁸¹
- including information on the availability of interim orders in any family violence community education programs,⁸⁸² and ensuring that people with disabilities are made aware of this option through any education campaigns.⁸⁸³

COMMISSION'S RECOMMENDATIONS

7.25 The commission agrees that interim intervention orders should be made more widely known among family violence victims. The final two suggestions about legal advice and community education are addressed at recommendations 39–41, 47, and 52.

7.26 All applicants should be made aware of the possibility of obtaining an interim order. The commission recommends that the Magistrates' Court Protocols require registrars to discuss the possibility of an interim order with all applicants. It is essential that adequate numbers of registrars are available in family violence lists to enable this. Registrar training and provision of registrars is addressed at recommendations 34–36.

7.27 The commission agrees that the standard application form must provide an opportunity for people seeking protection to indicate whether they require protection immediately or whether they are prepared to wait for a final hearing. Recommendation 43 proposes that the application form used in the Family Violence Court Division be used in all Magistrates' Courts. Although the application form used by the division includes a question on interim orders, its meaning may not be clear to those without legal or other assistance. Therefore, the commission recommends that the phrasing of this question be reviewed before the form is adopted in all courts. If applicants indicate they require immediate protection on the application form, then the registrar should put the case before the magistrate to make a decision. It is not appropriate for registrars to inform potential applicants that their situation is not serious or severe enough for an interim order.

880 Submission 63 (Darebin Family Violence Working Group).

881 Submissions 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 74 (Women's Legal Service Victoria). The commission makes recommendations regarding the availability of legal advice at recommendations 39–41.

882 Submissions 27 (Robinson House BBWR), 49 (Domestic Violence and Incest Resource Centre), 62 (Eastern Community Legal Centre), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 78 (Department for Victorian Communities). The commission makes recommendations relating to community education programs at recommendations 47, 52.

883 Submission 79 (Department of Human Services).

7.28 The commission considered changing the name from interim order to temporary or emergency order, but it believes ‘interim’ order is the most legally accurate term, even though not all applicants and respondents understand it. The commission believes that this should be dealt with through the provision of better information to applicants and respondents at courts. For example, the application form used in the family violence courts refers to interim orders as a ‘temporary order’ in the accompanying bracketed information. We make a recommendation to improve other forms of information available at Recommendation 42.

! RECOMMENDATION(S)

68. The Magistrates’ Court Protocols should be amended to require registrars to discuss with applicants whether there is a need for an interim intervention order. The protocols should make it clear that it is not the registrar’s role to decide whether an interim application will be placed before the magistrate.
69. The Magistrates’ Court should revise the question about interim intervention orders included on the application form used in the Family Violence Court Division for use in all Magistrates’ Courts. The question should be phrased simply, for example, ‘Do you need protection immediately, before your final application is heard?’

POSTPONED FINAL HEARINGS AND EXTENDING INTERIM ORDERS

7.29 Another problem outlined in the Consultation Paper is the process for extending an interim intervention order where the final hearing of an order is postponed, usually because the respondent has not been served with the order.⁸⁸⁴ Under the current system, an applicant must return to court and have the matter heard again, usually by a different magistrate. Applications for extensions of interim orders are usually granted. However, the commission has heard that the subsequent magistrate sometimes takes a different view of the facts of the case and does not extend

884 The commission makes a recommendation to improve the system of service at Recommendation 82. The commission has also previously recommended a police holding power for family violence incidents, so that any interim order made can be served on the respondent. This recommendation was implemented by the government in the Crimes (Family Violence) (Police Holding Powers) Bill 2005 and is discussed further at para 5.62.

the order. Even if an extension is granted, it still requires an extra attendance at court. One possible way to resolve this issue would be to automatically extend an interim order where the final hearing has been postponed. The applicant would not need to attend court and there would be no risk that the order would not last until the final hearing date.

VIEWS FROM SUBMISSIONS

7.30 The vast majority of submissions supported an automatic extension of interim orders where the respondent has not been served with the order.⁸⁸⁵ Submissions noted that re-attending court is stressful for applicants and may lead to them discontinuing the application.⁸⁸⁶ The Federation of Community Legal Centres stated that applicants should not need to re-attend court to get an extension where an order has not been served. This is especially the case where the respondent may be avoiding service. The

When a document issued by the court cannot be served on a person, the court will use another method of letting the person know about the document, such as leaving it with a family member, and this is known as **substituted service**.

federation suggested that an interim order should be automatically extended twice while the police make further attempts at service. Where they have still not managed to serve the respondent after two automatic extensions, it should be standard police practice to then make an application for substituted service.

7.31 Two of the 17 submissions that addressed this issue were opposed to administrative extensions of interim orders, stating that the court should be able to consider whether an extension is necessary or appropriate.⁸⁸⁷

COMMISSION'S RECOMMENDATIONS

7.32 The commission agrees with the majority of submissions that an interim order should be automatically extended where the final hearing date has been postponed. This change will reduce the number of times an applicant needs to appear in court and provide greater certainty that the interim order will last until the application for the final order is determined. The automatic extension should be made by a registrar once

885 Submissions 22 (Kim Robinson, social worker), 25 (Barbara Roberts), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 54 (Andrew Compton), 62 (Eastern Community Legal Centre), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 72 (Victoria Police), 79 (Department of Human Services), 86 (Magistrates' Court of Victoria).

886 Submissions 22 (Kim Robinson, social worker), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria).

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

it is determined that the final hearing date will be altered (eg where the police have informed the registrar that they have been unable to serve the order on the respondent). Registrars must be required to inform applicants that the order has not been served and that their interim order has been extended to the new hearing date.

7.33 The commission agrees with the Federation of Community Legal Centres that automatic extensions should not be unlimited. Automatic extensions should be allowed twice. If a final hearing still cannot proceed after two automatic extensions because the police have been unable to serve the respondent, the commission recommends the police apply to the court for substituted service. If the respondent has been served but there is a need for an extension for another reason, then the applicant should be required to attend court and seek an extension from a magistrate. This recommendation seeks to prevent an interim order being extended indefinitely without a final hearing occurring.

7.34 The commission does not agree with the submissions that suggested the court reconsider whether an interim order is necessary or appropriate every time an extension is required. This decision was already made by the court when the interim order was made. It is therefore an administrative matter to ensure that the interim order does not expire before a final hearing occurs. It should also be remembered that an interim order that has not been served on the respondent has no legal effect, so is not restraining the behaviour of the respondent.



RECOMMENDATION(S)

70. Where an interim order has been made and the final hearing needs to be postponed, the interim order should be automatically extended up to two times until the new hearing date. This should be an administrative procedure which is done by the registrar when the hearing date needs to change, for example where police have been unable to serve the interim order on the respondent.
71. Where an interim order is automatically extended due to an inability to serve the respondent, the registrar should inform the applicant of the automatic extension and send the applicant a copy of the extended interim order.

**RECOMMENDATION(S)**

72. Where there have been two automatic extensions of an interim intervention order due to an inability to serve the respondent and police are still unable to serve the order, the police should apply for an order for substituted service.

Chapter 8

Getting a Final Order

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INTRODUCTION

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

PLACE OF APPLICATION

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

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

ALLOWING FLEXIBILITY IN THE PLACE OF APPLICATION

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

892 Submission 61 (Broadmeadows Community Legal Service).

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

894 Submission 61 (Broadmeadows Community Legal Service).

895 Ibid.

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

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

! RECOMMENDATION(S)

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

ADULT APPLICATIONS INVOLVING CHILDREN

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

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

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

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

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

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

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

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

905 Submission 27 (Robinson House BBWR).

906 Submission 44 (Anonymous).

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

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

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

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

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

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

COMMISSION’S RECOMMENDATIONS

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

908 Submission 27 (Robinson House BBWR).

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

910 Ibid.

911 This is discussed at paras 6.158–6.159.

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

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

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

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

! RECOMMENDATION(S)

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

INTERVENTION ORDERS AND ASSOCIATES

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

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

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

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

ASSOCIATES OF THE PERPETRATOR

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

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

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

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

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

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

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

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

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

914 Parkinson (2004) above n 800, 48.

915 Submission 79 (Department of Human Services).

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

917 Submission 27 (Robinson House BBWR).

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

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

919 Submission 72 (Victoria Police).

920 Submission 39 (Royal Women’s Hospital).

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

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

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

924 Submission 40 (Whittlesea Domestic Violence Network).

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

COMMISSION'S RECOMMENDATIONS

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

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

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

! RECOMMENDATION(S)

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

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

ASSOCIATES OF VICTIMS

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

927 Submission 27 (Robinson House BBWR).

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

929 Parkinson (2004) above n 800, 48.

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

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

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

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

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

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

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

931 Submission 78 (Department for Victorian Communities).

932 Submission 79 (Department of Human Services).

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

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

935 Submission 40 (Whittlesea Domestic Violence Network).

COMMISSION'S RECOMMENDATIONS

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

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

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

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

APPLICATIONS BY GUARDIANS

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

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

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

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

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

942 Submission 39 (Royal Women's Hospital).

**RECOMMENDATION(S)**

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

SERVING APPLICATIONS AND FINAL ORDERS ON RESPONDENTS

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

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

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

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

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

944 Ibid 63.

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

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

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

VIEWS FROM SUBMISSIONS

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

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

946 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)), 77 (Anonymous).

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

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

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

OTHER JURISDICTIONS

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

947 Submission 44 (Anonymous).

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

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

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

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

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

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

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

**RECOMMENDATION(S)**

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

DEFENDED HEARINGS

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

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

955 Submission 44 (Anonymous).

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

957 Ibid 37.

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

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

OTHER JURISDICTIONS

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

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

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

974 Submission 28 (Murray Mallee Community Legal Service).

975 Submission 40 (Whittlesea Domestic Violence Network).

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

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

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

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

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

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

! RECOMMENDATION(S)

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

MUTUAL ORDERS AND CROSS APPLICATIONS

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

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

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

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

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

OTHER JURISDICTIONS

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

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

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

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

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

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

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

983 Ibid 214.

984 Ibid 217.

985 Ibid 217–218.

VIEWS FROM SUBMISSIONS

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

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

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

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

987 Submission 61 (Broadmeadows Community Legal Service).

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

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

990 Submission 86 (Magistrates’ Court of Victoria).

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

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

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

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

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

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

COMMISSION’S RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATION(S)

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

VEXATIOUS APPLICATIONS

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

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

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

997 Submission 80 (Anonymous).

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

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

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

OTHER JURISDICTIONS

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

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

999 *Supreme Court Act 1986* s 21.

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

! RECOMMENDATION(S)

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

ORDERS AGAINST YOUNG PEOPLE

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

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

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

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

OTHER JURISDICTIONS

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

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

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

1014 Bobic (2004) above n 1013, 3.

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

1016 Submission 86 (Magistrates' Court of Victoria).

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

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

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

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

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

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

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

PENALTIES AGAINST YOUNG PEOPLE IN INTERNATIONAL STANDARDS

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

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

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

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

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1036 Submission 41 (Victoria Legal Aid).

1037 Submission 41 (Victoria Legal Aid).

1038 Submission 72 (Victoria Police).

1039 Submission 86 (Magistrates' Court of Victoria).

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

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

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

1043 Submission 28 (Murray Mallee Community Legal Service).

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

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

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

COMMISSION'S RECOMMENDATIONS

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

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

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

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

1045 Submission 41 (Victoria Legal Aid).

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

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

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

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

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

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

! RECOMMENDATION(S)

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

UNDERTAKINGS

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

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

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

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

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

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

VIEWS FROM SUBMISSIONS

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

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

1047 Submission 81 (Anonymous).

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

1049 Ibid.

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

1051 Submission 86 (Magistrates' Court of Victoria).

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

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

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

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

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

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

1053 Submission 44 (Anonymous).

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

1055 Submission 79 (Department of Human Services).

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

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

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

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

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

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

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

1060 Submission 28 (Murray Mallee Community Legal Service).

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

1062 Submission 41 (Victoria Legal Aid).

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

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

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

COMMISSION’S RECOMMENDATIONS

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

1065 Submissions 30 (Violence Against Women Integrated Services), 49 (Domestic Violence and Incest Resource Centre). The commission recommends regular and thorough training for magistrates in family violence matters at Recommendation 38.

1066 Submissions 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services). The Magistrates’ Protocols do not include a requirement that magistrates explain the difference between an undertaking and an intervention order, but state, ‘A copy of the extract, undertaking and information form must be given to the parties. This is to avoid the current confusion about the difference between an order and an undertaking to the Court’: Magistrates’ Court of Victoria (2003) above n 575, para 19.1.

1067 Submission 51 (Villamanta Legal Service).

1068 Submissions 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

1069 Submission 28 (Murray Mallee Community Legal Service), 74 (Women’s Legal Service Victoria). This requirement is already contained in the Magistrates’ Court Protocols, but is rarely complied with in practice: submission 74 (Women’s Legal Service Victoria).

1070 Submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

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

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

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

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

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

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

1072 Submission 28 (Murray Mallee Community Legal Service).

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

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

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

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

1073 Submission 41 (Victoria Legal Aid).

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

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

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

! RECOMMENDATION(S)

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

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

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

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

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

! RECOMMENDATION(S)

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

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

COSTS

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

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

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

1076 *Crimes (Family Violence) Act 1987* s 21C(1).

1077 *Crimes (Family Violence) Act 1987* s 21C(2).

1078 Submissions 30 (Violence Against Women Integrated Services), 53 (Women's Electoral Lobby, Victoria), 74 (Women's Legal Service Victoria).

1079 Submissions 40 (Whittlesea Domestic Violence Network), 41 (Victoria Legal Aid), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

The potential for threats of costs orders will be reduced by other recommendations made by the commission, such as:

- increased access to legal advice;¹⁰⁸⁰
- the introduction of a notice system, so that the respondent cannot turn up to court without notifying the applicant;¹⁰⁸¹
- the introduction of a requirement that a mutual order cannot be made unless there are grounds for both orders;¹⁰⁸²
- greater regulation of the use of undertakings.¹⁰⁸³

8.148 One area where the use of costs orders was seen as problematic was where the police act as the applicant for the order. Therefore, the following section proposes changes for the availability of costs orders against police applicants.

COSTS AWARDED AGAINST POLICE

8.149 Anecdotal evidence suggests that since the introduction of the Police Code of Practice, costs are being awarded against the police more often than in the past in intervention order matters.¹⁰⁸⁴ Costs are being awarded against police in circumstances where they have brought an application in accordance with their obligations under the code. This is a serious concern, as it creates a disincentive for police to act according to their duty to bring an application where a person's safety, welfare or property appears to be endangered, or a criminal offence has been committed.

OTHER JURISDICTIONS

8.150 Other jurisdictions in Australia either do not allow costs against police applications for intervention orders, or limit the circumstances in which costs can be awarded. In Tasmania, costs cannot be awarded against police in an application for an intervention order in any circumstance.¹⁰⁸⁵ In New South Wales a costs order can only be made against a police applicant where the court is satisfied that the application was

1080 Recommendations 39–41.

1081 Recommendations 83–87.

1082 Recommendation 88.

1083 Recommendations 99–103.

1084 Submission 72 (Victoria Police).

1085 *Family Violence Act 2004* (Tas) s 34. Section 34 states, 'The court hearing an application under this Act made by a person other than a police officer may, if the court thinks fit, order either party to pay such costs as the court considers reasonable'.

made knowing it contained information that was false or misleading in a material way.¹⁰⁸⁶ In Western Australia costs cannot be awarded against a police applicant where the police officer acts in good faith and in the normal course of duty.¹⁰⁸⁷

VIEWS FROM SUBMISSIONS

8.151 The submission from Victoria Police mentioned this issue as a serious obstacle to increased police applications for intervention orders. The submission stated there is:

anecdotal evidence to suggest that since the introduction of [the] Code of Practice there has been an increase in the instances of costs being awarded against Victoria Police even in circumstances where there is no application by the defence and on the own motion of a Magistrate ... The issues of costs being awarded has the capacity to influence local police responses and can be a deterrent in police taking responsibility for the initiation of orders. We would therefore suggest that the act should be specific in relation to costs and only be awarded in circumstances where the application is vexatious, malicious or similar.

COMMISSION'S RECOMMENDATION

8.152 The commission recommends that a new Family Violence Act makes it clear that it is not appropriate to award costs against police when they are acting according to their obligations under the code. Costs should only be awarded against police where the application was made knowing it contained information that was false or misleading in a material way. Police applicants should be distinguished from other applicants, as they have a professional duty to apply for an intervention order in particular circumstances.

! RECOMMENDATION
<p>104.A new Family Violence Act should provide that costs should only be awarded against a police applicant where the court is satisfied that the application was made knowing it contained information that was false or misleading in a material way.</p>

¹⁰⁸⁶ *Crimes Act 1900 (NSW)* s 562N(3).

¹⁰⁸⁷ *Restraining Orders Act 1997 (WA)* s 69(3)(b).

Chapter 9

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INTRODUCTION

9.1 In this chapter we look at what happens once a magistrate has decided to make an intervention order. In particular, we will examine the conditions that can be included in intervention orders, as well as their length. Under the Crimes (Family Violence) Act an order can be made for a specific length of time or can be indefinite. This chapter outlines how guidance can be given to magistrates to determine an appropriate length for an order and what conditions should be considered for inclusion. In particular, we examine how two types of conditions—exclusion conditions and child contact conditions—can be made more frequently and in a way that offers better protection to victims. We also look at the current illustrative list of conditions included in the Act and make a recommendation for its expansion. We also recommend that a new Family Violence Act makes it clear that the list of possible conditions on an intervention order is illustrative only, and that a magistrate can impose any condition that will offer protection in the circumstances of the case.

DURATION OF INTERVENTION ORDERS

9.2 The Crimes (Family Violence) Act gives magistrates the discretion to decide whether to make an order for a specific or indefinite period. If no time is specified, the order will remain in force until it is revoked by the court, reversed or set aside on appeal.¹⁰⁸⁸ There are no criteria in the Act to guide the magistrate's discretion. Most other Australian jurisdictions have similar provisions regarding the duration of intervention orders. However, in the ACT and Queensland protection orders must be made for not longer than two years unless special circumstances exist.¹⁰⁸⁹ The commission's Consultation Paper asked whether the current approach to determining the duration of an intervention order is appropriate.

VIEWS FROM SUBMISSIONS

9.3 All submissions were concerned about the duration of intervention orders. Some submissions expressed concerns that the current system results in inconsistencies

1088 *Crimes (Family Violence) Act 1987* s 6.

1089 *Domestic Violence and Protection Orders Act 2001* (ACT) s 35; *Domestic and Family Violence Protection Act 1989* (Qld) s 34A.

between magistrates when determining the duration of an order.¹⁰⁹⁰ Violence Against Women Integrated Services and Victoria Police said orders are often not made for long enough, particularly where the parties still have family law issues to sort out and will have ongoing contact in some form when the order expires. Victoria Legal Aid said indefinite orders are often not appropriate because they may be based on an over-estimation of the risk posed to the applicant and therefore result in a significant infringement of the respondent's civil liberties. The Magistrates' Court informed the commission that the number of indefinite orders made has been falling every year from 1999. In the last financial year about 7% of orders were made for more than 10 years or an indefinite period.

9.4 Submissions suggested how the current approach to the duration of orders could be improved, including:

- setting a minimum¹⁰⁹¹ or a maximum¹⁰⁹² length for all intervention orders;
- providing criteria as guidance for magistrates when deciding on length;¹⁰⁹³
- using a pro forma risk assessment tool;¹⁰⁹⁴
- asking applicants how long they want an order for on the application form;¹⁰⁹⁵
- providing legal advice to applicants so they know what to ask for.¹⁰⁹⁶

The Federation of Community Legal Centres suggested that the intervention order application form should ask applicants how long they think they will need protection for and include options. The application form used by the Magistrates' Court Family Violence Division asks the applicant 'How long do you want the intervention order to last?', and provides options of less than 12 months, 12 months, or more than 12

1090 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 40 (Whittlesea Domestic Violence Network).

1091 Suggestions for an appropriate minimum ranged from six months to three years: submissions 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 40 (Whittlesea Domestic Violence Network), 49 (Domestic Violence and Incest Resource Centre), 72 (Victoria Police).

1092 Submission 65 (Associate Professor John Willis, La Trobe University) suggested setting a maximum length of 12 months.

1093 Submissions 25 (Barbara Roberts), 28 (Murray Mallee Community Legal Service), 41 (Victoria Legal Aid), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1094 Submission 54 (Andrew Compton).

1095 Submissions 49 (Domestic Violence and Incest Resource Centre), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres), 86 (Magistrates' Court of Victoria).

1096 Submission 86 (Magistrates' Court of Victoria).

months.¹⁰⁹⁷ Submissions from the Domestic Violence and Incest Resource Centre and the Federation of Community Legal Centres thought that 12 month orders were often the most appropriate length and should be standard practice or the minimum length for an order.

9.5 Submissions proposed criteria for magistrates that may be relevant to the length of the order, including:

- the length of the relationship;¹⁰⁹⁸
- frequency, nature or level of violence;¹⁰⁹⁹
- existence of current family law matters;¹¹⁰⁰
- whether children were present or were victims;¹¹⁰¹
- whether parties have re-located;¹¹⁰²
- any previous criminal history of the respondent.¹¹⁰³

COMMISSION'S RECOMMENDATIONS

9.6 All intervention orders should be made for a period that is relevant to the circumstances of the parties. Due to the wide variety of relationships and forms of violence covered by the legislation, the commission does not believe it is appropriate to include a prescribed minimum or maximum length for an order.¹¹⁰⁴ Magistrates must retain their discretion to determine the appropriate length of an order. However, the commission acknowledges the current problem of a wide variation in approach between magistrates. The commission believes that this variation will be partly addressed by our recommendation for a specialist list for family violence matters and training of magistrates at recommendations 37 and 38. However, we also agree that

1097 The commission recommends that this application form be used in all Magistrates' Courts at Recommendation 43.

1098 Submissions 28 (Murray Mallee Community Legal Service) 64 (Federation of Community Legal Centres (Vic)).

1099 Submissions 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1100 Submissions 28 (Murray Mallee Community Legal Service), 64 (Federation of Community Legal Centres (Vic)).

1101 Submission 28 (Murray Mallee Community Legal Service).

1102 Submission 28 (Murray Mallee Community Legal Service).

1103 Submission 79 (Department of Human Services).

1104 The commission has, however, recommended a maximum length of 12 months for orders against people who are aged under 18 years unless there are exceptional circumstances: see Recommendation 97.

other changes need to be made to ensure a more consistent approach to the duration of orders.

9.7 The commission supports the suggestion that applicants should be asked how long they believe they will need an intervention order. The commission recommends that the question that is included on the application form used in the Magistrates' Court Family Violence Division should be retained and used on all application forms.¹¹⁰⁵ Applicants are in the best position to predict the level and duration of risk involved, and it is therefore appropriate that the intervention order system takes their views into account. The commission agrees with the Magistrates' Court submission that legal advice is essential for applicants so they have an idea of what to ask for.¹¹⁰⁶

9.8 The commission also recommends that the new Family Violence Act should provide some guidance to magistrates on what to consider when determining the length of an order. However, the commission does not agree that a detailed list of criteria would necessarily assist in achieving consistency. The commission therefore recommends that when determining the length of an order, a magistrate should take into account:

- the views of the applicant (as expressed on the application form);
- the purposes and principles of the legislation.¹¹⁰⁷

9.9 This second point will be particularly relevant where the applicant is in a very dangerous situation but due to fear of the consequences of applying for a long order has requested a short period on the application form. In this situation, the magistrate can consider safety when determining the appropriate length of an order, and may therefore decide to make an order for a period that is significantly longer than the applicant requested.

1105 This question on the form is 'How long do you want the intervention order to last?' and provides options of: less than 12 months, 12 months, or more than 12 months.

1106 The commission recommends better access to legal advice at recommendations 39–41.

1107 The commission has recommended purposes and principles for a new Family Violence Act at recommendations 3, 4.

! RECOMMENDATIONS

105. The application form used in the Family Violence Court Division should continue to ask the question 'How long do you want the intervention order to last?' This form should be used in all Magistrates' Courts.

106. When determining the length of an intervention order, a magistrate should consider the:

- views of the applicant;
- purposes and principles of the legislation.

RESTRICTIONS AND CONDITIONS INCLUDED ON INTERVENTION ORDERS

9.10 When making an intervention order, the court may impose any restrictions or prohibitions on the respondent that appear necessary or desirable in the circumstances.¹¹⁰⁸ The Act lists conditions that can be included on orders. These conditions can:

- prohibit or restrict the respondent from approaching the protected person, including specifying a distance;
- prohibit or restrict the respondent from accessing premises where the protected person lives, works or frequents, whether or not the respondent has a legal or equitable interest in the premises;
- prohibit or restrict the respondent from being in a particular locality;
- prohibit the respondent from contacting, harassing, threatening or intimidating the protected person, or from damaging the protected person's property;
- prohibit the respondent from causing another person to engage in conduct that is prohibited by the order against the protected person;
- revoke any firearm licence or other authority to possess, carry or use a firearm.¹¹⁰⁹

1108 *Crimes (Family Violence) Act 1987* s 4(2).

1109 *Crimes (Family Violence) Act 1987* s 5(1).

9.11 We discuss the condition allowing a perpetrator to be excluded from the family home at 9.23–9.60 and conditions about contact with any children of the relationship at 9.61–9.98. The possible use of attendance at a men’s behaviour change program as a condition of an intervention order is discussed at paragraphs 10.80–10.89. This section therefore deals with how the existing conditions are used; whether any conditions should be added to the list; and how intervention orders can be made more appropriate to the parties in each case.

9.12 The commission’s consultations revealed that despite the broad discretion available to magistrates when determining conditions on orders, the court generally follows a ‘tick the box’ approach. It is rare for a magistrate to set a condition that is not included in the list.

9.13 The commission’s Consultation Paper also outlined specific conditions that are listed in the legislation of other states and countries but are not included in the Victorian legislation. These include:

- directing respondents to return certain personal property to protected people or allowing people to recover or have access to personal property that they reasonably need, whether or not respondents have a legal or equitable interest in the property;¹¹¹⁰
- preventing the respondent from contacting or harassing the protected person’s family members or co-workers,¹¹¹¹ or any person at a place the protected person lives or works;¹¹¹²
- directing that the respondent dispose of weapons used in the violence other than firearms;¹¹¹³
- suspending the respondent’s driver’s licence if satisfied that a motor vehicle was used when committing the violence;¹¹¹⁴

1110 *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(3); *Restraining Orders Act 1997* (WA) s 13(2)(e); *Domestic Violence Act 1994* (SA) s 5(2)(g); Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* Report (1999) Domestic Violence Legislation Working Group (1999) above n 351, 76. The *Domestic Violence Act 1995* (NZ) ss 62–69, provides for the court to make an ‘ancillary furniture order’ or a ‘furniture order’ that provides the protected person with the exclusive right to furniture and household items for the duration of the order.

1111 *Victims of Domestic Violence Act* (Canada) SS 1994, c V-6.02, s 7(1)(c).

1112 *Domestic Violence Act 1994* (SA) s 5(2)(e).

1113 Domestic Violence Legislation Working Group (1999) above n 351, 74. Confiscation of firearms and the revocation of a firearms licence can already be included on an intervention order: *Crimes (Family Violence) Act 1987* ss 5(1)(h), 18A.

- requiring the respondent to pay the protected person compensation for any monetary losses that occurred as a direct result of the violence;¹¹¹⁵
- making a ‘problem gambling order’, which bars the respondent from gambling.¹¹¹⁶

VIEWS FROM SUBMISSIONS

9.14 Submissions expressed concern that intervention orders are usually not tailored to the circumstances of the parties; include standard conditions without consideration of whether these conditions are relevant in the circumstances; and do not include enough detail to be useful for the parties, particularly in relation to child contact.¹¹¹⁷ Submissions were overwhelmingly supportive of better access to legal advice and representation in court to address these problems.¹¹¹⁸ Submissions noted that legal advice can help applicants know which conditions to ask for, any additional conditions that could be included, as well as changes to the standard conditions that may be useful. The Darebin Family Violence Working Group told the commission:

Applicants report that the more information and support they had in the application process, the more likely they were to proceed with an application and get an order that was suitable. Many unsupported applicants report leaving court without orders, with inappropriate orders, or with unenforceable undertakings.

The commission therefore recommends better access to legal advice at recommendations 39–41.

1114 *Domestic Violence and Stalking Prevention, Protection and Compensation Act* (Canada) CCSM 1999, c D93, s 15.

1115 *Victims of Domestic Violence Act* (Canada) SS 1994, c V-6.02, s 7(1)(f).

1116 *Domestic Violence Act 1994* (SA) s 10A. Under the *Problem Gambling Family Protection Orders Act 2004* (SA), the Independent Gambling Authority is empowered to make ‘problem gambling family protection orders’ that prevent a person from entering gambling premises or from gambling if there is a reasonable apprehension that the person may cause serious harm to family members because of problem gambling, and it is appropriate to make the order in the circumstances. South Australia is the only jurisdiction with such a scheme.

1117 Submissions 39 (Royal Women’s Hospital); 44 (Anonymous); 64 (Federation of Community Legal Centres (Vic)); 66 (Aboriginal Family Violence Prevention and Legal service (Victoria)); 74 (Women’s Legal Service Victoria). Child contact issues are discussed at paras 9.61–9.98.

1118 Submissions 27 (Robinson House BBWR); 38 (Emergency Accommodation Support Enterprise, EASE); 63 (Darebin Family Violence Working Group); 64 (Federation of Community Legal Centres (Vic)); 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)); 74 (Women’s Legal Service Victoria). Better access to legal advice is recommended at recommendations 39–41.

9.15 The Federation of Community Legal Centres and the Women's Legal Service Victoria also expressed concern that the current provisions of the Act do not clearly explain that the list of possible conditions is illustrative only, and that magistrates have the power to make other conditions if they think they are appropriate or necessary. The Women's Legal Service Victoria noted the need to change some of the terms in the illustrative list into plain English so that it is clear what types of behaviours are covered.¹¹¹⁹

9.16 Submissions had mixed opinions on including some of the extra conditions that are available in other states and countries. There was general support for including the condition that the respondent return property to the victim or allow access to certain property.¹¹²⁰ The Department for Victorian Communities noted that this could be a particularly effective condition to address financial abuse of the elderly. The Women's Legal Service Victoria also supported this condition, but noted that care should be taken to ensure that this condition does not lead to intervention order applications becoming lengthy disputes about property rights.

9.17 There was also general support for a condition requiring disposal of other weapons used in the violence.¹¹²¹ The Department for Victorian Communities supported imposing a requirement on the respondent to pay compensation to the respondent, however, the Women's Legal Service Victoria felt this is already adequately covered by other legislation. Similarly, a woman who had experienced family violence supported a restriction on a respondent's driver's licence, while the Women's Legal Service Victoria felt it was adequately covered by other legislation.

9.18 Robinson House and the Women's Legal Service Victoria supported a condition that the respondent not harass or approach the applicant's family or friends. The commission addresses this issue at paragraphs 8.39–40. There was no support for including a 'problem gambling order' as a possible condition for an intervention order.

COMMISSION'S RECOMMENDATIONS

9.19 The commission agrees that some of the problems experienced by applicants in obtaining an intervention order with appropriate conditions can be addressed through increased availability of legal advice at courts. However, it is also necessary to make

1119 This is discussed at paras 6.82.

1120 Submissions 25 (Barbara Roberts); 74 (Women's Legal Service Victoria); 78 (Department for Victorian Communities); 86 (Magistrates' Court of Victoria).

1121 Submissions 25 (Barbara Roberts); 27 (Robinson House BBWR); 74 (Women's Legal Service Victoria).

other changes to ensure that appropriate conditions and restrictions are included on all intervention orders.

9.20 The commission agrees that the list of conditions currently included in the Act may be seen as prescriptive rather than illustrative. The commission therefore recommends a new Family Violence Act makes it clear that any list of possible conditions is illustrative, and that magistrates have a broad discretion to include other conditions and details that they think are necessary or appropriate.

9.21 The commission also agrees that it would be useful to include some examples of possible conditions used in other states in Victoria's family violence legislation. Specifically, the commission supports the inclusion of a condition that the respondent returns specific property to the victim, or allows access to certain property that the protected person reasonably needs. This condition is listed in the ACT, Western Australian and South Australian legislation and was included in the Model Domestic Violence Laws.¹¹²² Similar provisions also exist in New Zealand.¹¹²³ This is an important condition, particularly where the respondent is remaining in the family home, or where the protected person has been subjected to financial abuse that has included the removal of property.

9.22 On balance, the commission does not consider that the other conditions proposed in the Consultation Paper should be listed as examples in the Victorian legislation. The magistrate retains a broad discretion to consider such conditions if necessary, however, the commission does not believe these other conditions are broadly applicable or sufficiently relevant to be included in the illustrative list. In particular, suspending a respondent's driver's licence is already a penalty for dangerous driving, if dangerous driving was involved in an act of family violence. The commission also recommends that suspension of a driver's licence should be available as a penalty for breaching an intervention order where the breach involved using a car.¹¹²⁴ A victim can also take civil action to obtain compensation from the perpetrator or can apply for compensation from VOCAT. Considering the wide range of items used as weapons in family violence situations, the commission does not believe that an order to destroy other weapons will normally be practical or desirable. In addition, the

1122 *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(3); *Restraining Orders Act 1997* (WA) s 13(2)(e); *Domestic Violence Act 1994* (SA) s 5(2)(g); Domestic Violence Legislation Working Group (1999) 76.

1123 The *Domestic Violence Act 1995* (NZ) ss 62–69, provides for the court to make an 'ancillary furniture order' or a 'furniture order' that provides the protected person with the exclusive right to furniture and household items for the duration of the order.

1124 See para 10.76.

commission does not believe a ‘problem gambling order’ is an appropriate remedy for family violence, because it focuses on an issue that may not be related to the violence. If gambling has been an issue in the family violence situation, such as in situations of economic abuse, magistrates can consider making a condition related to gambling in exercising their discretion.

! RECOMMENDATIONS

107. The new Family Violence Act should make it clear that the list of possible conditions that can be included on an intervention order are illustrative only and that the magistrate has discretion to ‘impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances’.

108. The new Family Violence Act should provide a list of possible conditions for an intervention order that includes all the current examples, as well as a power to ‘direct the respondent to return certain personal property to the protected person or allow the protected person to recover or have access to personal property, whether or not the respondent has a legal or equitable interest in the property’.

EXCLUSION ORDERS

There should be some law that a man has to be taken out of the house ... it’s wrong for the women to have to leave their home ... some women, for safety reasons wouldn’t feel safe staying but ... [they would] if the laws were upheld by the Restraining Orders ... The woman has to change her whole life. It’s half the reason why you don’t want to leave ... why did I have to go, why? He’s the one that’s been violent, why can’t he be removed? You don’t like to disrupt your kid’s lives, you want to make their life as normal as possible while all this is being sorted out.¹¹²⁵

The following are some strategies that should be incorporated into national initiatives against domestic violence and considerations that States should contemplate when taking steps to address domestic violence: ...

1125 Participant in a Tasmanian family violence study: Patton (2003) above n 94, 77.

Provisions should provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved.¹¹²⁶

9.23 An ‘exclusion order’ or ‘ouster order’ is an order that requires the perpetrator to leave the family home, regardless of the perpetrator’s legal or equitable rights in the property. These orders allow the person seeking protection to remain in the family home. The Act currently enables the court to include this condition on an intervention order, but the Act does not include a specific term to describe it. Before making an exclusion condition, the court must consider the need to ensure protection from violence, the welfare of any children involved and the accommodation needs of all persons affected by the order, and must give paramount consideration to protection.¹¹²⁷

BENEFITS OF EXCLUSION ORDERS

9.24 There are a number of important benefits involved where the court includes an exclusion condition on an intervention order. First, it is fair for the violent party to be required to leave the family home, rather than the victim and the victim’s children. Ensuring that the person who has used violence is the one who is forced to leave the home reinforces the message that violence is wrong and that perpetrators will be held accountable in a range of ways.¹¹²⁸ As the Violence Against Women Specialist Unit in NSW states:

For over two decades government programs, community campaigns and the women’s movement have stated that the responsibility for the violence lies with the perpetrator. The victim is not the guilty party. This important principle needs translating into practice, whereby the innocent party is enabled to stay in her own home, and the violent partner is required to leave. Indeed if there was no overriding gender divide on domestic violence (with the perpetrator invariably a male and the victim female), it would probably be

1126 Coomaraswamy (1996) above n 126, para 142.

1127 *Crimes (Family Violence) Act 1987* s 5(2).

1128 Violence Against Women Specialist Unit [NSW], *Violence Excluded: A Study into Exclusion Orders South East Sydney*, Key Findings of the Study (2004) 3; Robyn Edwards, *Staying Home Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (2004) 36; Domestic Violence and Incest Resource Centre, *Family Violence and Homelessness: Removing the Perpetrator from the Home*, Discussion Paper No 2 (2002) 6; Vanessa Kearney, ‘The Option of Staying at Home’ (Paper presented at the Home Truths: Stop Sexual Assault and Domestic Violence a National Challenge, Melbourne, 15–17 September 2004) 2.

accepted wisdom and common sense that the violent partner be required to leave the home. This is making the perpetrator accountable.¹¹²⁹

9.25 Secondly, it is much better and safer for any children of the relationship that they can remain in their own home and area, and do not need to change schools.¹¹³⁰ A recent study conducted by the Coburg Brunswick Community Legal and Financial Counselling Centre into financial abuse within relationships found that women ‘overwhelmingly agreed on the importance of maintaining residence in the family home following the relationship breakdown in order to ensure a level of stability and familiarity for their children’.¹¹³¹ The study stated:

The women interviewed repeatedly spoke of their homes as the source of their locations in the community, the focus of their children’s relationships with the social worlds of the schools and school friends and the sites of their family stability.¹¹³²

9.26 Thirdly, experiencing family violence creates a high risk for women and children of becoming homeless or experiencing other severe economic and social disadvantage.¹¹³³ Various Australian studies have found that women and children are severely economically, educationally and socially disadvantaged if they need to leave their homes due to family violence, and that there is a high risk they will become homeless.¹¹³⁴ One woman who participated in a NSW study gave the following advice to victims of violence:

Stay [in your home] if you can because you will lose too much if you walk off and you might never, never get it back again ... the only way for [victims of violence] to have a life is to stay in the house ... stay there if you can and carry on with your life.¹¹³⁵

9.27 An exclusion condition will not be appropriate in every case. It may be that the victim of violence does not feel safe remaining in the home and would prefer to

1129 Violence Against Women Specialist Unit (2004) above n 1128.

1130 Ibid 3; Edwards (2004) above n 1128, 36, 51; Partnerships Against Domestic Violence (2000) above n 661, 46.

1131 Elizabeth Branigan, *‘His Money or Our Money?’ Financial Abuse of Women in Intimate Partner Relationships* (2004) 31.

1132 Ibid 31.

1133 Ibid 3; Edwards (2004) above n 1128, 36, 51; Partnerships Against Domestic Violence (2000) above n 661, 46; Health Outcomes International, *Improving Women’s Safety* (2004) 12; Patton (2003) above n 94, 77; Domestic Violence and Incest Resource Centre (2002) above n 1128, 4. This is also the case internationally: Coomarasamy (1996) above n 126, para 59.

1134 Edwards (2004) above n 1128, 51; Coburg Brunswick Community Legal and Financial Counselling Centre (2004) above n 1131, 35.

1135 Edwards (2004) above n 1128, 51.

move to temporary accommodation out of the perpetrator's reach.¹¹³⁶ However, it is also true that victims should have the right to choose whether they remain in their own homes or leave.¹¹³⁷ Recent Australian studies have found that the majority of women who have experienced family violence would prefer to remain in their own homes.¹¹³⁸ An estimated 98% of participants in a national Australian study believed that women should and do have the right to remain in the family home if they wish.¹¹³⁹ In a small qualitative study in NSW, Edwards found that none of the women who remained in their own homes had experienced the man returning and being violent, while those who had left their homes were often found by the perpetrator anyway.¹¹⁴⁰

9.28 It also seems that applying for an exclusion condition does not necessarily increase the chances that the application will be contested by the respondent. A Melbourne family violence service providing support to victims who apply for exclusion conditions found that 42% of cases were contested on the return date in 2004.¹¹⁴¹ In the NSW study conducted by the Violence Against Women Specialist Unit, less than half the cases where an exclusion order was applied for were contested.¹¹⁴²

BARRIERS TO OBTAINING EXCLUSION ORDERS

9.29 The commission's Consultation Paper outlined some of the barriers that people face when seeking an order that would remove the perpetrator from the home. Anecdotal evidence, including submissions received by the commission, suggests that exclusion conditions are rarely made in Victoria.¹¹⁴³ The most important barriers identified are: the attitudes of magistrates to making such conditions, the lack of information available explaining how to apply for an exclusion condition, and the

1136 Partnerships Against Domestic Violence (2000) above n 661, 56; Health Outcomes International (2004) above n 1133, 245.

1137 Health Outcomes International (2004) above n 1133, 15.

1138 Partnerships Against Domestic Violence (2000) above n 661, 56; University of South Australia, *Reshaping Responses to Domestic Violence*, Final Report (2000) 41; Edwards (2004) above n 1128, 38.

1139 Health Outcomes International (2004) above n 1133, 153.

1140 Edwards (2004) above n 1128, 33, 54.

1141 Email from Vanessa Kearney, Eastern Domestic Violence Outreach Service, 17 November 2005.

1142 Violence Against Women Specialist Unit (2004) above n 1128, 11.

1143 Eg, submissions 3 (Eastern Domestic Violence Outreach Service), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre); Domestic Violence and Incest Resource Centre (2002) above n 1128, 23.

invisibility of exclusion conditions within the legislation. Each of these barriers is discussed below.

ATTITUDES OF MAGISTRATES

9.30 One of the main barriers to obtaining an exclusion condition is the attitude of some magistrates that such conditions should only be made in rare circumstances, if at all. Submissions mentioned a perception on the part of some Victorian magistrates that exclusion conditions:

- are a ‘back door’ method to determining a property settlement which should be dealt with under family law;¹¹⁴⁴
- unduly interfere with the property rights of the person who has used violence;¹¹⁴⁵
- conditions are unfair on men who have used violence because there is no alternative accommodation for them.¹¹⁴⁶

9.31 The Magistrates’ Court told the commission:

Despite the legislation being relatively clear, there seems to be a hesitation in removing a person from ‘his’ home with a related failure to acknowledge that this is exactly where the violence occurs.

9.32 A recent study in Sydney on applications for exclusion orders also found an overwhelming concern on behalf of magistrates for the accommodation needs of the male defendant.¹¹⁴⁷ None of the transcripts disclosed any concern for the accommodation needs or the safety of the victim or children.¹¹⁴⁸ Magistrates focused on the perpetrator’s wishes, as demonstrated in the following transcript where the magistrate addresses the perpetrator:

1144 Domestic Violence and Incest Resource Centre (2002) above n 1128, 31; submission 3 (Eastern Domestic Violence Outreach Service).

1145 Domestic Violence and Incest Resource Centre (2002) above n 1128, 26; submissions 22 (Kim Robinson, social worker), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 86 (Magistrates’ Court of Victoria).

1146 Submissions 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE). See also Violence Against Women Specialist Unit (2004) above n 1128; Domestic Violence and Incest Resource Centre (2002) above n 1128.

1147 Violence Against Women Specialist Unit (2004) above n 1128, 8.

1148 Ibid.

are you wanting her to move out, or are you going to move out at some stage or what ... I take it that you oppose an order that puts you out of the house do you Mr X.¹¹⁴⁹

9.33 A Queensland study reached similar conclusions, finding a generally positive attitude to the possibility of making an exclusion order from magistrates, but that these orders were generally seen as an extreme response to physical violence.¹¹⁵⁰ The study also revealed 'an overriding preoccupation with the rights of the respondent'.¹¹⁵¹

9.34 Some magistrates also believe that it is much easier for women who have experienced family violence to access temporary shelters than it is for violent men to find emergency accommodation.¹¹⁵² This is often not the case and also ignores the need to hold perpetrators accountable for their actions.¹¹⁵³ The Australian Institute of Health and Welfare found that in 2002–03, over a two-week data collection period, it was estimated that the average daily refusal rate for agencies that were primarily targeted at women escaping family violence and seeking to obtain immediate accommodation was 48%.¹¹⁵⁴

9.35 It is important to emphasise that an exclusion condition does not affect who owns the home, or who has other legal rights to the home, and it does not affect either party's legal rights in any ongoing or contemplated family law property proceedings. An exclusion condition is a response to ensure safety of the victim and any children. The power to make an exclusion order is therefore a crucial part of the magistrates' power to protect family members from violence, and is not a punitive measure.¹¹⁵⁵

9.36 An exclusion condition only relates to a right of a party to occupy a property for a defined period. Where a property is occupied by the parties subject to a lease in

1149 Violence Against Women Specialist Unit, NSW, *Violence Excluded: A Study into Exclusion Orders South East Sydney* Key Finding of the Study (2004) 10.

1150 Rachael Field et al, 'Issues for Magistrates in the Making of Ouster Orders Under the Domestic Violence (Family Protection) Act, 1989 (Qld)' (Paper presented at the International Society Family Law Conference, Brisbane, 9–13 July 2000) 10.

1151 Ibid.

1152 Submissions 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 62 (Eastern Community Legal Service). See also Violence Against Women Specialist Unit (2004) above n 1128.

1153 Domestic Violence and Incest Resource Centre (2002) above n 1128, 69. For information on difficulties with women's access to emergency and temporary housing, see: Office for Women, Department of Family and Community Services, *Women's Refuges, Shelters, Outreach and Support Services in Australia: From Sydney Squat to Complex Services Challenging Domestic and Family Violence* (2004).

1154 S Marcolin, *Female SAAP Clients and Children Escaping Domestic and Family Violence 2003–04* (2005) 60.

1155 Mick Boyle, *Men, Male Family Violence and Homelessness*, Council to Homeless Persons <www.chp.org.au/parity/articles/results.html?filename_num=00132> at 22 September 2005.

joint names or the sole name of the respondent and an exclusion condition is made in favour of the applicant, consequent orders may be required to transfer the tenancy into the victim's name.

LACK OF INFORMATION

9.37 Another difficulty with accessing exclusion conditions is the lack of information available and misinformation given to applicants by police and court staff. As one submission stated: 'I was told by the policeman that it was as much my husband's right to stay in the house as mine'.¹¹⁵⁶

9.38 Court staff, police and legal representatives often try to dissuade applicants from applying for these types of conditions, and the information booklet 'Applying for an Intervention Order' does not provide any information on exclusion orders.¹¹⁵⁷ If victims are to seriously consider remaining in their home as an option, information needs to be provided, not only on how to achieve this legally, but also outlining the risks that may be involved in this choice.¹¹⁵⁸

INVISIBILITY IN LEGISLATION

9.39 A further barrier to obtaining an exclusion condition is their invisibility within the legislation.¹¹⁵⁹ As mentioned in paragraph 9.23, although the Crimes (Family Violence) Act allows such conditions to be made, they do not have a specific term to describe them in the Act. The Act states that an order may:

Prohibit or restrict access by the defendant to premises in which the aggrieved family member lives, works or frequents and such an order may be made whether or not the defendant has a legal or equitable interest in those premises.¹¹⁶⁰

A NSW study on the accessibility of exclusion orders has found that this invisibility in the relevant legislation leads to a procedural and administrative barrier in obtaining

1156 Submission 44 (Anonymous).

1157 Submissions 3 (Eastern Domestic Violence Outreach Service), 4 (Eastern Domestic Violence Outreach Service); Domestic Violence and Incest Resource Centre (2002) above n 1128, 37.

1158 Health Outcomes International (2004) above n 1133, 156; Domestic Violence and Incest Resource Centre (2002) above n 1128, 36. A recent NSW study exploring how women leaving a violent relationship could remain in their homes has also found that lack of information about the possibility of an exclusion order meant that many women did not think it was an option to remain in the home: Edwards (2004) above n 1128, 39.

1159 Domestic Violence and Incest Resource Centre (2002) above n 1128, 36–43.

1160 *Crimes (Family Violence) Act 1987* s 5(1)(b).

one.¹¹⁶¹ This was also seen as a key barrier to accessing exclusion orders by the Domestic Violence and Incest Resource Centre.¹¹⁶²

9.40 Despite evidence of these barriers, a metropolitan Melbourne family violence service, the Eastern Domestic Violence Outreach Service, has had success in supporting women to obtain this condition. The program run by the service demonstrates that access to information about exclusion conditions, support in obtaining an order and developing a safety plan greatly increase the chances of such a condition being made. In 2004 the service supported 58 women seeking an exclusion condition. Of these, 52 were granted on an interim basis and 49 were granted as part of an ongoing order. The applications were contested in 17 of the matters.¹¹⁶³

REMAINING IN THE HOME AS A HUMAN RIGHT

9.41 As highlighted at the beginning of this section, the UN Special Rapporteur on violence against women has recommended that all States should ‘provide for the removal of the abuser from the shared home and allow the victim-survivor to retain her present housing, at least until formal and final separation is achieved’.¹¹⁶⁴ The UN Model Strategies also provide that protection orders should include ‘removal of the perpetrator from the domicile’.¹¹⁶⁵

9.42 Women’s Health West has noted that ‘an approach to family and domestic violence focused on the social and economic rights of women would require, for example, that the perpetrator of violence instead be removed from the family home’.¹¹⁶⁶ The Women’s Rights Action Network Australia has also recommended that a woman’s right to stay in the home must be implemented through the conditions available in intervention orders.¹¹⁶⁷ The Eastern Domestic Violence Outreach Service

1161 Violence Against Women Specialist Unit (2004) above n 1128, 8.

1162 Domestic Violence and Incest Resource Centre (2002) above n 1128.

1163 Email from Vanessa Kearney, Eastern Domestic Violence Outreach Service, 17 November 2005.

1164 Coomarasamy (1996) above n 126, para 142.

1165 *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice para 7(g).

1166 Women’s Health West, *Submission to the Victorian Government’s Community Consultation on Human Rights* (2005) 10.

1167 Women’s Rights Action Network, *Our Rights, Our Voices—The Victorian Community Report on Women* (2004) 8.

also ‘believe[s] strongly in the right of women who have experienced abuse to use the legal processes available to them to remain in their home—if that is their choice’.¹¹⁶⁸

VIEWS FROM SUBMISSIONS

9.43 The submissions received by the commission overwhelming supported exclusion conditions being made more frequently and contained many suggestions for changes to improve applicants’ access to them.¹¹⁶⁹ Submissions stated that an exclusion order should be made ‘as a matter of course’ if the applicant requests it. The Women’s Domestic Violence Crisis Service told us: ‘Women and children should be able to be safe in their own homes while the violent partner or ex-partner should be made to leave and to change his behaviour’.

9.44 Submissions noted that women and children are often made homeless due to family violence. Being forced to leave the family home can cause ‘long-term poverty and social dislocation’.¹¹⁷⁰ Robinson House and the Women’s Domestic Violence Crisis Service were concerned that it is inequitable that the person who uses violence is not the one to experience the disruption of leaving the home. An exclusion condition is one way of holding a perpetrator accountable for the use of violence.¹¹⁷¹ Submissions noted that exclusion orders are particularly important where children are involved because it can be very disruptive, particularly to their schooling, when they are forced into temporary shelters.¹¹⁷²

9.45 The Domestic Violence and Incest Resource Centre suggested that exclusion conditions should be clearly named and outlined within the Act so that the option is not invisible within the legislation. The Magistrates’ Court supported a change to legislation to incorporate an expectation that where violence has occurred the perpetrator will be removed from the home. The Magistrates’ Court also supported an

1168 Kearney (2004) above n 1128, 2.

1169 Submissions 3 (Eastern Domestic Violence Outreach Service), 4 (Eastern Domestic Violence Outreach Service), 25 (Barbara Roberts), 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 33 (Women’s Domestic Violence Crisis Service), 38 (Emergency Accommodation Support Enterprise, EASE), 46 (Royal Children’s Hospital), 48 (Coburg Brunswick Community Legal and Financial Counselling Centre), 61 (Broadmeadows Community Legal Service), 62 (Eastern Community Legal Centre), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 78 (Department for Victorian Communities), 79 (Department of Human Services).

1170 Submission 48 (Coburg Brunswick Community Legal and Financial Counselling Centre).

1171 Submission 64 (Federation of Community Legal Centres (Vic)).

1172 Submissions 27 (Robinson House BBWR), 41 (Victoria Legal Aid), 45 (Rochelle Campbell, women’s health resource worker), 46 (Royal Children’s Hospital).

expectation or presumption that children remain in their own home. Some submissions also mentioned the need for the legislation to state the factors that the magistrate should consider when deciding whether to make an exclusion condition.¹¹⁷³

9.46 The Eastern Domestic Violence Outreach Service and the Women's Legal Service Victoria stated that information should be more readily available about the possibility of obtaining an exclusion condition, particularly at the interim stage. For example, the possibility of applying for an exclusion condition could be mentioned on the intervention order application form.¹¹⁷⁴ Police and court staff could be required by legislation to inform applicants that they can apply for an exclusion condition.¹¹⁷⁵ Applicants need assistance, information and support to investigate the option of remaining in the home.¹¹⁷⁶

9.47 Many submissions also mentioned the need for improved services to support the making of exclusion conditions. For example, the lack of temporary accommodation for men who use violence is seen as a barrier to the use of these conditions.¹¹⁷⁷ Temporary men's accommodation that provides behaviour change programs would assist in increasing the number of these orders made.¹¹⁷⁸ The Victorian Aboriginal Legal Service also said refuges must be made available for Indigenous respondents, along with support and rehabilitation, if exclusion conditions are made more frequently. The Eastern Community Legal Centre also noted that magistrates and registrars need to be educated about how hard it is for women to find refuge accommodation.

1173 Submissions 8 (Werribee Legal Service), 22 (Kim Robinson, social worker), 49 (Domestic Violence and Incest Resource Centre).

1174 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services).

1175 Submission 30 (Violence Against Women Integrated Services).

1176 Submissions 63 (Darebin Family Violence Working Group), 74 (Women's Legal Service Victoria), 78 (Department for Victorian Communities).

1177 Submissions 27 (Robinson House BBWR), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 40 (Whittlesea Domestic Violence Network), 45 (Rochelle Campbell, women's health resource worker), 54 (Andrew Compton), 61 (Broadmeadows Community Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 78 (Department for Victorian Communities). See also: Domestic Violence and Incest Resource Centre (2002) above n 1128; Edwards (2004) above n 1128, 42.

1178 Submissions 27 (Robinson House BBWR) and 72 (Victoria Police). See also Domestic Violence and Incest Resource Centre (2002) above n 1128.

9.48 The need for general and drug and alcohol counselling for both men and women was also mentioned.¹¹⁷⁹ Financial support is also often necessary for the applicant to be able to meet rental or mortgage payments or to install security devices in the home.¹¹⁸⁰ Victoria Police noted that more use could be made of crime compensation for victims for these purposes. It is also possible if a tenancy is in the respondent's name for the respondent to terminate the tenancy agreement while the applicant is living there. Changes could therefore be made to tenancy law to prevent this.¹¹⁸¹

OTHER JURISDICTIONS

9.49 Some of the issues raised have been addressed in the legislation of other jurisdictions. For example, Queensland legislation refers specifically to 'orders that include [an] ouster condition', and outlines the conditions that should be included on such an order to allow the respondent temporary access to the home to remove property.¹¹⁸² The Queensland *Residential Tenancies Act 1994* allows a tribunal to make an order giving sole tenancy of a residential property to a person who has experienced family violence, including those who were occupants of the property and not co-tenants.¹¹⁸³ The lessor of the property has the right to be heard on the application.¹¹⁸⁴ A Magistrates' Court can also deal with an application for sole tenancy when considering a restraining order application.¹¹⁸⁵

9.50 Tasmanian legislation also permits the court to alter a residential tenancy agreement where the person against whom an order is made is a tenant of a property where the affected person lives.¹¹⁸⁶ This provision means that the person who has used

1179 Submissions 40 (Whittlesea Domestic Violence Network), 45 (Rochelle Campbell, women's health resource worker).

1180 Submissions 40 (Whittlesea Domestic Violence Network); 48 (Coburg Brunswick Community Legal and Financial Counselling Centre); 63 (Darebin Family Violence Working Group). The Eastern Domestic Violence Outreach Service assists women to change the locks on the house, install sensor lights and security doors. Women can apply for the costs of these security measures through VOCAT. The service also notes that where rental or mortgage repayments are too expensive, an exclusion order may serve as a temporary measure while the home is sold or alternative accommodation is located. This means the woman only needs to move once rather than twice: Kearney (2004) above n 1128, 4, 6.

1181 Domestic Violence and Incest Resource Centre (2002) above n 1128, 86.

1182 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A.

1183 *Residential Tenancies Act 1994* (Qld) s 150.

1184 *Residential Tenancies Act 1994* (Qld) s 150(8).

1185 *Domestic and Family Violence Protection Act 1989* (Qld) s 62A(1).

1186 *Family Violence Act 2004* (Tas) s 17.

violence cannot terminate the tenancy and is no longer a tenant of the property. Affected people can be given sole tenancy of the property even if they were previously only an occupant of the premises.¹¹⁸⁷ Any person who has an interest in the premises is entitled to appear and be heard in relation to the application.¹¹⁸⁸ Proposed amendments will also mean that if a tenancy is transferred to a victim of violence, any security deposit previously paid is not refundable to the previous tenant and no further security deposit can be requested by the landlord.¹¹⁸⁹

9.51 One of the most comprehensive pieces of legislation regarding exclusion orders is the New Zealand *Domestic Violence Act 1995*. This Act provides for occupation orders that give the applicant sole use of the property¹¹⁹⁰ and tenancy orders that grant the applicant tenancy of a property where the other party was previously either a sole or joint tenant.¹¹⁹¹ The legislation also provides for ancillary furniture orders which prevent the person who has used violence from removing furniture, household appliances and household effects from the premises.¹¹⁹² These orders can be granted if they are necessary for the protection of the applicant or it is in the best interests of the applicant's children.¹¹⁹³

COMMISSION'S RECOMMENDATIONS

9.52 The commission agrees that exclusion conditions should be made much more frequently than is currently the case. If the applicant feels safe remaining in the property, then the presumption should be that the person who has used violence is the one who must leave. For exclusion conditions to be more accessible to applicants, the commission makes the following recommendations.

INCLUDING EXCLUSION ORDERS IN LEGISLATION

9.53 The possibility of making an 'exclusion order' needs to be specifically named and outlined in the Act. This will make this type of order more visible, and will help to show magistrates and registrars that this type of order is within the jurisdiction of the court. There is evidence from Victoria that the lack of a defined term and type of

1187 *Family Violence Act 2004* (Tas) s 17(1).

1188 *Family Violence Act 2004* (Tas) s 17(4).

1189 Residential Tenancy Amendment Bill 2005 (Tas) s 16.

1190 *Domestic Violence Act 1995* (NZ) s 52.

1191 *Domestic Violence Act 1995* (NZ) s 56.

1192 *Domestic Violence Act 1995* (NZ) s 62.

1193 *Domestic Violence Act 1995* (NZ) ss 53(2), 57(2).

order in the Act leads to applicants being given incorrect information and being unable to apply for the type of order they want.¹¹⁹⁴ Therefore the Act should explicitly state, as in the Queensland legislation, that an 'exclusion order' may be made as part of an intervention order.

9.54 The Act should also state that where an applicant requests that the violent party be excluded from the family home, there is a presumption that this type of order will be made.¹¹⁹⁵ This presumption will ensure that where a victim feels safe remaining in the home, the perpetrator will be held accountable and made to leave, rather than the victim. It will also minimise disruption to the lives of any children involved, and will reduce the risks of homelessness and poverty to people who have experienced family violence. This presumption would override the previous prevailing notion that the perpetrator's accommodation needs must be considered as the main priority.¹¹⁹⁶

9.55 A new Family Violence Act should also include factors that a magistrate must consider when deciding whether to make an exclusion order. The commission recommends that these factors should include the safety of the applicant, the safety and the welfare of any children involved, and the disruption that would occur to the applicant and any children if they have to leave the family home.

9.56 The commission also recommends that a new Family Violence Act should contain provisions similar to those in Queensland and Tasmania regarding residential tenancies. Where the parties are living in a rental property and the lease is in the perpetrator's name only, it is currently possible for the perpetrator to cancel the lease despite an exclusion order being made by the court. This means that the victim and any children must leave the property. Therefore, where a tenancy for the family home

1194 Domestic Violence and Incest Resource Centre (2002) above n 1128, 40.

1195 The Australian national study *Improving Women's Safety* found that the majority of participants thought there should be a presumption in family violence legislation that women and children can remain in their homes if they want to: Health Outcomes International (2004) above n 1133, 104. Participants in a national study on family violence and homelessness suggested 'the removal of magistrates' discretion such that orders which provide for sole occupancy of the woman in the family home are assumed unless there are exceptional reasons why this is not possible': Partnerships Against Domestic Violence (2000) above n 661, 58.

1196 The two NSW studies on the use of exclusion orders also recommended that magistrates must give priority to the safety needs of women and children, as opposed to the accommodation needs of the perpetrators when considering whether to make an exclusion order: Edwards (2004) above n 1128, 57; Violence Against Women Specialist Unit [NSW] *Violence Excluded: A Study into Exclusion Orders: South East Sydney*, Final Report (2004) 16.

is in joint names or is in the perpetrator's name only, there should be provision enabling the tenancy to be transferred into the victim's name only.¹¹⁹⁷

PROVIDING INFORMATION AND SUPPORT

9.57 The commission also recommends that information on the possibility of excluding the perpetrator from the family home should be more readily available to applicants.¹¹⁹⁸ Information should be provided to potential applicants that outlines how to apply for an exclusion order, as well as the possible risks involved in applying for such an order. The information should refer applicants to support services and legal advice so they have the opportunity to fully consider the implications of their decision.¹¹⁹⁹ Information pamphlets must be available in a range of languages, because lack of information about the option of an exclusion order is a major barrier for victims from non-English speaking backgrounds in applying for such an order.¹²⁰⁰

9.58 The intervention order application form should also be amended to include a question asking whether the applicant wants to live in the family home and have the violent person removed.¹²⁰¹

9.59 The provision of information must be accompanied by legal advice and other support, as outlined in recommendations 24, 39–41, 46, 49 and 53, to ensure that victims can make an informed decision about what type of order they want to apply for and steps they may need to take to improve their safety if they do decide to stay in their homes.

9.60 The commission also recommends that magistrates and police prosecutors are provided with comprehensive information about the temporary accommodation

1197 The *Residential Tenancies Act 1997* contains a power for the tribunal to create a tenancy on behalf of a person living in rented premises who is not a tenant in specified circumstances. However, these circumstances do not specifically relate to the situation of a violent relationship: ss 232–233.

1198 Two NSW studies on the use of exclusion orders found that a lack of information about the availability of these orders was a barrier for women, and recommended that women should be routinely informed about exclusion orders, including through the provision of information pamphlets: Edwards (2004) above n 1128, 57; Violence Against Women Specialist Unit (2004) above n 1196, 15.

1199 Health Outcomes International (2004) above n 1133, 57.

1200 Ibid 168.

1201 One of the NSW studies referred to above also recommended that a discrete category be created for exclusion orders on the relevant form: Violence Against Women Specialist Unit (2004) above n 1196, 15. The commission has recommended at Recommendation 43 that the court adopt the application form used in the Family Violence Court Division across all courts. This form currently includes the possibility of a condition prohibiting the defendant from 'coming within ... metres of my home, workplace or school'. The form does not specify that this can include excluding the respondent from the family home.

options that already exist for men.¹²⁰² This will ensure that magistrates are aware that some emergency or temporary accommodation options are available to men, and that a lack of other options should not be used as a reason to deny women and children the right to live in their own homes.

! RECOMMENDATIONS

109. The new Family Violence Act should explicitly include an 'exclusion order' as a possible condition on an intervention order. The list of conditions should include a condition such as 'exclude the respondent from occupying the home previously shared, whether or not the home is rented or owned jointly by either of the parties'.

110. If the grounds for an intervention order are made out and the applicant seeks an exclusion order, there should be a presumption in favour of an exclusion order being granted.

111. In addition to a presumption in favour of exclusion orders, the magistrate should take the following factors into account when considering whether an exclusion order should be made:

- the wishes of the applicant;
- the welfare of any children involved;
- the disruption that would occur to the applicant and any children if the applicant leaves the family home.

1202 Providing information to magistrates about the existence of temporary men's accommodation was also recommend by Violence Against Women Specialist Unit, NSW Attorney General's Department, *Violence Excluded: A Study into Exclusion Orders: South East Sydney* Final Report (2004)16, and Health Outcomes International (2004) above n 1133, 104.

! RECOMMENDATIONS

112. Where a court is making an exclusion order and there is a tenancy agreement for the family home in joint names or solely in the perpetrator's name, the court should be able to require the applicant to indemnify the respondent in relation to the tenancy agreement. The *Residential Tenancies Act 1997* should be amended to make it clear that in cases involving family violence VCAT should have the power to order the tenancy to be transferred into the victim's name.
113. The court should provide information on the possibility of obtaining an exclusion order and outline the risks involved and matters an applicant may want to consider when making this decision.
114. The application form for an intervention order should include a question asking whether the applicant seeks to remain in the family home and have the respondent removed.
115. A resource for magistrates, prosecutors and police should be developed that outlines the types of temporary housing available for male respondents.

INTERVENTION ORDERS AND CHILD CONTACT

There were times when Josh didn't want to go with his father, but he knew he didn't have a choice. Paul on one occasion had told Josh, 'Wave to your mother because you won't see her again.' Josh looked back at me and I could see him screaming ... I was crying and begging Paul not to force him to go and to let him stay home this time. Josh was screaming 'Mummy I don't want to go.' This was unbearable. Paul took off and returned the children Sunday evening.¹²⁰³

For the last year he has been manipulating the [children] and forcing them to do things they don't want to do, like call his wife Mummy, and making fun of me, and

1203 Parkinson (2004) above n 800, 37.

really seriously hurting them. ... My children were so afraid of what was going to happen to me. They weren't dealing with it. They weren't sleeping, they were bed-wetting, my son was always sick. My ex wasn't thinking of them, this was all about him hurting me. He knew the only way he could hurt me was through them because he knows the love I have for them. He has been calling my son a different name since he was born. He didn't like the name I chose and so he just calls him by a different name.¹²⁰⁴

9.61 It is essential that applicants and children are not exposed to further violence and abuse through child contact arrangements. As we have previously discussed in paragraphs 4.27–4.29, the commission believes that the circumstances where an intervention order is available to protect a child living with a violent relationship should be expanded. This section therefore discusses changes that need to be made to the intervention order system to prevent child contact arrangements being used as a way to further abuse applicants and children.

9.62 Where a parent applies for an intervention order in the Magistrates' Court, the parties and the court have to consider three possible legal situations regarding child contact:

- There is already a child contact order or a parenting plan registered by a court.¹²⁰⁵ The conditions of the child contact order or parenting plan may be inconsistent with conditions on any intervention order made.
- There is no child contact order or registered parenting plan, but one of the parties has applied for a child contact order and a decision is to be made by a court.
- There is no child contact order or parenting plan in place.

9.63 This section will outline changes that need to be made in all three scenarios to ensure that children are protected from family violence.

IMPACT OF CHILD CONTACT

9.64 Research in Australia and internationally has demonstrated that the period immediately following separation from a violent relationship is the time of greatest risk of an escalation of violence, including murder. In an analysis of all intimate partner homicides committed in Australia over 14 years, the Australian Institute of

1204 Interview with Lucy, 4 May 2005.

1205 In Victoria, contact orders may be made and parenting plans registered by the Family Court of Australia, the Federal Magistrates Court or a Magistrates' Court.

Criminology found that one-quarter of the homicides were committed between couples who had separated or divorced.¹²⁰⁶

9.65 Once parties have separated, violence often continues through child contact arrangements, although the nature of the violence may change. A recent Queensland study found that all participants had experienced post-separation violence from their partners, and most of this had occurred around child contact. Further abuse included verbal harassment and physical violence at contact handover, using telephone contact to harass the mother, and using children to pass on abusive messages and threats.¹²⁰⁷ The study found:

All of the participants who were sending children on contact visits indicated that the children were in a constant state of emotional upheaval because of the contact parent asking questions about the residential parent and denigrating that parent.¹²⁰⁸

9.66 A recent NSW study reached similar conclusions, with all but one of the female participants experiencing post-separation violence or abuse from their ex-partner at some stage. The participants were mothers who had children living with them and had been the targets of violence before separation. A significant proportion of the post-separation abuse was linked to child contact, particularly where the contact or negotiations for contact gave some level of access to the mother.¹²⁰⁹ Research from England and Denmark has also demonstrated that most post-separation violence committed against mothers is linked in some way to child contact.¹²¹⁰

9.67 In addition to exposing victims to violence, child contact arrangements can also place children at an increased risk of violence and abuse. In situations where the father has not previously directly abused the children, after separation his access to the children may be used as a way to further abuse the mother.¹²¹¹ Where his access to the mother has been limited, the violent man may start abusing the children as a way to continue exercising power and control over her.¹²¹² Women who participated in the

1206 Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia* (2003) 2.

1207 Women's Legal Service, *An Unacceptable Risk: A Report on Child Contact Arrangements where there is Violence in the Family* (2002) 46–50.

1208 Ibid 47.

1209 Miranda Kaye et al, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003) 35–7.

1210 Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996) 3.

1211 Women's Legal Service (2002) above n 1207, 39; Submissions 46 (Royal Children's Hospital), 58 (Family Court of Australia).

1212 Kaye et al (2003) above n 1209, 13.

NSW study described a variety of abuse committed against their children on contact visits aimed partly at abusing the mother:

threatening to kill the child(ren) or their mother; killing children's pets; destroying or removing children's favourite toys; interrogating the children to discover their address or phone number or details of their mother's life; and name calling and abuse, including in one case screaming outside the door of the house 'I pay for you so you have to see me'.¹²¹³

9.68 One woman who participated in the Queensland study noted:

You're still being abused because your children are being abused and they're a part of you and they're in pain and they're unhappy and they're suffering then you're unhappy. So basically they're just an extension of you and that abuse is still inflicted on you through them.¹²¹⁴

HOW THE COURT DEALS WITH CHILD CONTACT

9.69 Given the high levels of violence committed against both women and children on separation from a violent relationship, it is important to challenge the assumption that it is in the best interests of the child for the court to maintain contact with both parents, when an intervention order is made to protect the mother. Although long-term decisions about child contact are properly determined in the Family Court or the Federal Magistrates Court, Victorian magistrates hearing family violence matters have a responsibility to protect children from violence, including making appropriate arrangements for child contact prior to a Family Court or Federal Magistrates Court hearing. Applications for intervention orders are often made in moments of crisis in a violent relationship, well before any family law proceedings are contemplated. An application for an intervention order may be the first step in leaving the relationship. Therefore, it is crucial that magistrates understand the risks involved in allowing child contact immediately after the couple has separated, and that they make safe arrangements for contact handover where they determine that contact between the child and the perpetrator is not a risk to the child.

9.70 Magistrates have the power under section 68T of the Family Law Act to make, vary, revoke or suspend a Family Court contact order when hearing a family violence matter. Where there is no previous order or agreement about child contact, magistrates have the power to make a contact order and include the contact terms in any intervention order made. These powers were introduced in legislation in recognition

1213 Ibid 32.

1214 Women's Legal Service (2002) above n 1207, 50.

of the need to protect children from family violence before a case can be heard in the Family Court. Although some magistrates use these powers to protect children from violence, others do not, and their use is inconsistent across the state.¹²¹⁵ This exposes women and children to further violence.

VIEWS FROM SUBMISSIONS

9.71 The commission has consistently heard that magistrates are reluctant to deal with child contact issues when making intervention orders, or that they allow contact with children as an exception to any protection offered to the applicant.¹²¹⁶ This exposes applicants and children to further violence. One woman the commission spoke to said:

When I got my intervention order the judge asked whether there were any family orders in place. When I said no, he said that my ex needed access to the children. I just thought no way. He had threatened to kill the kids. His biggest threat was that he was going to kill himself and the kids because a bitch like me didn't deserve them. Why would I allow them to see him?¹²¹⁷

9.72 Submissions also outlined examples where magistrates had refused to deal with child contact issues, believing that it is a matter for the Family Court only. The Violence Against Women Integrated Services noted that 'magistrates who hold these beliefs seem to fail to understand the nature of family violence and the effect it has on children both long and short term'. The Federation of Community Legal Centres said 'it is important that magistrates understand that a violent parent is not better than no parent at all'. The Women's Legal Service Victoria told us:

Currently we find that many magistrates refuse to deal with issues relating to child contact on the basis that it is 'outside their jurisdiction'—but this reluctance seems to us to stem more from a view that it is outside their experience.

1215 See, eg, Domestic Violence and Incest Resource Centre (2002) above n 1128, 30–33; Submission 86 (Magistrates' Court of Victoria).

1216 Submissions 8 (Werribee Legal Service), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 33 (Women's Domestic Violence Crisis Service), 61 (Broadmeadows Community Legal Service), 63 (Darebin Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women's Legal Service Victoria), 79 (Department of Human Services).

1217 Interview with Julie, 27 April 2005.

The Magistrates' Court acknowledged that 'these orders are not now consistently made'.¹²¹⁸

9.73 Submissions also outlined the need for thorough training and education about child contact for magistrates. The Family Court of Australia noted that the recent changes to the Crimes (Family Violence) Act, giving magistrates powers under s 68T of the Family Law Act, will not lead to more consistent protection from family violence. What is needed is 'an ongoing education program that recognises the prevalence of family violence in our community, and a commitment to protect those who suffer as a result'. Two recent Australian studies into child contact and family violence have also recommended that magistrates should undergo thorough training on the dynamics of family violence and their powers under the Family Law Act to deal with child contact issues.¹²¹⁹

COMMISSION'S RECOMMENDATIONS

9.74 Due to the problems experienced by many people with inappropriate or no orders being made for child contact, the commission recommends that magistrates undergo thorough training about child contact, to ensure that their existing powers are utilised more often and in a more effective way. The commission also recommends ways that these powers should be changed. However, a basic understanding by magistrates of their role in child contact is essential before any other changes to their powers will have any impact.

! RECOMMENDATION

116. Any training of magistrates in the area of family violence should include:

- the impact of family violence on children and that therefore contact is not always in the best interests of the child;
- the risk of violence and abuse for children during contact visits and during contact handover where the mother must attend;

1218 The Magistrates' Court also noted that it would support re-drafting of s 68T of the Family Law Act to be clearer and easier for magistrates to use.

1219 Kearney McKenzie and Associates, *Review of Division 11: Review of the Operation of Division 11 of the Family Law Reform Act to Resolve Inconsistencies between State Family Violence Orders and Contact Orders made under Family Law* (1998) 28; Kaye et al (2003) above n 1209, 151.



RECOMMENDATION

- ways that contact handover can be made safer in those cases where contact is desirable;
- how section 68T of the Family Law Act operates and how it may be used.

NO CONTACT WHERE AN INTERVENTION ORDER IS MADE FOR A CHILD

9.75 As discussed in paragraphs 4.27–4.29, the commission recommends that intervention orders should be made on behalf of children wherever they have heard, witnessed or otherwise been exposed to family violence or are at risk of being exposed to family violence. If a magistrate makes an intervention order to protect a child from the respondent, it must be made clear to the parties that this means there should be no contact between the perpetrator and the child. This means:

- If a Family Court contact order already exists, the magistrate must suspend the contact order.¹²²⁰ The magistrate must inform perpetrators that if they want to resume contact with the child, then they will need to apply to the Family Court or the Federal Magistrates Court for a decision.
- If there is no previous Family Court contact order, then the magistrate should make it clear to the parties that there can be no contact between the respondent and any children.

9.76 The interaction between intervention orders and child contact orders is currently unclear to applicants and respondents, as well as to the police who need to enforce the orders.¹²²¹ It is therefore essential that magistrates make it clear to the parties, and on the intervention order, that no contact is allowed between the perpetrator and the child unless the Family Court or the Federal Magistrates Court later decides otherwise.

9.77 It is also essential that magistrates have easy access to any Family Court contact orders. There are protocols in place between the Magistrates' Court and the Family Court to ensure orders are faxed to the magistrate where requested. However, it would be more efficient if the Magistrates' Court had access to child contact orders through

1220 This is possible under s 68T of the *Family Law Act 1975* (Cth). The Werribee Legal Service noted that pre-existing Family Court orders should be suspended as a matter of course where an intervention order is made for a child.

1221 Kearney McKenzie and Associates (1998) above n 1219, 6; Kaye et al (2003) above n 1209, 151; submissions 28 (Murray Mallee Community Legal Service), 46 (Royal Children's Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

an electronic database. Therefore, the commission recommends the development of a database for this purpose.

RECOMMENDATIONS

117. When magistrates make an intervention order for a child or including a child, the magistrate should make it clear to the respondent that there must be no contact between the child and the respondent unless the Family Court or the Federal Magistrates Court later decide otherwise. If there is a contact order in place, such orders should be suspended pursuant to section 68T of the *Family Law Act 1975*. This should be clearly stated on the intervention order.

118. Magistrates' Courts should be able to access Family Court contact orders through a national database.

CONTACT WHERE NO INTERVENTION ORDER IS MADE FOR THE CHILD

The intervention order I had stated that the husband could contact me to organize child contact ... As there were no family court orders in place and the intervention order did not cover my son, this was the only provision for contact to occur, and there were no stipulations about the sort of contact. The husband interpreted this as coming over to the house was OK as long as he said it was for child contact. And that he could do whatever he liked in this regard, and take [my child] away from me. This was not adequate for either of our safety.¹²²²

9.78 Where a magistrate is satisfied that a child has not heard, witnessed or otherwise been exposed to family violence, or is not at risk of being exposed, then the court may make an intervention order that applies to the parent only. In this situation, conditions for any contact between the child and the perpetrator must be clearly outlined to protect the non-violent parent from further violence perpetrated through child contact arrangements.

9.79 Women are sometimes exposed to further violence through inadequate intervention orders. This is because magistrates sometimes:

1222 Submission 44 (Anonymous).

- include an ‘except for child contact’ clause in the order without further conditions or explanation;
- do not include any arrangements for safe handover of children in the order;
- do not exercise their powers under the Family Law Act to vary or suspend any pre-existing child contact orders where it would be in the best interests of the child to do so.

INCLUDING A STANDARD ‘EXCEPT FOR CHILD CONTACT’ CONDITION

9.80 It is common practice for magistrates to include a standard ‘except for child contact’ condition on intervention orders.¹²²³ This is the case even where there has been no prior agreement about any child contact. The condition usually states that the perpetrator cannot approach or contact the protected person ‘except ... to exercise child contact by agreement with the aggrieved family member or pursuant to a court order’. This standard exception leads to the following problems:

- Perpetrators have free rein to contact and harass the victim on the pretext of exercising or arranging child contact, especially where there is no previous agreement.¹²²⁴
- Intervention orders are made very difficult to enforce by police, as the perpetrator can always claim they contacted or approached the victim for the purposes of child contact.¹²²⁵ Police may therefore be reluctant to charge the perpetrator with a breach of the intervention order.
- It is unclear for both protected people and perpetrators what type of contact is allowed.¹²²⁶

9.81 One Family Court judge has described the use of standard ‘except for child contact’ provisions in intervention orders as a ‘cop-out’ which ‘avoids the real problem of women’s safety’.¹²²⁷ A family violence outreach worker interviewed for a Victorian study on family violence and homelessness commented:

1223 See Victorian Law Reform Commission (2004) above n 8, para 8.30.

1224 Submissions 22 (Kim Robinson, social worker), 28 (Murray Mallee Community Legal Service), 44 (Anonymous), 61 (Broadmeadows Community Legal Service), 74 (Women’s Legal Service Victoria).

1225 Kearney McKenzie and Associates (1998) above n 1219, 6; Kaye et al (2003) above n 1209, 151; Submission 28 (Murray Mallee Community Legal Service).

1226 Submissions 46 (Royal Children’s Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).

1227 Helen Rhoades, et al, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report* (1999) 53.

In my experience, an intervention order which allows the perpetrator to telephone and approach under the circumstances of child access is a completely redundant order. In most cases it just doesn't work. He can telephone her when he wants and it is very difficult to prove whether he is talking about child access or he is threatening her.¹²²⁸

NO ARRANGEMENTS FOR HANDOVER

9.82 Where magistrates include the 'except for child contact' condition or where they make an intervention order that is silent about child contact, there is sometimes no provision made about how contact handover will occur. Altering or creating ways for contact handover to occur that does not expose victims to violence is crucial to protecting victims and children from violence. As noted in paragraph 9.67, child contact handover is a high risk time for violence and can lead to children being exposed to violence where they had not been previously. Therefore, all magistrates need to ensure that safeguards are in place for handover.

NOT MAKING CHANGES TO EXISTING ORDERS

9.83 Magistrates do not consistently exercise their powers under the Family Law Act to suspend or vary an existing child contact order where it would be in the best interests of the child to do so.¹²²⁹ Where magistrates make an intervention order that does not cover the child, they need to consider how any existing Family Court contact order could be amended to protect the applicant, particularly at contact handover times.

VIEWS FROM SUBMISSIONS

9.84 The submissions received by the commission were almost unanimous that the current system does not provide adequate protection when it comes to child contact.¹²³⁰ Many of these submissions highlighted problems with the current system similar to those outlined, including:

1228 Domestic Violence and Incest Resource Centre (2002) above n 1128, 29.

1229 Kaye et al (2003) above n1209, 151; Kearney McKenzie and Associates (1998) above n 1219, 19; submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 64 (Federation of Community Legal Centres (Vic)).

1230 Submissions 14 (Anonymous), 22 (Kim Robinson, social worker), 25 (Barbara Roberts), 27 (Robinson House BBWR), 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 38 (Emergency Accommodation Support Enterprise, EASE), 40 (Whittlesea Domestic Violence Network), 44 (Anonymous), 46 (Royal Children's Hospital), 49 (Domestic Violence and Incest Resource Centre), 58 (Family Court of Australia), 61 (Broadmeadows Community Legal Service), 63 (Darebin

- perpetrators using the ‘except for child contact’ condition to continue to harass and abuse their ex-partner;¹²³¹
- magistrates not varying or suspending existing child contact orders, which exposes applicants to violence through the conditions on that order;¹²³²
- the current system not taking into account significant research demonstrating the high risk of violence against applicants and children at contact handover;¹²³³
- parents not understanding the ‘except for child contact’ condition, and therefore not knowing what type of contact is allowed.¹²³⁴

9.85 Submissions also included suggestions for how the system could be changed to provide better protection:

- the ‘except for child contact’ condition should only be included where there is a written agreement about how and when contact will occur;¹²³⁵
- careful consideration should be given to contact and handover arrangements. Handover should be supervised or occur in a safe location¹²³⁶ or be arranged through a third person nominated by the applicant;¹²³⁷
- suggestions for safe contact arrangements could be made by a liaison worker or court staff after consulting with the applicant and respondent;¹²³⁸
- Victoria should examine the New Zealand legislation as a possible model for change.¹²³⁹ This model provides that there should be no unsupervised

Family Violence Working Group), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria), 79 (Department of Human Services).

- 1231 Submission 22 (Kim Robinson, social worker), 28 (Murray Mallee Community Legal Service), 61 (Broadmeadows Community Legal Service), 74 (Women’s Legal Service Victoria).
- 1232 Submissions 28 (Murray Mallee Community Legal Service), 30 (Violence Against Women Integrated Services), 61 (Broadmeadows Community Legal Service), 79 (Department of Human Services).
- 1233 Submission 46 (Royal Children’s Hospital).
- 1234 Submissions 46 (Royal Children’s Hospital), 66 (Aboriginal Family Violence Prevention and Legal Service (Victoria)).
- 1235 Submissions 28 (Murray Mallee Community Legal Service), 74 (Women’s Legal Service Victoria).
- 1236 Submissions 45 (Rochelle Campbell, women’s health resource worker), 69 (Victorian Community Council Against Violence).
- 1237 Submission 22 (Kim Robinson, social worker).
- 1238 Submissions 5 (Sam Iliadis, Acting Sergeant, Victoria Police), 63 (Darebin Family Violence Working Group).
- 1239 Submissions 28 (Murray Mallee Community Legal Service), 49 (Domestic Violence and Incest Resource Centre), 64 (Federation of Community Legal Centres (Vic)), 74 (Women’s Legal Service Victoria). Recent

- contact between children and the perpetrator of family violence unless the child's safety can be assured.
- Supervised contact centres where handover can occur should be more readily available.¹²⁴⁰

CHILD CONTACT WITH VIOLENT PARENTS IN INTERNATIONAL STANDARDS

9.86 The UN Special Rapporteur on violence against women has acknowledged the difficulties involved where the perpetrator of violence seeks to maintain contact with children from the violent relationship. She has recommended that batterers should not be given access to their children, to protect the children from abuse and prevent them being used as leverage.¹²⁴¹ However, she also states:

In cases where visitation rights are granted, visitation should be supervised and arranged in a way so as not to cause the woman any contact with the batterer. Details such as transportation [and] the site of the visitations ... should be included on the court decree.¹²⁴²

OTHER JURISDICTIONS

9.87 In New Zealand, the approach to child contact in situations of family violence is different to that in Australia. Family violence and family law matters are heard in the same jurisdiction in New Zealand. Where there is family violence, significant evidence must be provided to show that contact would be in the best interests of the child. If a family violence protection order is made, then it automatically includes any children of the applicant's family.¹²⁴³ If violent parents want to have contact with the children, they must make an application for a parenting order.¹²⁴⁴ Where there is violence between the parents, the court can only grant violent parties supervised access, and cannot give them an order for the day-to-day care of the child unless the court is

studies have also recommended that all Australian jurisdictions should consider law reform in this area based on the New Zealand provisions: Kaye et al (2003) above n 1209, 151; Women's Legal Service (2002) above n 1207, 122.

1240 Submissions 27 (Robinson House BBWR), 61 (Broadmeadows Community Legal Service), 64 (Federation of Community Legal Centres (Vic)). This is also a recommendation of the Women's Rights Action Network Australia's recent report on women's rights in Victoria: Women's Rights Action Network, *Our Rights, Our Voices—The Victorian Community Report on Women* (2004) 8.

1241 Coomarasamy (1996) above n 126, para 142(k).

1242 Ibid.

1243 *Domestic Violence Act 1995* (NZ) s 16(1).

1244 Parenting orders are dealt with under the *Care of Children Act 2004* (NZ).

satisfied the child would be safe.¹²⁴⁵ When deciding whether the child will be safe in the care of the violent party, the court must consider a range of factors, including:¹²⁴⁶

- the nature and seriousness of the violence;
- the physical or emotional harm caused to the child by the violence;
- whether the other party to the proceedings considers the child will be safe and consents to the contact;
- any views expressed by the child;
- any steps taken by the violent party to prevent further violence from occurring. This could include successful completion of a behaviour change program.

9.88 Another important aspect of the New Zealand legislation is that where the court makes a parenting order and there has been violence between the parents, then the court must consider whether the parenting order should be subject to conditions designed to protect the safety of the non-violent parent while contact takes place.¹²⁴⁷ This includes arrangements for where and how the child is being collected from, or returned to, the non-violent parent.¹²⁴⁸

COMMISSION'S RECOMMENDATIONS

9.89 The commission agrees that the current intervention order system does not provide consistent protection for children or their non-violent parents due to inadequate provisions for child contact. This must be urgently addressed if the intervention order system is to fulfil the aim of preventing future acts of family violence. The commission has recommended at Recommendation 10 that intervention orders should be made to protect children more frequently, including wherever a child has heard, witnessed or otherwise been or may be exposed to family violence. Where a child has not been exposed to family violence, and is not at risk of being exposed to such violence, the court should consistently make much more detailed, clear and safe instructions about how child contact may occur.

1245 *Care of Children Act 2004* (NZ) ss 60(3), (4).

1246 *Care of Children Act 2004* (NZ) s 61.

1247 *Care of Children Act 2004* (NZ) s 51(2).

1248 *Care of Children Act 2004* (NZ).

Where a Family Court Contact Order Already Exists

9.90 Where a Family Court contact order already exists and a magistrate is making an intervention order that protects the parent only, the magistrate must consider how the existing contact order can be varied to provide greater protection to the non-violent parent. All magistrates need to consider altering handover arrangements that are unsafe, such as arrangements that involve the violent parent picking the children up from the other parent's home. The New Zealand legislation seeks to take account of the need to ensure safe handover of children. The Victorian legislation should include a similar provision that requires magistrates to consider how to make safe handover arrangements.

9.91 Possibilities for safer handover methods that are used by the Family Court and may be considered by magistrates include:

- handover occurring in a public place;
- handover occurring away from the victim's home;¹²⁴⁹
- handover occurring at a police station;¹²⁵⁰
- handover being arranged and occurring at a child contact centre;
- a court-appointed third party arranging and conducting child handover.

9.92 When considering the option of using a third party for contact arrangements, all magistrates should consider the potential impact on any person chosen. NSW research has shown that in many cases such arrangements have led to the nominated third person experiencing physical violence, abuse and intimidation at contact handover.¹²⁵¹

9.93 Research has also shown that handover arrangements where parents do not have direct contact with each other, such as at a supervised child contact centre, is often the safest way for handover to occur.¹²⁵² The commission supports the use of child contact centres for handover arrangements. Provision of more child contact centres by the federal government would make this option more accessible and greatly increase the safety of victims and children. In areas where child contact centres are

1249 A recent report on ways that women experiencing family violence can remain in their homes found that an important aspect to ensure the woman's safety in this situation is that any child contact occurs away from the home: Edwards (2004) above n 1128, 58.

1250 This requires the consent of the officer in charge.

1251 Kaye et al (2003) above n 1209, 125–6.

1252 Ibid 146; Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999* (2000) 176.

available, magistrates should be made aware of their availability and requirements through training and professional development.

RECOMMENDATIONS

119. The new Family Violence Act should include a requirement that magistrates must consider altering any pre-existing Family Court child contact order pursuant to section 68T of the *Family Law Act 1975* when making an intervention order on behalf of one of the parents.

120. When magistrates are amending a child contact order pursuant to section 68T of the Family Law Act, magistrates should consider changing handover arrangements so they are as safe as possible. This could include:

- handover occurring in a public place;
- handover occurring at a police station;
- handover being arranged and occurring at a child contact centre;
- a court-appointed third party arranging and conducting child handover.

Where no Family Court Contact Order Exists

9.94 The commission agrees with the suggestion that where there is no previous Family Court contact order, the ‘except for child contact’ condition should only be included on an intervention order where there is a written agreement about when and how contact will occur. The child contact conditions must be included on the order made, so it is easily accessible and understandable for the parties and for the police. This will make it easier for the parents to know what types of behaviour are acceptable under the order. It will also make it easier for police and magistrates to determine whether an alleged breach was actually a breach of the terms of the order or was permitted child contact.

9.95 All magistrates should include how and when child contact is to occur as a condition of the intervention order. The child contact conditions could be made as part of the intervention order, or preferably by exercising jurisdiction under s 68T of the Family Law Act and making a precise order about contact. Reference to the contact order would then be included as a condition of the intervention order which would include the words ‘to give better effect to paragraph x of this order it is a

condition that contact takes place as follows: ...'. This would enable greater clarity for the parties and the police if the intervention order needs to be enforced.

9.96 To decide on the terms for the contact, the magistrate should consider the views of both parties, as well as the views of the children if they are old enough to express them. If parties have come to an agreement before the hearing, then this agreement can be provided to the magistrate, however, the magistrate should not be bound to follow this agreement if the magistrate believes it may expose the children or non-violent parent to violence. For example, an agreement reached by the parties may provide that the violent parent will pick the children up from the protected person's home, but the magistrate may decide that it would be safer for handover to occur at a child contact centre where the parents do not need to see each other.

9.97 The magistrate must ensure that adequate provisions are included to ensure safe handover in any order or condition relating to child contact. Factors for the magistrate to take into account when deciding on a contact handover arrangement that is as safe as possible are included in Recommendation 120.

9.98 If the respondent is not in court and the applicant does not want any contact to occur, then the magistrate should not be able to make an 'except for child contact' condition on any order made. This includes interim intervention order applications, where the respondent is usually not present. The order should not allow the respondent to breach the terms of the order (such as not contacting or approaching the protected person) to contact any children. The intervention order should clearly state that if respondents want to make arrangements for contact with any children in the care of the protected person, they will need to make an application to the Federal Magistrates Court or the Family Court. In the meantime, there should be no contact between the violent parent and the children. If, however, applicants think that contact is appropriate and safe, then the magistrate must consider their views when deciding on any possible contact condition. It must be made clear to respondents that if they do not appear in court on the final hearing date, an order may be made that restricts their contact with their children. This should be included in the accompanying information that respondents receive when served with an application.



RECOMMENDATIONS

121. An 'except for child contact' condition should only be included on an intervention order where a condition about how and when contact will occur is also included in the order.



RECOMMENDATIONS

122. Where a respondent has not appeared in court, including during an interim intervention order application, then an 'except for child contact' condition (with an accompanying condition explaining how and when contact will occur) can only be made where the applicant requests such a condition. Otherwise, the order should make it clear that the respondent must not breach the conditions of the order, including for the purposes of contacting children.

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
<p>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.</p>	

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.

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)

143. In any family violence proceeding the respondent should not be able to personally cross-examine:

- the applicant or complainant;
- any family member of the parties;
- any other person the court declares a protected witness.

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.

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.

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.

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.

Chapter 12

Beyond the Justice System

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INTRODUCTION

12.1 In this report we have focused on recommending changes to the way the justice system responds to family violence. However, we recognise that broader change is necessary to ensure an effective legal response. In this chapter, we outline the need for a widespread community education campaign about family violence, including a program in secondary schools. This would ideally accompany legislative change and would promote a broader understanding of the nature of family violence and its prevention. We discuss the possibility of establishing a family violence death review committee to learn from failures in the system, and the governance needs of an integrated family violence system.

FAMILY VIOLENCE AND BROADER CULTURAL CHANGE

12.2 Cultural change requires a transformation in the norms, values, attitudes, and beliefs of people, which changes the way they act and behave. It is a gradual process which can be encouraged through changes to the legal system, government policy, education, people speaking publicly, the media, the arts, social marketing,¹⁴⁵⁰ and public education/communication campaigns.

12.3 Cultural change is particularly important in preventing family violence. Researchers, practitioners, and international human rights standards recognise that violence against women is primarily caused by traditional attitudes and stereotyped views of women and their role in society,¹⁴⁵¹ making public and community education a particularly important part of addressing family violence. People and institutions attempting to address family violence are still often working against ingrained attitudes that explicitly or implicitly condone family violence, misunderstand it, or view it as a 'private' issue. When family violence is responded to in an inappropriate manner, by a member either of the legal system or of the community, it is at least partly caused by problematic cultural attitudes, norms, values or beliefs about family violence.

12.4 In Victoria, much cultural change has already occurred. Although the law's response to family violence is arguably slower than the community response, there are

1450 Robert Donovan and Rodney Vlasis, *VicHealth Review of Communication Components of Social/Marketing/Public Education Campaigns Focusing on Violence Against Women* (2005) 4.

1451 *General Assembly Declaration on the Elimination of Violence Against Women*, GA res 48/104, UN Doc A/RES/48/104 (1993) preamble; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993); Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* UN Doc E/CN.4/1996/53 (1996) paras 22, 27.

encouraging signs of change. The most recent examples are the Victoria Police Code of Practice which reflects a new police approach to family violence, and the establishment of a pilot specialist division of the Magistrates' Court. As outlined in the introduction, new government policies addressing family violence, such as *Changing Lives: A New Approach to Family Violence in Victoria*, respond to and are part of changing cultural attitudes to family violence. As the Minister for Women's Affairs, Mary Delahunty has stated: 'To really change the culture of violence in our community there must be a concerted effort across Government and community agencies to address the issues'.¹⁴⁵²

12.5 Along with service sector, social policy and legal system changes designed to improve the response to family violence, public education/communication campaigns are also useful tools. They may aim to change general community attitudes about family violence and, in doing so, change the community's response to it. They may target particular groups already affected by violence, for example, perpetrators, by attempting to challenge their thinking about violence, or making them aware of help that is available for behaviour change. Alternatively, they may target young people for long-term family violence prevention. They may also seek to educate the community about new family violence policies and initiatives.

12.6 The Victorian Government has not implemented such a campaign in Victoria. A public campaign to create broad cultural change is not part of either the Women's Safety Strategy or the recommendations of the Statewide Steering Committee to Reduce Family Violence. This is for two main reasons:

- priority and funding were given to making substantial improvements to the service sector and justice response to family violence;
- the federal government was launching its own Australian-wide community campaign.¹⁴⁵³

The Victorian Government has, however, supported the international public campaign, 'White Ribbon Day'.¹⁴⁵⁴ They have also published a companion publication

1452 Office of Women's Policy, Department of Premier and Cabinet, *Acting on the Women's Safety Strategy* (2002) 3.

1453 See paras 12.9–12.11.

1454 A UN Development Fund for Women international campaign, 'White Ribbon Day' is said to be 'a chance for the community, and particularly men, to speak out against all forms of violence against women'. In Melbourne in 2005, it involved Australian Football League players signing a huge white ribbon in Federation Square, Melbourne. Supporting such campaigns is also part of changing culture and this campaign perhaps illustrated that family violence as an issue is gaining more diverse attention in the community.

to the Women's Safety Strategy, *Women's Safety, Women's Voices*, which outlines the stories of seven women who have experienced violence. The aim of this publication is to 'play an important educative role by increasing community understanding of women's experiences of violence, which are sometimes hidden, even from close friends and family'.¹⁴⁵⁵ VicHealth has also recently published research on social marketing/public education campaigns focusing on violence against women,¹⁴⁵⁶ and will be conducting a survey of Victorian community attitudes to violence.

COMMUNITY CAMPAIGNS IN OTHER STATES AND AUSTRALIA-WIDE

12.7 Two other states have run broad public education campaigns about family violence since 1995. Tasmania's Safe At Home¹⁴⁵⁷ campaign forms part of the Tasmanian Government's response to family violence, which has involved significant change to both the legislative and service responses. Safe At Home involved a ten-week media campaign to coincide with the passing of extensive new family violence legislation through the Tasmanian parliament in December 2004. It included paid television, radio and print commercials, targeted 'secondary material' (eg messages on the back of shopping receipts where women and children can confidentially access information about family violence) and unpaid media advocacy strategies. It aimed to increase awareness of family violence among target audiences; to promote confidence, among victims in particular, that reporting family violence to the police will increase safety; and to communicate the consequences of violent behaviour. The slogan of the campaign is: 'Everyone has the right to be safe at home'.¹⁴⁵⁸

12.8 The Northern Territory Government has run a three-phase campaign from 1995, with the third phase 'Let's stop it...' launched in 2001 and completed in June 2003. The campaign used radio, cinema, television and printed materials to inform people about family violence and 'challenge community attitudes that accept domestic violence as normal'.¹⁴⁵⁹ The 2001–3 campaign aimed to:

1455 Office of Women's Policy, Department of Premier and Cabinet, *Women's Safety, Women's Voices* (2002) 5.

1456 Donovan and Vlasis (2005) above n 1450.

1457 'Safe at Home' is conducted by the Department of Justice, Department of Premier and Cabinet, Department of Policy and Public Safety, and the Department of Health and Human Services. The program as a whole is budgeted at \$17.7 million over four years. The media component was allocated \$175 000.

1458 Donovan and Vlasis (2005) above n 1450, 40–3.

1459 Ibid.

build upon the successes of earlier campaigns by moving beyond increasing awareness to encouraging people who witness, experience or hear domestic violence to take action. It also aimed to increase or reinforce the community's understanding that domestic violence is never justified, and that the offender and not the victim is responsible for the violence.¹⁴⁶⁰

12.9 The federal government's Australia Says No campaign, run in 2004 and 2005, included television commercials, a booklet posted to each Australian household, a poster and brochure. The campaign was aimed at women experiencing violence, 'to increase their understanding that violence is a crime and is not acceptable, is never their fault, and that although seeking help can be and feel difficult, it is the right thing to do and can make a difference'.¹⁴⁶¹ It was also aimed at men in general and those who engage in violence:

to increase their awareness that violence against women is not acceptable and is a crime, women do not deserve violence, men can help to stop other men being violent towards women, that violence does not only include hitting, and they must seek consent for sexual activity.¹⁴⁶²

12.10 This campaign has provoked criticism. It hastily replaced another campaign, No Respect, No Relationship, which was developed over a period of three years at the cost of at least \$3.53 million.¹⁴⁶³ No Respect, No Relationship intended to educate young people about the importance of being shown respect in a relationship, with the aim of producing long term changes in behaviour and attitude.¹⁴⁶⁴ That is, it appeared to aim towards genuine cultural change. It was meant to encourage and reinforce intentions to form non-violent relationships, and to act on warning signs of relationship violence.¹⁴⁶⁵ This is substantially different from the ultimate campaign that was run. As Mandy McKenzie states:

One of the most significant differences between the original campaign and the one that was finally delivered was the removal of references to emotional abuse and controlling or coercive behaviour.¹⁴⁶⁶

1460 Ibid.

1461 Ibid 34.

1462 Ibid.

1463 Mandy McKenzie, 'What Happened to Respect? How a National Violence Prevention Campaign Went Off the Rails' (2005) *No to Violence Journal* 12.

1464 Ibid.

1465 Mandy McKenzie, 'What Happened to Respect? How a National Violence Prevention Campaign Went Off the Rails' (2005) *No to Violence Journal*.

1466 Ibid.

McKenzie even argues that the ‘shelving’ of the No Respect, No Relationship campaign, and replacement with Australia Says No, means that ‘Australia now lags behind other countries in terms of violence prevention’.¹⁴⁶⁷

12.11 Another limitation of the Australia Says No campaign is that it created substantial and sudden increases in demand for local and regional family violence services, which were only funded retrospectively to cope with this demand. Also, the help line given in the campaign was the general Life Line help line, rather than a specialist one, creating problems in referring victims to direct help.

PUBLIC EDUCATION AS A STATE RESPONSIBILITY

12.12 International instruments recognise the need for governments to provide community education that seeks to address family violence, particularly violence against women. The committee in charge of implementing CEDAW has stated that all states parties to the convention should:

Identify [in their reports to the Committee] the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result ... Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices that hinder women’s equality.¹⁴⁶⁸

Similarly, the United Nations Model Strategies and Practical Measures highlight the need for:

Relevant and effective public awareness, public education and school programmes that prevent violence against women by promoting equality, cooperation, mutual respect and shared responsibilities between women and men.¹⁴⁶⁹

12.13 As well as public campaigns conducted through the media, international standards state that governments should also support:

the fundamental role of intermediate institutions, such as primary health-care centres, family-planning centres, existing school health services, mother and baby protection

¹⁴⁶⁷ Ibid 14.

¹⁴⁶⁸ Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 19* (11th session, 1992) UN Doc A/47/38 at 1 (1993) para 24(e),(f).

¹⁴⁶⁹ *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 14(a).

services, centres for migrant families and so forth in the field of information and education related to abuse.¹⁴⁷⁰

12.14 International standards also comment on the potentially negative role of the media in creating cultural change, through portraying stereotyped views of women and using patterns of presentation that generate violence.¹⁴⁷¹

COMMISSION'S RECOMMENDATIONS

12.15 The commission acknowledges that the state government's funding and priority for family violence policy has the potential to bring about substantial improvements in the community and legal sector response to the needs of victims. However, the commission believes that the government's efforts to address family violence, both in the short and long term, would be substantially improved through the use of a community campaign.

12.16 Such a campaign could coincide with the launch of new family violence legislation in Victoria. This would follow the Tasmanian model of integrating a public campaign about family violence with the launch of new government initiatives and legal reform.

12.17 If the government were to fund such a campaign, the commission recommends it should include:

- a broader recognition of family violence, including non-physical family violence, such as emotional abuse and coercive and controlling behaviour;
- the recommendations of this report to incorporate a broader definition of family violence in the legislation, implying a significant change in the legal response to family violence in Victoria.
- attempts at long-term prevention and behaviour change.

The commission also recommends that such a campaign:

- takes account of national and international evidence about potential pitfalls to avoid in campaigns focusing on violence against women;

1470 United Nations, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (1995) Annex: Beijing Platform for Action, para 125(j).

1471 Ibid; *General Assembly Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women*, GA Res 52/86, UN Doc A/RES/52/86 (1998) Annex: Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, para 15.

- accompanies appropriate financial and other support to the agencies that would be affected in the short and long term by such a campaign. This support should be in place by the time the campaign begins.

12.18 The commission also believes that long-term prevention of family violence could be facilitated through education in Victorian schools about respect in family relationships, as recommended by international human rights standards.

! RECOMMENDATIONS

148. The Victorian Government should research, fund and implement a community campaign about family violence with the aim of bringing about changes in community attitudes about family violence and respect in family relationships. It might also include education about changes in the legal and service system responses to family violence and prevention of family violence. Such a campaign would ideally be launched in conjunction with the launch of the new Family Violence Act.

149. A community campaign should include a broad recognition of the nature of family violence, including emotional abuse and coercive and controlling behaviour.

150. A community campaign should be based on:

- well-founded research and testing on target groups to ensure its overall effectiveness, including the recent and continuing research of VicHealth;
- the principles expressed by the commission regarding addressing family violence.

151. A community campaign should be accompanied by financial and other support to the relevant agencies which would be affected by such a campaign before the campaign is launched.

152. The Victorian Government should consider introducing a statewide and consistent education program for Victorian secondary schools on respect in relationships.

CULTURAL CHANGE AND MEMBERS OF THE LEGAL SYSTEM

12.19 We make these recommendations in the context of recommending, throughout this report, education initiatives for members of the justice system including police, magistrates and registrars.¹⁴⁷² These include:

- specialised training for registrars who come into contact with family violence matters;
- a specialist list of magistrates who hear all family violence matters, and training on family violence issues for all those who sit on this specialist list;
- better police training on the dynamics of family violence, particularly from a victim's perspective;
- better police training on cultural awareness and the barriers experienced by particular groups to the justice system in the context of family violence.

SYSTEM FAILURE LESSONS: DEATH REVIEW COMMITTEES

12.20 In many jurisdictions of the USA, Canada and the United Kingdom, family violence death review committees have been established over the past ten years.¹⁴⁷³ Although these committees vary in their mandates, scope and features, their aim is generally to develop recommendations for change to ensure a reduction in family violence and homicide.¹⁴⁷⁴ The committees do not look at who is criminally responsible for each death, but focus on how to improve the responses of agencies, policies and protocols, given the circumstances of the death.¹⁴⁷⁵

12.21 Committees are usually made up of professionals such as law enforcement officials, doctors, shelter workers, family violence victim advocates, coroners and

1472 See Chapter 5 and Chapter 6.

1473 Metropolitan Police [Great Britain], *Findings from the Multi-Agency Domestic Murder Reviews in London: Prepared for the ACPO Homicide Working Group* (2003); Neil Websdale, Maureen Sheeran, and Byron Johnson, *Reviewing Domestic Violence Fatalities: Summarizing National Developments* (2004) <www.vaw.umn.edu/documents/fatality/fatality.html> at 19 December 2005; Domestic Violence Death Review Committee [Ontario], *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002* (2002).

1474 Santa Clara County Domestic Violence Council, *Death Review Committee Final Report: January 1–December 31, 2003: Speak—Save Lives* (2003) 4; *The Penal Code of California* pt 2 tit 7 ch 4 § 11163.3 (2004); Domestic Violence Death Review Committee (2002) above n 1473, 45.

1475 See, eg the *Coroners Act* of Ontario that prohibits the finding of legal responsibility for a death: *Coroners Act*, RSO 1990, c 37, s 31(2).

criminologists.¹⁴⁷⁶ Committees generally do not commence their work until after any criminal proceeding is complete.¹⁴⁷⁷ Some committees are required to only consider homicides where the victim and perpetrator are in an intimate partnership,¹⁴⁷⁸ whereas others also examine any relationship where the parties were related or from the same household.¹⁴⁷⁹ The practical operation of death review committees also varies. For example, the Philadelphia Project reviews hundreds of cases, spending about 30 minutes per review,¹⁴⁸⁰ while the Washington State Domestic Violence Fatality Review spends a significant amount of time collecting information regarding the death and several hours discussing each case.¹⁴⁸¹

12.22 Recommendations made by family violence death review committees operating in other jurisdictions have included matters such as the need for broader community education about family violence, for education of key professionals who come into contact with victims and for greater police accountability and supervision.¹⁴⁸² These sorts of findings have led some to comment that such committees may be an expensive way of eliciting findings that already exist in a significant body of other research.¹⁴⁸³ Community sector participation in reviews may therefore be seen as a diversion from core work by some service providers.¹⁴⁸⁴

12.23 In Australia, homicides that occur in the context of family violence are relatively common. Almost two in five homicides occur between family members, with around 60% of these involving intimate partners.¹⁴⁸⁵ Three-quarters of homicides

1476 *The Penal Code of California* pt 2 tit 7 ch 4 s 11163.3 (2004); Domestic Violence Death Review Committee (2002) above n 1473, 46.

1477 See, eg: Sacramento County Domestic Violence Death Review Team, *Annual Report December 2003: Presented to: Sacramento County Board of Supervisors & Sacramento County Domestic Violence Coordinating Council* ([2003]) 15; Domestic Violence Death Review Committee (2002) above n 1473, 6.

1478 Santa Clara County Domestic Violence Council (2003) above n 1474, 4; Domestic Violence Death Review Committee (2002) above n 1473, 45.

1479 See, eg *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 9(1).

1480 Websdale, Sheeran and Johnson (2004) above n 1473.

1481 Margaret Hobart, 'Tell the World What Happened to me'. *Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2002) 86.

1482 Metropolitan Police (2003) above n 1473, 30–1; Santa Clara County Domestic Violence Council, above n 1474, 16; Domestic Violence Death Review Committee (2002) above n 1473, 31.

1483 United Kingdom, *Parliamentary Debates*, House of Commons Standing Committee E, 24 June 2004 afternoon, 134 (Sandra Gidley).

1484 *Ibid.*

1485 Jenny Mouzos and Catherine Rushforth, 'Family Homicide in Australia' (Paper presented at the Eighth Australian Institute of Family Studies Conference, Melbourne, 12–14 February 2003) 1–2.

between intimate partners involve men killing their female partners.¹⁴⁸⁶ It has been suggested that intimate partner homicide is at the extreme end of a continuum of domestic violence¹⁴⁸⁷ and that these homicides cannot be separated from family violence.¹⁴⁸⁸ In this context, a family violence death review committee can be seen as a possible systemic response to such deaths.

12.24 The commission believes that a family violence death review committee may be an important way for the whole system to learn from mistakes and failings. This could be particularly the case in an ‘integrated system’, where a family violence death could reveal systemic failings. Given the various models used in other jurisdictions, the commission recommends that the possibility of establishing a death review committee in Victoria be explored further by the Statewide Steering Committee to Reduce Family Violence, in consultation with the State Coroner.

! RECOMMENDATION

153. In consultation with the State Coroner, the Statewide Steering Committee to Reduce Family Violence should investigate and make recommendations to the government regarding the creation of a family violence death review committee in Victoria.

GOVERNANCE AND AN INTEGRATED FAMILY VIOLENCE SYSTEM

12.25 Broad cultural change is also effected through leadership and policy development. The framework for policy implementation to guide the work of the many government departments in addressing violence against women is detailed in the Women’s Safety Strategy 2002. Responsibility for planning and implementation of the initiatives lies with many individual departments¹⁴⁸⁹ and leadership for the framework is provided by the Annual Meeting of Ministers on Women’s Safety and three key steering committees which provide advice on implementation.¹⁴⁹⁰ The purpose of these

1486 Ibid 2.

1487 Ibid 6.

1488 Metropolitan Police (2003) above n 1473, 16.

1489 There are 11 ministers and their respective departments: Office of Women’s Policy (2002) above n 1452.

1490 These committees are the Statewide Steering Committee to Reduce Family Violence; the Statewide Steering Committee to Reduce Sexual Assault and Non-relationship Violence; and the Statewide Steering

committees is to provide high level consultation and co-ordination across government departments, between government departments and between government and non-government sectors. The three committees all report to the Chief Commissioner of Police.¹⁴⁹¹

12.26 Comprehensive policy directions which define the aims of each committee are grouped under four key themes of protection and justice; options for women; education and violence prevention; community action and co-ordination. In 2005 the Statewide Steering Committee to Reduce Family Violence published its report in response to the outcomes detailed in the Women's Safety Strategy. The specific task for this committee is to provide advice on the development of a multi-agency and integrated response to family violence.¹⁴⁹²

12.27 The complexity of the task in achieving change and reform to create an integrated system for dealing with family violence is compounded by the multiplicity and complexity of the many key partners, participating services and support agencies involved.¹⁴⁹³ The Statewide Steering Committee has proposed that the responsibility for the implementation, monitoring and evaluation of an integrated system be placed within a single government agency or department and has said that this department must have influence and authority to ensure that all services adhere to their responsibilities.¹⁴⁹⁴

Committee to Reduce Violence Against Women in the Workplace. All committees have representatives from government and non-government organisations.

1491 Office of Women's Policy (2002) above n 1452.

1492 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria: Report of the Statewide Steering Committee to Reduce Family Violence* (2005) 5.

1493 Key partners include: Victoria Police, Magistrates' Courts, the Family Violence Division of the Magistrates' Court and the Family Violence Court Intervention Project; family violence support and crisis accommodation services; generalist and community services offering family violence crisis services; men's behaviour change programs; Men's Referral Service; community legal centres; child protection services; Indigenous and culturally and linguistically diverse support services; women and children's support programs. Additional participating services who will work closely with the partner agencies include: family violence networkers, homeless and children's networkers; victim's services; family services; hospital emergency departments and community health services; Indigenous family violence regional action groups; regional Aboriginal Justice Advisory Committees; and Corrections Victoria: *ibid* 33.

1494 *Ibid* 45.

12.28 Minister Candy Broad has been appointed the coordinating minister of the five ministers who are working together on the whole-of-government approach to family violence.¹⁴⁹⁵

12.29 Similar issues were identified in Tasmania when the Family Violence Act introduced sweeping changes into the law which significantly impacted on the level of service required from police, courts, corrective services, prosecution agencies and victim support services, as well as requiring the development of new services to support the legislative requirements. The policy framework for the new approach proposed that an interagency steering committee be convened under the auspices of the Department of Justice and Industrial Relations.¹⁴⁹⁶ This department has broad powers to identify gaps or problems in the emerging system and is able to require other government departments to address issues. The department is able to make alterations to the budgets of other departments to ensure the system operates effectively. This structure has at its peak the Cabinet Social Policy Sub-Committee with membership from Attorney-General's, Justice, Health, Police and Education Departments.¹⁴⁹⁷

12.30 An integrated family violence system will pose many challenges in achieving necessary cultural change, in prioritising and phasing in its program elements and in achieving sufficient flexibility to enable the system to be developed. Placing the responsibility and authority for its implementation and monitoring within a single department will be essential in achieving this goal.

1495 Department for Victorian Communities, *Changing Lives: A New Approach to Family Violence in Victoria* (2005). As of November 2005, the ministers were: the Attorney-General, Rob Hulls; the Minister for Women's Affairs, Mary Delahunty; the Minister for Police and Emergency Services, Tim Holding; and the Minister for Community Services and Children, Sherryl Garbutt.

1496 Tasmania Department of Justice and Industrial Relations, *Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania*, Options Paper (2003) 46.

1497 Interview with Elizabeth Little, Principal Consultant, Department of Justice [Tasmania], 30 May 2005.

Appendix 1

CONSULTATION PAPER SUBMISSIONS

No	Date	Name	Organisation
1	2 Jan 2003	Phillip Westwood	
2	16 Feb 2004		Vietnamese Community in Australia – Vic Chapter
3	29 June 2004		Eastern Domestic Violence Outreach Service
4	16 July 2004		Eastern Domestic Violence Outreach Service
5	16 July 2004	Sam Iliadis	Acting Sergeant, Victoria Police
6	17 June 2004		Office of the Public Advocate
7	31 Aug 2004	Barbara Roberts	
8	16 Sep 2004		Werribee Legal Service
9	5 Oct 2004	Cindy Smith	Social Worker
10	10 Dec 2004	Prue Innes	
11	16 Dec 2004	Anonymous	
12	4 Jan 2005	Paul Evans	Sergeant, Victoria Police
13	10 Jan 2005	Adrian Sowton	
14	11 Jan 2005	Anonymous	
15	12 Jan 2005	Anonymous	
16	17 Jan 2005	Suzanne McDonald	Acting Sergeant, Victoria Police
17	21 Jan 2005		The Police Association

18	21 Jan 2005	William D Wilde	
19	31 Jan 2005		Family Law Council
20	2 Feb 2005	Mrs EF Belsten	
21	3 Feb 2005	Adrian Sowton	
22	10 Feb 2005	Kim Robinson	Social Worker
23	14 Feb 2005		Zonta Club of Frankston
24	21 Feb 2005	James Hickey	
25	22 Feb 2005	Barbara Roberts	
26	22 Feb 2005	Valerie Ashton	Public
27	24 Feb 2005		Robinson House BBWR
28	25 Feb 2005		Murray Mallee Community Legal Service
29	25 Feb 2005	James Hickey	
30	25 Feb 2005		Violence Against Women Integrated Services
31	25 Feb 2005	Lisa Keyte	Senior Constable, Gay and Lesbian Liaison, Victoria Police
32	26 Feb 2005	John Murtari	
33	28 Feb 2005		Women's Domestic Violence Crisis Service
34	1 March 2005	Andrea Marian	
35	1 March 2005	Anonymous	
36	1 March 2005		Paediatric Division, Royal Australasian College of Physicians
37	1 March 2005		County Court Law Reform Committee
38	1 March 2005		Emergency Accommodation Support Enterprise EASE
39	1 March 2005		Royal Women's Hospital
40	1 March 2005		Whittlesea Domestic Violence Network
41	3 March 2005		Victoria Legal Aid

42	3 March 2005	Roy Tucker	Retired Psychiatric Social Worker
43	3 March 2005		Humanist Society of Victoria
44	3 March 2005	Anonymous	
45	3 March 2005	Rochelle Campbell	Women's Health Resource Worker
46	3 March 2005		Royal Children's Hospital
47	3 March 2005	Judy Johnson	
48	4 March 2005		Coburg Brunswick Community Legal and Financial Counselling Centre
49	7 March 2005		Domestic Violence and Incest Resource Centre
50	7 March 2005	Barry Johnstone	Senior Registrar, Magistrates' Court of Victoria
51	7 March 2005		Villamanta Legal Service
52	11 March 2005		Gippsland Community Legal Service
53	11 March 2005		Women's Electoral Lobby, Victoria
54	11 March 2005	Andrew Compton	
55	11 March 2005		Crime and Misconduct Commission Queensland
56	11 March 2005		Lone Fathers Association (Australia)
57	21 March 2005		Victorian Aboriginal Legal Service
58	22 March 2005		Family Court of Australia
59		duplicate	
60	22 March 2005	Andrew Compton	
61	23 March 2005		Broadmeadows Community Legal Service
62	29 March 2005		Eastern Community Legal Centre
63	29 March 2005		Darebin Family Violence Working Group
64	31 March 2005		Federation of Community Legal Centres (Vic)

65	31 March 2005	John Willis	Associate Professor, La Trobe University
66	31 March 2005		Aboriginal Family Violence Prevention and Legal Service (Victoria)
67	1 April 2005	Rosemary Hunter	Professor, Griffith University
68	1 April 2005		Statewide Steering Committee to Reduce Family Violence
69	6 April 2005		Victorian Community Council Against Violence
70	11 April 2005		Asylum Seeker Resource Centre
71	19 April 2005	Anonymous	
72	19 April 2005		Victoria Police
73	27 Nov 2004	Anonymous	
74	20 April 2005		Women's Legal Service Victoria
75	29 April 2005		National Network of Indigenous Women's Legal Services
76	14 Feb 2005	Anonymous	
77	2 March 2005	Anonymous	
78	May 2005		Department for Victorian Communities
79	3 June 2005		Department of Human Services
80	29 June 2005	Anonymous	
81	25 July 2005	Anonymous	
82	15 August 2005	James Hickey	
83	2 March 2005	Anonymous	
84	14 Dec 2004	Anonymous	
85	27 Oct 2005	Deborah Weiner	
86	11 Nov 2005		Magistrates' Court of Victoria
87	11 Nov 2005		CASA House

Glossary

affidavit

A written statement made under oath out of court.

applicant

A person who lodges an application for a family violence protection order, who may be the person who needs protection from family violence, a police officer, or a guardian of a child or young person.

balance of probabilities

The standard of proof in civil cases, and requires the magistrate to determine if it is more likely that the applicant or the respondent is telling the truth.

charge

When the police arrest someone, they must charge them with a crime.

circle sentencing

Involves the defendant's community and the victim making recommendations to the judge in relation to sentencing.

complainant

A person who applies for an intervention order on their own behalf or on behalf of another person.

complaint

A formal accusation of a crime. A **complaint and warrant** is an application for an intervention order that includes a power of arrest. A **complaint and summons** does not have a power of arrest.

cross-examination

When a witness is questioned by the lawyer from the opposing side.

defendant

The accused person in criminal proceedings.

ex parte

A Latin term meaning 'from one side'. Ex parte applications are heard in the absence of the defendant.

evidence

Includes any statements, objects or other things used to prove the facts in a legal hearing or trial.

family conferencing

Where family members who have used or experienced violence sit down with a mediator to discuss their experiences and come up with solutions to stop the violence.

guardian

A person who is legally appointed to protect the rights of another person. A plenary guardian has all the powers and duties that a person would have if they were a parent of the person subject to the guardianship order if the person was a child. A limited guardian has powers and duties over specific areas only.

in chambers

When a magistrate makes a decision out of the court.

interim order

A temporary order which is issued until a hearing can be conducted to decide whether a final intervention order is made.

jurisdiction

The territory over which judicial or State authority is exercised.

justice system

When referring to the justice system, we are talking about police, the courts, prisons and any other of the State's responses to crime or wrongdoing.

magistrate

A judicial officer in the Magistrates' Court who may judge civil and some criminal cases.

on the papers

When a decision is based on written material, ie without the parties present or giving oral evidence.

ouster order

An order made by a magistrate to remove a respondent from his or her home.

perpetrator

The family member who uses violence against another family member.

police prosecutor

Appears in court as the representative of the person who alleges the crime.

registrar

A registrar is a staff member at a court who carries out the court's administrative tasks.

restorative justice

Refers to the process that brings together people who have a stake in a specific crime or wrongdoing to decide how to deal with the consequences of the wrongdoing.

revocation

A revocation of an intervention order is its cancellation.

serve

Physically handing over (serving) court documents, such as an intervention order, to the person named in the document.

stay

An order of a court which suspends the operation of a previous order.

substituted service

When a document issued by the court cannot be served on a person, the court will use another method of letting the person know about the document, such as leaving it with a family member.

summary offence

An offence that is heard by a magistrate rather than a judge and jury.

summons

A summons is a formal request from a court to attend a hearing or trial.

technical breach

Magistrates and police sometimes use the term **technical breach** to refer to a breach that does not involve physical violence, eg a respondent coming within a prohibited distance.

variation

An intervention order variation occurs after application by one or all of the parties for the court to change the terms of the order.

vexatious litigants

Vexatious litigants are people who persistently institute legal proceedings without any reasonable grounds. In the area of family violence, vexatious litigants may be motivated to repeatedly bring an application against a family member as a way to continue to harass that person after separation.

victim–offender mediation

Where the victim/s and offender sit down with a mediator to discuss their experiences and decide on solutions or punishment for the violence.

warrant

A court document that allows police to arrest the accused or bring him or her before the court.

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