Victorian
Law Reform
Commission

Review of Family Violence Laws:
Consultation Paper

Victorian Law Reform Commission

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Call for Submissions

The Victorian Law Reform Commission invites your comments on this Consultation Paper and seeks your responses to the questions raised.

How to Make a Submission

A submission may be made in writing or by phone or in person.

You may choose to answer all of the questions or only those questions in which you have a particular interest or expertise. There is no particular form or format you need to follow.

Written submissions may be forwarded by:

- Mail: PO Box 4637, GPO Melbourne Vic 3001
- Email: law.reform@lawreform.vic.gov.au
- Fax: 8619 8600

Assistance in Making a Submission

- If it would assist you to make a submission by phone or in person;
- if you require an interpreter; or
- if you require some other assistance to have your views on these issues heard,

please telephone the Commission on 8619 8619 and ask to speak to a researcher working on the Family Violence reference.

Confidentiality

Submissions are public documents and may be accessed by any member of the public. If you want your submission to remain confidential you must clearly advise us whether:

- you want your submission to be quoted or sourced but your name not to be disclosed; or
- you do not want your submission to be quoted or sourced to you in a Commission publication.

Deadline for Submissions
28 February 2005

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Preface

This consultation paper has been prepared in a climate of increasing awareness and action about family violence. There is a sense of determination to address these issues and the community is engaged in constructive debates about the directions for the justice system in a complex and diverse society. We have heard divergent and strong views about the appropriate directions for the legal system, what principles should govern the actions of police officers, magistrates and court staff, particularly when they are required to deal with children, people with disabilities, indigenous people and people from culturally and linguistically diverse communities. Many of these views are difficult to reconcile and consultation on these issues will be very important in shaping our final recommendations.

Many people contributed to developing our knowledge while we were engaged in understanding the many issues concerning the *Crimes (Family Violence) Act 1987.* Through their willingness to assist us we were able to have valuable meetings in every region across Victoria. I thank each and every person who contributed their time and expertise in defining the issues that inform our work.

This paper would have been significantly the poorer without the dedication, determination and particular skills of the principal researchers, Liana Buchanan and Angela Langan. Liana had the primary responsibility for writing the majority of the paper. Angela Langan made significant contributions to the publication including the responsibility for writing Chapter 9. Special acknowledgment and thanks are due to them.

As always however, the publication has benefited from the skills and work of all the members of the reference team, which included Ghada Audicho and Nesam McMillan. They also ably researched and made significant contribution to parts of the publication. Ghada Audicho has contributed to sections on Indigenous issues and Nesam McMillan made a major contribution to chapters 2 and 6 and influenced Chapter 3.

Many others have provided research assistance during its production. I particularly thank volunteer interns Ruth-Bella Barson for assistance with terminology and definitions, Jane McCulloch on European models and legislation, Sarah Riley on

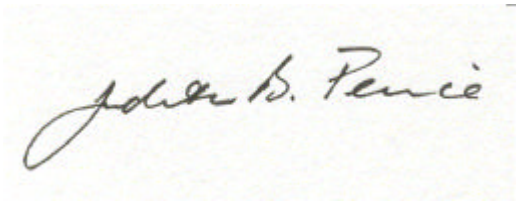
Indigenous issues, Romany Tauber on immigrant women, and Manisha Jayetileke who researched Death Review Committees for the Advisory Committee. Sarah Wainwright joined us towards the end of the publication and contributed cheerful and skilled assistance with footnotes.

The team has been complemented by the approach and views of Paris Aristotle, Part-time Commissioner, who has ably supported the work and assisted in the direction and positioning of the reference. His insight into appropriate community engagement has been very valuable. We owe a large debt to the intellectual strength of the Chairperson of the Commission, Professor Marcia Neave, and to the support of all the Part-time Commissioners. The Chief Executive Officer, Padma Raman, has contributed her many skills and valuable experience to assist and refine the work of the reference.

Alison Hetherington, Communications Officer, edited the publication, wrote and produced the plain English summary and oversaw aspects of production. Simone Marrocco, the Commission's Project Officer, took the principal role in the organisation of the many consultations. Julie Bransden prepared the bibliography and maintained our library and Kathy Karlevski assisted with production.

Three advisory committees have been established to assist the reference. These have enabled us to access the very special expertise of a wide range of people. I thank all members for their valuable insights and contribution to our knowledge.

I hope this Consultation Paper will stimulate further debate across the community, which will assist in the formulation of recommendations in the final report.



Judith Peirce, Commissioner

ACKNOWLEDGMENTS

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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

ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
Art	Article
CASA	Centre Against Sexual Assault
c	chapter (Canadian legislation)
CCSM	Continuing Consolidation of the Statutes of Manitoba
CCTV	closed circuit television
ch	chapter
CJ	Chief Justice
CONN GEN STAT	Connecticut law
Cth	Commonwealth
DART	Domestic Assault Response Team
DHS	Department of Human Services
div	division
et al	and others
eg	for example
FVIP	Family Violence Intervention Plan
ibid	in the same place (as the previous footnote)
ie	that is
IWDVS	Immigrant Women's Domestic Violence Resource Centre
J	Justice
LEAP	Law Enforcement Assistance Program

n	footnote
NESB	non-English speaking background
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NZ	New Zealand
OPA	Office of the Public Advocate
para(s)	paragraph(s)
pt	part
Qld	Queensland
reg	regulation
RSC	Revised Statutes Canada
s	section (ss pl)
S	supplement
SA	South Australia
sch	schedule
SS	Statutes of Saskatchewan
Tas	Tasmania
USA	United States of America
v	versus (said as 'and')
VCCAV	Victorian Community Council Against Violence
VCAT	Victorian Civil and Administrative Tribunal
Vic	Victoria
VLRC	Victorian Law Reform Commission
VOCAT	Victims of Crime Assistance Tribunal
VPM	Victoria Police Manual
WA	Western Australia

* TERMINOLOGY

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.

- Person who has experienced family violence: We use this terminology rather than refer to 'victims' or 'survivors' of family violence, in recognition of the fact that many women who experience family violence do not identify as victims or survivors. We also wish to avoid terms that define a person who has experienced violence with reference to that experience.
- Person in need of protection/person seeking protection: We use these terms when we are referring to persons who seek or need protection from family violence through an intervention order.
- Person/family member who uses or has used violence: We use these terms rather than referring to a 'perpetrator' or 'violent family member', although we acknowledge that these terms are preferred by some people.
- Applicant: This refers to the person who lodges an application for an intervention order. The applicant will often be the person who needs protection from family violence. In other situations, however, the applicant will be the police or some other person who applies for an order on behalf of the person needing protection.
- Respondent: This term refers to the person against whom an intervention order is sought or against whom an order is made.
- Defendant: This refers to a person who has been charged with a criminal offence, for example, breach of an intervention order.
- Cognitive Impairment/Impaired Mental Functioning: We use the term 'impaired mental functioning' when 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.
- Intervention order: Although different jurisdictions use different terms for civil family violence orders, such as 'protection orders' and 'restraining orders', we refer to all such orders as intervention orders.

* TERMINOLOGY

The Commission has used gender-neutral language when referring to persons seeking protection and respondents. As we discuss in Chapter 2, family violence is a gendered form of violence and is perpetrated primarily by men against women.[1] However, of those who use the intervention order system for family violence, men and boys comprise a significant minority of people for whom an intervention order is sought (approx 30%) and approximately one-fifth of respondents are female.[2]

In addition, the Commission is evaluating how effectively the intervention order system addresses all forms of family violence. Our approach must be inclusive of everyone in the community, including children who experience violence, people in same-sex relationships and some Indigenous people, who state that family violence can affect all members of their community.

However, in some instances gender-specific terminology is used. This occurs, for example, when we refer to information obtained during consultations where the consultation participants were specifically referring to women or to men.

1 See paras 2.6–2.9.

2 See paras 4.11.

Executive Summary

PURPOSE AND SCOPE OF THIS PAPER

This Consultation Paper is released as part of the Victorian Law Reform Commission's review of the *Crimes (Family Violence) Act 1987*. The Commission has been asked to review the Act, and to identify any procedural, administrative or legislative changes necessary to ensure the best possible response to family violence.

The Consultation Paper is intended to:

- inform the community of the scope and nature of our inquiry;
- outline concerns and problems with the intervention order system as it currently operates; and
- invite community comment to inform our final recommendations to the Victorian Government.

In preparing this Paper, the Commission conducted extensive face-to-face consultations between January and July 2004 to help us identify all issues relevant to the review. We will hold further meetings in 2005 about specific issues before finalising our recommendations.

YOUR COMMENTS

It is important to us that all members of the community have the opportunity to express their views on this important area of the law.

The ways in which you can tell us your views are set out on page iii of the paper, along with a complete list of questions.

REVIEWING THE ACT IN THE CONTEXT OF CHANGE

The review of the *Crimes (Family Violence) Act 1987* is occurring in the context of a number of important initiatives in relation to family violence. As these developments are occurring contemporaneously with the reference we are yet to consider their effectiveness.

Of particular interest are initiatives that will significantly affect the experiences of applicants and respondents in the intervention order system. They include the new Victoria Police Code of Practice for the Investigation of Family Violence, the pilot Family Violence Courts at Heidelberg and Ballarat, and the changes to the Act that are proposed in the Magistrates' Court (Family Violence) Amendment Bill 2004. The Victorian Government has also recently provided its response to the Indigenous Family Violence Task Force Report and is reviewing child protection laws.

THE JUSTICE SYSTEM'S RESPONSE TO FAMILY VIOLENCE—CHAPTER 3

In the development of responses to family violence there has been an ongoing debate about whether a criminal law or a civil justice response is the most appropriate.

The criminal law plays an important symbolic role in demonstrating that family violence is unacceptable. The civil law—the intervention order system—provides direct access for a person in need of protection and is another option for police to control abusive behaviour against family members. Each system has benefits and limitations.

For example, the criminal justice system cannot deal with all forms of family violence because not all constitute a criminal offence. It requires a higher standard of proof and the people who experienced violence lose control over the process as they become witnesses for the State. Further, using criminal law may be undesirable for some Indigenous people or others who do not want to invoke criminal sanctions against a family member.

These limitations are addressed by civil orders, although these do not always provide effective protection, especially where there is a history or prior, persistent abuse, where the respondent has had prior contact with the criminal justice system, or where the parties have children and are required to have ongoing contact.

In theory, both the civil and the criminal justice responses should be applied to family violence in Victoria. In practice, however, many people think that family violence is not treated as criminal behaviour and the civil system is usually used instead of the criminal law.

ALTERNATIVE JUSTICE SYSTEM APPROACHES

Other approaches being developed in response to the limitations of the criminal and civil justice responses include:

- pro-arrest, pro-charge or pro-prosecution policies, which have been introduced to address criticisms of police inaction and to reduce the discretion of staff in criminal justice agencies;
- the creation of special criminal offences—for example, in Spain it is an offence to 'customarily wield physical or mental violence' against a family member and in Sweden it is against the law to commit a 'gross violation of a woman's integrity';
- use of increased penalties for family violence offences, including if a child was present at the time of the offence;
- diversion and rehabilitation, including voluntary or court-ordered attendance at a behaviour change program by the person who has used violence;
- community-based alternatives, such as the establishment of holistic healing centres; 'cooling-off', 'sobering up' or 'time-out' centres; local safe houses; or community involvement in 'policing' family violence, such as night patrols, and in helping resolve situations of family violence; and
- restorative justice practices, including circle sentencing and family group decision-making conferences.

Integrated Responses and Specialist Courts

Many alternative justice system responses to family violence have been supported by the establishment of specialist courts or by strategies to increase inter-agency coordination.

Inter-agency approaches focus on promoting cooperation and dialogue between support providers, police, court personnel, correctional staff and counselling or treatment providers. Such approaches may be 'coordinated' or 'integrated'—an integrated response model involves a more comprehensive collaboration, where the multidisciplinary response has a separate identity to the individual agencies involved.

Throughout our consultations we heard that there is a need to increase such coordination and monitoring across Victoria, although a number of local responses have been developed to improve coordination.

In Victoria, an integrated response to family violence is being developed and two specialist Family Violence Courts will commence early in 2005. The Family Violence Courts will include:

- court specialisation using skilled personnel;
- the ability to deal with interconnected legal matters within the same court;
- provision of separate liaison workers for applicants and defendants; and

- enhanced physical security.

AIMS OF THE CRIMES (FAMILY VIOLENCE) ACT

When considering alternative legal approaches, it is important to identify the aims of the justice system response. A legal approach to family violence could aim to:

- provide protection;
- make people who use violence accountable;
- support and empower people who have been subjected to family violence;
- encourage behaviour change; and/or
- punish people who use violence against family members.

THE VICTORIAN INTERVENTION ORDER SYSTEM—CHAPTER 4

The Act enables people at risk of family violence to obtain an intervention order against a violent family member (the respondent). Most orders are sought by or on behalf of women and girls, and most orders are sought against male respondents. Orders are made on the grounds that a respondent has:

- assaulted a family member or caused damage to property and is likely to do so again;
- threatened to assault a family member or cause damage to property and is likely to do so again; and
- harassed or molested a family member or has behaved in an offensive manner and is likely to do so again.

Most people in need of protection apply directly to their local Magistrates' Court and complete the application, known as a complaint, with the assistance of the court registrar. The registrar may issue a summons requiring the respondent to attend court, or alternatively, a warrant for arrest. The police have the responsibility for serving the application and/or arresting the respondent.

Interim (temporary) orders may be made in the absence of the respondent and are made for a limited time. At the return date of an application, the applicant provides evidence to the magistrate, who decides whether to grant the order or not. It is the respondent's decision whether he or she contests the application. The magistrate must ask whether the respondent has a gun licence, and if a final intervention order is made any gun licences are automatically cancelled.

If the respondent breaches the order, the police may prosecute. This is a criminal matter and so the evidence must prove the case beyond a reasonable doubt. The failure of the police to consistently enforce orders was a source of complaint by many participants in the Commission's consultations.

Additionally, the police may charge a person for an offence under the criminal law. The *Crimes Act 1958* and the *Summary Offences Act 1966* cover a range of threatened or actual violent offences. In Victoria, there are no specific offences relating to the assault of a family member.

Many problems occur where there is an intervention order and an order made under the Family Law Act providing for contact between a child and the respondent. The intervention order is invalid to the extent it conflicts with the Family Court contact order. A magistrate may make, vary or discharge a contact order when granting an intervention order, although consultation participants said this is rarely done.

Although our terms of reference do not include the stalking provisions of the Crimes Act, the issue of stalking-related intervention orders was frequently raised during our consultations. Some consultation participants believed that stalking orders are being used in ways that are not intended and these applications clog the system. Others said that stalking applications also cause family violence matters to be viewed less seriously by some police, court personnel and magistrates.

USING THE INTERVENTION ORDER SYSTEM—CHAPTER 5

GROUNDS FOR OBTAINING AN INTERVENTION ORDER

Although the grounds for obtaining an intervention order are reasonably broad, concerns were raised in many of our consultations that the grounds do not ensure that all people who need protection from family violence can obtain it. In particular, the difficulty of obtaining legal protection from non-physical violence and abuse was consistently raised. Women are told by police officers, registrars and court staff that they cannot obtain an order unless they are at risk of physical violence.

Other jurisdictions in Australia and elsewhere have provisions that include or clarify what sort of behaviour constitutes non-physical violence.

Children's exposure to family violence can result in a range of serious, negative effects, but the Act is not clear about whether an order may be made in relation to a child who is present or witnesses violence but is not the primary target of the respondent's violent behaviour. Magistrates are inconsistent about whether they make intervention orders for the protection of children who have not been the direct targets of violence.

The Magistrates' Court (Family Violence) Bill 2004 will introduce new provisions to clarify this and enable orders to be made if the child, who is a family member, has 'heard or witnessed violence'.

Another area, which is gaining increasing recognition, is the use of violence against pets as a means of hurting or controlling women. We are interested in your views about whether the grounds for obtaining an order should include abuse of animals.

WHO CAN USE THE ACT

The Act lists the 'family members' it covers and includes intimate partners, relatives, step relatives, past relatives, and people who are 'ordinarily members of the household'. The definition of 'family member' is broad, and it was suggested in consultations that the scope of the Act is limited in a number of ways.

Some jurisdictions use definitions that specifically include broader concepts of family. Queensland defines a relative as 'someone who is ordinarily understood to be or to have been connected to the person by blood or marriage'. The Northern Territory refers to 'a relative according to…contemporary social practice'.

Indigenous and non-English speaking communities told us that kinship and broader family relationships, which are important in their communities, are not included. In the Northern Territory the definition includes 'a relative according to Aboriginal tradition'.

For people with disabilities, a carer who uses violence but does not come within the definition of a 'family member' or is not found to be in an 'intimate personal relationship' is not included, although the context of the violence may be identical to abuse which is recognised as family violence.

In Queensland, the definitions specifically include carers who are in an 'informal care relationship' and NSW includes a relationship involving one person's dependence on an ongoing paid or unpaid carer.

Sometimes harassment or intimidation is carried out by associates, friends or a new partner of the person who uses violence and these people are not included unless they are in a recognised 'family member' relationship to the person in need of protection. Currently, a family violence order can only be sought against a violent family member that prohibits him or her from causing another person to engage in conduct restrained by the court. Similarly, a violent family member may harass or abuse the protected person's friends, family or colleagues, but these people cannot always obtain an order against the violent family member.

CHILDREN AS RESPONDENTS

It has been suggested that the Victorian legislation should not allow orders to be made against children, or should only allow an order to be made for a limited period. Such restrictions apply or have been proposed in several other jurisdictions.

INTERIM ORDERS

LACK OF KNOWLEDGE ABOUT INTERIM ORDERS

The ability to apply for an interim order is an important part of obtaining appropriate protection.

In consultations we heard that some people, particularly those who do not have access to support services or legal advice, do not know they can apply for emergency protection and that nothing on the application forms refer to this. We heard that court registrars do not always advise applicants of this option.

EXTENSIONS OF AN INTERIM ORDER

Usually, an extension to the final hearing date is granted if the respondent has not received the complaint and summons. Sometimes, however, a different magistrate will disagree about the need for the interim order and refuse to grant the extension.

THE NEED FOR ORAL EVIDENCE

Unless the police seek an urgent order after hours, the person seeking protection needs to attend the court and give oral evidence to the magistrate about why he or she needs the order.

The Magistrates' Court (Family Violence) Bill 2004 proposes to allow after-hours interim orders if the application is supported either by oral or affidavit evidence.

PROCESS BY WHICH AN INTERIM ORDER BECOMES A FINAL ORDER

If an interim order is made, the court will summon the respondent to appear at a hearing on a certain date. The applicant must attend court and give evidence and argue for the need for the order again, having already done so to obtain the interim order.

If the respondent does not attend the court, the magistrate must make a decision about whether to make the order in his or her absence.

In New Zealand, the respondent is required to notify the court that he or she intends to defend the order within a set time. If the respondent does not do this, the interim order will automatically become final. A similar approach is proposed in the ACT.

Some participants in our consultations disagreed with this approach because it would disadvantage respondents with low literacy or who did not read English.

AFTER-HOURS INTERIM ORDERS

The availability of after-hours interim orders is especially important because the majority of family violence incidents occur at night and on weekends. The only way to get an order after hours is if the police apply on behalf of the person seeking protection.

A common concern raised in consultations is that police are sometimes reluctant to apply for after-hours interim orders.

IMPROVING ACCESS TO AFTER-HOURS ORDERS

It was suggested that other people, such as certain family violence workers, should be able to make telephone applications.

Another option is to improve the consistency of the after-hours police response, for example by placing a duty upon police to apply if they believe that a family violence offence has been, or is likely to be, committed.

It is critical that the after-hours application process is easy to understand and implement; this is generally not the case. For police officers serving in rural and regional areas, personnel resources and the distances involved in signing the complaint in front of a supervising officer may be onerous. Travel time to and from the incident may be lengthy and if there are no grounds to arrest without a warrant, the person in need of protection and any children may need to be taken to the police station. The person who has used violence has the opportunity to abscond and/or destroy family property in this period.

Options include:

- streamlining the process by allowing police to make telephone applications without completing a signed form of complaint, with safeguards such as tape recording of the application;
- extending police powers to detain a prospective respondent while the interim order is obtained; and
- empowering police to issue temporary interim orders.

UNDERTAKINGS

An undertaking to the court not to behave in a certain way, such as assaulting or threatening another person, has no legal effect and cannot be enforced.

Where there is minimal evidence, an undertaking from the respondent may be the best option for some people seeking protection. However, there is significant concern that undertakings are used inappropriately, and that some people agree to them under pressure and without understanding the implications.

DURATION AND EXTENSIONS OF INTERVENTION ORDERS

An intervention order is made for a specific term, or an indefinite period, as determined by the magistrate. Most family violence orders are made for one year or less and only 11.5% of orders are made for longer than ten years or indefinite duration.

There are no criteria to guide magistrates' decisions as to the length of the order.

As soon as an order expires it ceases to have any effect. If an extension is sought or the order has expired, the protected person must return to court and again prove the grounds for an order exist.

Applications for extensions may sometimes fail because the order has effectively provided protection during its currency and there is therefore no evidence to support an extension.

Even if an order or extension is granted in these situations, returning to court regularly to renew or re-apply for protection can be difficult and distressing for a protected person. These concerns must be balanced by the fact that intervention orders are serious orders, and it may be inappropriate to restrict the conduct of the respondent for long or indefinite periods.

VARIATIONS AND REVOCATIONS

If the terms of an order need to be changed, only a party to the application for an intervention order can apply. Police therefore are excluded unless they were the applicant. Even where further violence occurs and it is appropriate for the police to apply, they are unable to do so.

Orders are often not varied when they should be, such as to allow for changes of circumstances between the protected person and the respondent involving arrangements for contact with children. This may expose the respondent to criminal sanctions for a breach, and the protected person to threatened or actual 'aiding and abetting' charges. It was suggested that the process of varying an order should be simplified. Conflicting suggestions were made, however, as to whether the revocation process should be more or less difficult.

Another is that where a guardian has been appointed by the Office of the Public Advocate it is unclear whether the court will allow only the guardian, as original applicant for the order, to revoke or vary the order, rather than the protected person.

BARRIERS TO ACCESSING INTERVENTION ORDERS—CHAPTER 6

Many factors can prevent a person who is experiencing violence from seeking assistance. Some people do not identify the behaviour they are subjected to as family violence or are not aware of what, if any, help is available to them.

Other obstacles include:

- fear of the person who uses violence;
- being judged by those they turn to for help, such as police officers and court staff;
- having to leave their family home, local communities, schools and belongings, and difficulty finding accommodation;
- fear of the legal system and court processes;
- fear that the potential involvement of child protection services may result in the removal of children;
- reluctance to potentially expose the person who uses violence to jail; and
- a widespread view that 'intervention orders are not worth the paper they are written on'.

ADDITIONAL BARRIERS FOR PARTICULAR GROUPS

There are particular barriers for people in some communities, such as people from non-English speaking backgrounds, Indigenous people, people with disabilities and people in same-sex relationships. Many people are of course affected by several of these issues and experience compound barriers to the system.

PEOPLE FROM NON-ENGLISH SPEAKING BACKGROUNDS

Migrant and refugee women, especially when newly arrived, may have varied understandings of what behaviour constitutes family violence. Additionally, they may be subject to other barriers such as:

- ostracism from their community;
- limited access to interpreters or having to use interpreters from within a small community;
- threats of deportation;
- financial and other dependency on their partners; and
- alien legal concepts and an unfamiliar legal system.

INDIGENOUS PEOPLE

The intervention order system is generally not seen as providing what is needed or wanted to address family violence in Indigenous communities. Indigenous people identified barriers such as:

- lack of appropriate services, including refuges and services for men's support/rehabilitation;
- difficulty accessing support or the courts for people in remote locations;
- fear of institutional racism, especially police racism;
- reluctance to involve criminal justice agencies and expose family members to incarceration and the consequences of incarceration;
- fear of removal of children; and
- potential isolation from family and community.

PEOPLE WITH DISABILITIES

Women with disabilities suffer twice the rate of assault, rape or abuse, but are much less likely to receive assistance.

In consultations we heard there is a lack of accessible information and a failure of many family violence services to meet the needs of women with disabilities. We also heard that disability service providers generally have a limited understanding of family violence issues.

People with disabilities may experience family violence in different circumstances to others, as they may be abused by live-in carers or staff in residential institutions. These situations are not included in the Act.

The ability to obtain external assistance or to find appropriate alternative accommodation is often much more difficult for people with disabilities. People with cognitive impairment face additional barriers as they may not understand that what has happened is a crime, are more likely to be disbelieved or may have difficulty in explaining what occurred.

PEOPLE IN SAME-SEX RELATIONSHIPS

Fear of an adverse reaction, such as scepticism, prejudice or homophobia from police, court officers or others may prevent many people in same-sex relationships from reporting family violence, or from using the intervention order system. Other barriers include lack of access to appropriate services and fear of being isolated from the broader gay and lesbian community.

GATEWAYS TO THE INTERVENTION ORDER SYSTEM—CHAPTER 7

The outcomes for people who attend court for an intervention order without personal or legal support are diverse, and largely depend on the skills, abilities and inclinations of the registrars and magistrates they encounter.

APPLICATIONS BY PEOPLE IN NEED OF PROTECTION

Although there are 29 community legal centres that provide some form of legal assistance for intervention order matters and Victoria Legal Aid offers free advice, few people obtain legal advice.

Almost all consultation participants said accessing legal advice is extremely important and that informed, appropriate legal advice should be more readily and consistently available.

Because few people receive legal advice or representation, court staff play a critical role in assisting people to make an application for an intervention order.

Although the Magistrates' Court protocols provide guidelines to registrars to govern standards of service, many concerns have been raised about inconsistent practices and approaches by registrars.

Other concerns were raised that some court staff act as decision makers and determine whether applications will be accepted and whether applicants are 'genuine'. This may arise from a misunderstanding about what kind of person constitutes a 'real' victim of family violence, or what family violence is, and an inappropriate judgment can have serious consequences for the applicant.

Often the registrar is an applicant's sole source of advice and influences the scope of the application, what information is included, what is provided to the magistrate, and what terms and conditions the person seeking protection requires.

All consultation participants acknowledged the critical role played by registrars for unrepresented applicants.

NON-LEGAL SUPPORT

The role of non-legal support, such as Court Network, family violence and other support services, is viewed positively, although the limited availability of appropriate services for Indigenous people or people with disabilities and of ethno-specific backgrounds remains a cause for concern in those communities.

Court liaison workers are to be employed in the new Family Violence Courts in Ballarat and Heidelberg to assist applicants and respondents.

APPLICATIONS BY POLICE

In several regions police play an active role in leading or participating in local programs to improve outcomes for people seeking protection from family violence. However, a strong theme emerged during consultations that the police should take a more active approach to intervention orders as an important element of police response to family violence.

The new police Code of Practice for the Investigation of Family Violence has strengthened the obligations of police in this area and states:

- applying for an order may mean making an application without the agreement of the person in need of protection;
- police must consider including any children in an order when DHS is not involved;
- when police do not apply for an order they must explain the civil options available and refer the person affected to appropriate referral agencies and the court registrar; and
- police must record their reasons for not applying for an intervention order.

Most participants believe that police officers' personal qualities most often determine whether the person in need of protection obtains an appropriate outcome.

In consultations, we heard that although police should play a greater role in applications, views were mixed as to whether the police should proceed against the wishes of the person in need of protection. Applications against people's wishes removes their control over the process and may deter them from contacting police again. However, their refusal may be made from fear of retaliation.

APPLICATIONS BY THIRD PARTIES

If an application is made by someone other than the person in need of protection or the police, the court must not hear the matter if the person in need of protection objects.

This can cause difficulties for applications by a guardian on behalf of a person in need of protection where the guardianship order has been made for a person with a disability who has been found unable to make reasonable judgments.

The Office of Public Advocate has suggested that an exception should be made to this provision in relation to people who have a guardian appointed under the *Guardianship and Administration Act 1986.*

WHERE APPLICATIONS MAY BE MADE

Civil proceedings in the Magistrates' Court must be held either in the place closest to the respondent's place of residence or to the location where the relevant event(s) occurred. This applies to intervention order matters, although it is not consistently applied.

People seeking protection may have sound reasons for choosing to go to a court quite distant from the respondent's residence, their own residence or the place they experienced family violence.

ENSURING PROTECTION FOR CHILDREN OF PROTECTED PERSONS

The Act allows a parent's intervention order application to include children if the reasons for obtaining protection for the parent and the children arise out of the same or similar circumstances.

Unless they are included in an application, the court is not independently required to give specific attention to children living with the parties and cannot make an intervention order in relation to such children. If children are included, detailed and specific evidence is usually required about why the order is required in relation to each child.

Under the proposed amendments to the Magistrates' Court (Family Violence) Bill 2004, magistrates will be required to consider whether there are any children who:

- are family members of the respondent or the person seeking protection; and
- have been subjected to, or have heard or witnessed violence by the defendant (which constitutes grounds for the making of an order).

Magistrates will then be required to make an order in respect of any children if satisfied there are grounds for making the order, even when a child has not been included in an application.

COURT-INITIATED ORDERS

In some other states the courts have the power to independently make an intervention order during criminal or child protection proceedings, even when no application has been made.

MAKING EFFECTIVE INTERVENTION ORDERS—CHAPTER 8

The effectiveness of intervention orders depends largely on the types of orders made, as well as the enforcement of those orders.

WHAT THE ACT SAYS ABOUT RESTRICTION AND CONDITIONS

In making intervention orders, the court has a discretion to impose any restrictions or prohibitions that appear necessary or desirable, such as:

- prohibiting the respondent from approaching the protected person;
- prohibiting or restricting the respondent from accessing certain premises;
- prohibiting the respondent from contacting, harassing, threatening or intimidating the protected people or damaging their property;
- prohibiting the respondent from causing someone else to do these things;
- directing the respondent to participate in counselling; and
- revoking any firearms licence.

Other jurisdictions include the power to make additional conditions, including:

- returning property or allowing the protected person to recover property;
- disposing of weapons used in the violence;
- suspending a driver's licence in some circumstances;
- paying compensation; or
- making a 'problem gambling order'.

COURT'S APPROACH TO CHOOSING RESTRICTIONS AND CONDITIONS

Many magistrates tend to impose a standard set of conditions when making an intervention order. However, the orders appear to be more effective where care is taken to consider what types of provisions are most likely to make the order effective.

The types of orders made are significantly influenced by the application form, which uses a 'tick a box' approach. This does not encourage applicants to seek tailored orders, or magistrates to take responsibility for making orders to suit the circumstances.

OUSTER/EXCLUSION ORDERS

Orders that require the respondent to leave the home and allow the applicant and any children to remain in the home, which we call ouster orders, warrant particular attention.

Although not all people who fear family violence want to remain in their home, adults and children who have experienced family violence who must leave their homes suffer considerable social and personal disruption and financial disadvantage.

We do not know how many ouster orders are made, but anecdotal evidence obtained during our consultations suggests that many magistrates are reluctant to make them, and many applicants are advised not to seek them.

Results from a project run by the Eastern Domestic Violence Outreach service suggest that access to assistance, information and support to seek an ouster order increases the likelihood of such an order being made.

DIRECTIONS TO ATTEND A PROGRAM

Coordinated responses to family violence are increasingly using behaviour change programs for men.

Our consultations suggest that a small number of magistrates recommend that respondents undertake a behaviour change program when orders are made against them. Consultation participants supported the use of these programs, although there are some concerns that they may not be effective and that there is a need for culturally appropriate programs.

The Magistrates' Court (Family Violence) Bill proposes a system to order men to attend an assessment and, if eligible, attend counselling as a condition of an intervention order. The proposed program also provides for outreach and concurrent programs for respondents' family members.

ORDERS ABOUT CHILDREN AND CHILD CONTACT

Two main criticisms have been raised about the courts' approaches to making intervention orders when a respondent's contact with a child is to be taken into account. These are that magistrates too readily include standard 'except for child contact' provisions in intervention orders, and that they rarely use their powers to vary or suspend Family Court contact orders.

Research shows that violence against children at contact and against women at contact handover is common. It is also important to obtain a balance between unnecessarily prohibiting contact and exposing family members to violence.

REFERRALS TO THE CHILDREN'S COURT

When an adult is making an application in the Magistrates' Court on behalf of a child, some magistrates believe that the application for the child should be heard only by the Children's Court.

The Children's Court provides experienced magistrates and special arrangements to assist children. However, many parents who are required to repeat the application process at the Children's Court, after they have been heard at the Magistrates' Court, do not do so because of distance, cost and the experiences they have already encountered at court.

The Children's Court does not have the power to make orders for an adult against an adult respondent, so it is not possible for the adult in need of protection to apply directly to the Children's Court for an order for themselves against another adult.

Magistrates' Approaches to Family Violence Matters

Many consultation participants believed that differences in decision-making by magistrates reflected differing levels of understanding about family violence.

NSW and Queensland research shows that only a relatively small number of magistrates recognised issues of control, assertion of power and gender imbalances as causes of family violence. A significant proportion thought that domestic violence matters are best resolved privately. Although most said there is no excuse for violence, they were evenly divided about whether it takes 'two to tango' and that both parties can be to blame for violence.

Many participants in consultations believed magistrates' attitudes to family violence affect the decisions they make and that they should receive training about the nature, dynamics, effects and underlying issues involved in family violence.

Legislative Guidance About Matters to be Taken Into Consideration

Unlike the Victorian Act, most equivalent Australian legislation provides direction to the court to take certain principles into account when considering whether to make an intervention order.

Examples are:

- the need to ensure the person is protected from family violence;
- the welfare of children affected by the violence;
- hardship caused to the respondent or others;
- how the order would likely affect contact with children; and
- the respondent's criminal record and any previous, similar behaviour of the respondent.

LEGISLATIVE GUIDANCE ABOUT THE ACT'S OBJECTS

The Act does not include information about its objects. Object clauses, when included in legislation, clarify legislative intent and guide judicial decision-making. In family violence law the objects may be to:

- ensure the safety of people who fear or experience violence;
- reduce and prevent violence between family members;
- make orders that are consistent with certain principles underlying the Declaration of the Elimination of Violence Against Women;
- make orders that are consistent with the United Nations Convention on the Rights of the Child;
- ensure access to the courts is speedy, inexpensive and simple; and/or
- provide a legally enforceable mechanism to prevent violent conduct.

COSTS ORDERS

In the Act there is an exception to the rule that each party must bear their own costs if the court believes that the application was 'vexatious, frivolous or in bad faith'.

Despite this, consultation participants said a number of lawyers use the threat of costs to pressure an applicant to withdraw an application, agree to a court undertaking or consent to a mutual order.

ENFORCEMENT OF INTERVENTION ORDERS—CHAPTER 9

BREACH OF AN INTERVENTION ORDER—A CRIMINAL OFFENCE

The intervention order system cannot provide protection from family violence if intervention orders are not enforced. During consultations, we heard many complaints about the failings of the current system. These include:

- poor police response;
- significant variations in police responses to breaches;
- lack of appropriate penalties;
- refusal to act on breaches perceived to be 'minor' or 'technical';
- police action based on judgmental attitudes; and
- racist beliefs affecting police's decisions about whether to act.

The new code of practice requires that police:

- must strictly interpret and enforce intervention orders;

- must provide the parties with appropriate referrals;
- must conduct a thorough investigation to identify and locate offenders; and
- must pursue criminal options.

The new code also recognises that an entrenched practice of not acting on 'minor' or 'technical' breaches is unacceptable.

Evidence of Breaches

We heard that police do not routinely gather evidence in family violence matters and therefore rely on the protected person's testimony to prove the breach. Although corroboration is not required by law, police may decline to prosecute a breach because there is no other independent evidence available.

Police may be exposed to orders against them for costs if they unsuccessfully prosecute breaches.

Protected Person's Wishes

In consultations, police were frequently criticised for a lack of understanding of the complex dynamics of family violence which assist, for example, to explain why a woman may withdraw from proceedings or refuse to give evidence in a breach matter. The police may proceed with prosecution against the wishes of the protected person.

Dealing with a Protected Person's Involvement in Breaches

Different views were raised in consultations about what should happen when a protected person in some way encourages or consents to the respondent's breach of the intervention order. Participants told us that police threaten to, or do, lay charges of aiding and abetting against the protected person.

Participants also said that respondents can easily raise the excuse that 'she invited me' or 'she agreed' because this is difficult to disprove.

The new code of practice clarifies that a protected person should be advised of procedures to vary or revoke the order in this situation and that police should be 'cautious in pursuing any offence of aid and abet'.

Consequences of Breaching an Order

The maximum penalty for a first offence is a fine of 240 penalty units ($24 540) or imprisonment for two years. For a subsequent offence the maximum penalty is five years imprisonment.

The conflicting issues raised in consultations included:

- the penalties imposed are insufficient to deter those who refuse to comply, including respondents who commit serial harassment;
- the possibility of jail may deter some women from seeking a criminal justice response, particularly Indigenous women;
- the need for men to take responsibility for their behaviour through behaviour change programs; and
- the problems caused by the delay between the breach and the court sanctions.

One possible approach is to apply different maximum penalties to different types of breach, such as those involving physical violence and those that do not. In Western Australia it is proposed to increase penalties for a breach if it is witnessed by children.

Other options raised with us included the provision of short-term respite, direction to attend behaviour change programs and diversion.

ALTERNATIVE OPTIONS FOR ENFORCING INTERVENTION ORDERS

One approach is to attempt to prevent the occurrence of breaches through monitoring of the order. This occurs in a pilot program in NSW where police attend the respondent's premises uninvited to check on the respondent.

Court monitoring through progress reports from behaviour change or drug and alcohol programs are other possible responses.

IMPROVING PROCESS AND PROCEDURE—CHAPTER 10

SERVICE OF INTERVENTION ORDERS

Various concerns related to the service of documents were raised in consultations, in particular: not knowing when the documents have been served; how long it often takes to serve documents; and difficulties for the police in serving the respondent.

Suggestions for improvement include improving the use of substituted service, and strengthening police powers to detain a respondent or to obtain a warrant for the purpose of serving an order.

NOTICE OF THE RESPONDENT'S INTENTION TO DEFEND

The respondent is not required to advise the applicant or the court whether he or she intends to attend court, and it is uncommon for this to occur. This causes

difficulties for all involved, particularly the person seeking protection. Suggestions for improvement are:

- requiring the respondent to notify the court if the case will be defended before the hearing;
- using listing systems at court, such as mention hearings;
- providing a right of adjournment if no prior notice has been received; and
- automatically converting a temporary order into a final order if the respondent does not notify the court of an intention to defend.

COURT ENVIRONMENT

Fear for their physical safety while at court affects many women. Some courts have excellent security arrangements, but others do not. In many regional courts, for example, there are no separate waiting areas for people seeking protection.

Other considerations raised were:

- the need for a more child-friendly environment and/or child-care facilities;
- inadequate disability access;
- intimidating and formal environments; and
- lack of Indigenous staff.

REPRESENTATION AND SUPPORT AT COURT

REPRESENTATION

Many consultation participants said it is important for people seeking protection to have access to legal advice and/or representation. Reasons given for this included that representation:

- improves the evidence which is presented at court;
- enhances presentation of the application generally, because this will be conducted by someone who understands legal rules and court process;
- reduces the trauma associated with the proceedings for self represented applicants; and
- improves the efficiency of the court.

However, most adults do not have any legal representation throughout the process. Various legal advice avenues are available, for example though community legal centres and Victoria Legal Aid, but there are significant limitations to the level of legal support available.

Representation for respondents was also seen as important as this may reduce the respondent's frustration and antagonism towards the system, and prevent difficult and abusive behaviour towards the person seeking protection during the hearing.

Unlike the Children's Court, there is no practice in place in the Magistrates' Court to ensure that children involved in intervention order proceedings are legally represented. Children therefore do not have a separate voice in the proceedings. Two models are currently used for child representation—these involve acting in accordance with the child's wishes as is done in the Children's Court, or acting in the child's best interests as is done in the Family Court.

Non-legal Support During Proceedings

It is proposed in the demonstration Family Violence Courts at Heidelberg and Ballarat that on-site court liaison workers for applicants and respondents will:

- provide information and referrals;
- assist with safety planning;
- arrange legal representation;
- coordinate witness assistance and support needs;
- contact the applicant during the process; and
- undertake eligibility assessments for court-directed behaviour change counselling for men.

Involvement of Child Protection Agencies

The Magistrates' Court has no separate power to involve the DHS Child Protection Service. It is important to provide maximum protection for children, however, there are concerns that the possible involvement of this service may deter some women from seeking protection from the court.

Parties' Understanding of Intervention Order Proceedings

Many consultation participants said that parties frequently do not understand the proceedings or their outcome. Respondents who may not understand what the order means are less likely to comply with it. This is exacerbated for people from non-English speaking backgrounds and people with a cognitive impairment.

Magistrates are required to explain the order and the consequences to the respondent. Other states provide for various means of communication, including court staff explaining the order, explanatory notes in languages other than English and arrangements with Indigenous people to assist the court to explain the order.

MISUSE OF THE INTERVENTION ORDER SYSTEM

Concerns were raised in consultations about the various ways in which people misuse the Act.

VEXATIOUS LITIGANTS

Vexatious litigants are those who repeatedly use the court to make malicious or mischievous applications based on similar allegations. The Magistrates' Court has no power to declare a person a vexatious litigant and therefore prevent that person from commencing future legal proceedings without permission.

CROSS APPLICATIONS AND MUTUAL ORDERS

A belief that there is some advantage to be gained, for example in Family Court proceedings, may lead some respondents to cross apply or to seek consent to a mutual order. The court is allowed to make an order, even if it is not satisfied the grounds are proved, provided the parties consent to it. Some applicants may be pressured into accepting a mutual order on the basis it will shorten the proceedings and minimise distress.

APPLICATIONS FOR VARIATIONS AND REVOCATIONS

Respondents may repeatedly try to vary an order or have it revoked as a means of harassing the applicant.

Suggestions to reduce the respondent's ability to repeatedly force the applicant back into court include:

- only allowing protected persons to apply for a variation or revocation;
- requiring the court to give the respondent leave to apply; and
- limiting the number of applications that may be made.

The Magistrates' Court (Family Violence) Amendment Bill 2004 will, if passed, limit the circumstances in which the court may grant a respondent's application to vary or revoke an intervention order.

EVIDENCE IN INTERVENTION ORDER PROCEEDINGS—CHAPTER 11

REDUCING THE STRESS OF GIVING EVIDENCE

The nature of family violence makes the process of giving evidence in intervention orders especially difficult. Giving evidence in front of or being cross-examined by the respondent exacerbates the daunting process of testifying and can affect the quality of evidence obtained by the court.

Experiences are compounded for women from non-English speaking backgrounds, who may be unfamiliar with the legal system, understand less of what is occurring in court or whose communities or cultures do not encourage discussion of personal matters.

Alternative arrangements for giving oral evidence include:

- giving evidence by closed circuit television (CCTV);
- using screens in the court room so the defendant cannot be seen by a witness;
- allowing a support person to sit with the witness in the witness box;
- requiring lawyers not to robe and to be seated during examination and cross-examination;
- controlling who is in court while witnesses give evidence.

The Magistrates' Court (Family Violence) Bill will require a magistrate to make directions for the giving of children's evidence by alternative means. The Bill also allows magistrates to provide that an adult may use alternative means.

Closed Courts

Enabling witnesses to give evidence in closed court is already possible, but we have not heard of instances where courts have been closed for family violence cases. Under the provisions in the Magistrates' Court (Family Violence) Bill there is no requirement that the court be closed, even when children are giving evidence.

Cross-examination by Unrepresented Respondents

We also understand from our consultations that a large proportion of applicants and respondents represent themselves, therefore the respondent may cross-examine the applicant and any other witness.

In the *Sexual Offences: Law and Procedure: Final Report* we recommended that the accused in criminal proceedings for sexual assault be prevented from personally cross-examining the complainant or a protected witness, and that the respondent be invited to arrange legal representation for this purpose.

Access to Interpreters

All consultation participants who work with clients from non-English speaking backgrounds said the courts' inability to consistently provide accredited, impartial interpreters was an ongoing problem.

Some specific problems with inappropriate interpreters and practices are:

- some interpreters breach client confidentiality, with occasionally disastrous results;
- some act unprofessionally, for example advising women to return to their husbands;
- some work without being accredited to the required level;
- only one interpreter is provided for both the applicant and the respondent; and
- no interpreter is provided when a party can speak English but is not confident of understanding English in the context of legal proceedings.

CHILDREN AND YOUNG PEOPLE AS WITNESSES

Where children have experienced or witnessed family violence, giving evidence in court involving a parent is likely to cause further stress.

This is acknowledged by restricting children from giving evidence in protection order hearings in other states and in the *Family Law Act 1975* (Cth). Similar restrictions are proposed in the Magistrates' Court (Family Violence) Bill 2004 which, if passed, will provide that children must not be present in court or called as a witness unless this is authorised by the court. This provision does not apply when the child is the respondent.

EVIDENCE USED IN INTERVENTION ORDER PROCEEDINGS

Most intervention order proceedings rely on the evidence of the person in need of protection. Consultation participants suggested that options for reducing this reliance should be explored.

Sworn written statements, known as affidavits, could be used, subject to cross-examination, instead of direct oral testimony in some cases. This will be permitted under the Magistrates' Court (Family Violence) Bill 2004. The proposed amendments will also clarify that the person in need of protection is not required to give evidence in some circumstances.

Other jurisdictions allow evidence to be given by affidavit, sworn complaint or police statement with the agreement of the parties or where the court has given leave.

ADMISSIBILITY OF EVIDENCE OF OUT-OF-COURT STATEMENTS

In family violence cases, evidence from friends, family members, counsellors or other people who have been told about the abuse may be the only information available to support the case of the person seeking protection.

The rule against hearsay prevents evidence of a statement made to a witness by a person who is not called to give evidence from being admitted when the object of the evidence is to establish that the content of the statement is true. The purpose of the rule is to ensure the court only hears reliable evidence.

Legislation in some other jurisdictions allows evidence of out-of-court statements, therefore allowing evidence from counsellors or others who the person in need of protection has told about the violence, at least in some circumstances.

Also, the Office of the Public Advocate has submitted that an exception to the rule against hearsay needs to be made where a person is 'a represented person' within the meaning of the Guardianship and Administration Act 1986.

Evidence About the Nature and Effects of Family Violence

Consultation participants expressed concern that some magistrates do not appear to understand important aspects of family violence, and believe this is reflected in comments and decisions they make.

The lack of understanding covers some fundamental issues, such as the psychological and emotional effects of abuse and the increased risk of violence after separation.

Although education and training may assist some aspects of this lack of understanding, it has been suggested that the provision of social research evidence about the nature and dynamics of family violence by expert witnesses ('social framework' evidence) would assist magistrates to understand and evaluate claims presented to them.

Questions

Chapter 3

1. Given the information on approaches outlined in this Chapter, are any significant changes required to the Victorian justice system's response to family violence? Are there any other approaches that we should consider?
2. What should the primary purposes of the *Crimes (Family Violence) Act 1987* be, for example, protection, punishment or rehabilitation? Which approaches are most likely to achieve these purposes?

Chapter 4

3. Should stalking intervention orders be dealt with under separate legislation? Why or why not?

Chapter 5

4. Are the grounds for obtaining an intervention order at section 4(1) of the *Crimes (Family Violence) Act 1987* adequate?
5. Should 'family violence' be defined in the legislation? In particular, should the *Crimes (Family Violence) Act 1987* specifically provide that forms of abuse other than actual or threatened physical abuse constitute family violence, and should those other forms of violence give grounds for an order to be made?
6. The proposed amendments to the *Crimes (Family Violence) Act 1987* will allow intervention orders to be made in respect of children who have 'heard or witnessed' family violence. Are any further changes needed to increase protection of children who are at risk of exposure to family violence?
7. Should the grounds for obtaining an intervention order under the *Crimes (Family Violence) Act 1987* include actual or threatened abuse of animals?
8. Is the definition of 'family member' adequate? If not, what other kinds of relationship should be added?

9. Should the *Crimes (Family Violence) Act 1987* enable intervention orders to be made against associates of a respondent when the associate has threatened or engaged in violent behaviour towards the protected person?

10. Should the *Crimes (Family Violence) Act 1987* enable intervention orders to be made for the protection of a protected person's associates when the respondent has threatened to or has engaged in violent behaviour towards the associates?

11. Should the *Crimes (Family Violence) Act 1987* be amended to limit the court's ability to make an intervention order against a child or young person under 18 years of age?

12. What might be done to ensure that everyone who requires the more immediate protection of an interim intervention order is aware they may apply for one?

13. Should the *Crimes (Family Violence) Act 1987* provide that, if it expires, an interim order should be extended until the application for an intervention order is finalised, unless the circumstances of the protected person have changed?

14. The proposed amendments will, if passed, remove the requirement that family violence interim intervention orders be supported by oral evidence. Are further changes needed to increase the likelihood that interim orders will be granted without the person seeking protection being required to give oral evidence?

15. Should the *Crimes (Family Violence) Act 1987* provide for a process by which an uncontested interim order automatically converts to a final order in certain circumstances? If so, when should this occur?

16. Are any changes required to improve the process of obtaining interim intervention orders outside ordinary business hours?

17. Should others besides members of the police force be able to apply for interim intervention orders outside business hours? If so, who?

18. What changes are needed to ensure undertakings are only used when it is safe and appropriate to do so?

19. What changes will ensure that people seeking protection from family violence fully understand the consequences of accepting an undertaking from the respondent to the court before agreeing to withdraw their application?

20. Is the current approach to determining the duration of intervention orders appropriate?

21. What changes would improve the protection provided to protected persons at the time their intervention order expires?

22. Should the police be able to apply for variations to an intervention order when they did not apply for the original order? Should the protected person's consent be required for this to occur?

23. Should the process of seeking a variation or revocation be made easier for protected persons?

24. Should the *Crimes (Family Violence) Act 1987* require that the court is satisfied that:

    - when a protected person is seeking a variation or revocation, the application does not result from pressure on, or coercion of, the protected person; and
    - the revocation or variation, if granted, will not compromise the safety of any protected family member

25. Are any other changes required to improve the revocation and variation provisions in the *Crimes (Family Violence) Act 1987*?

26. If the guardian of a person in need of protection obtains an intervention order, should the *Crimes (Family Violence) Act 1987* stipulate that only the guardian has the authority to bring any application for variation, revocation or extension of the order?

Chapter 6

27. Have we accurately described the barriers that prevent people who need protection from accessing the intervention order system?

28. Are there other groups of people within the community who face particular obstacles that prevent them from using the *Crimes (Family Violence) Act 1987*?

29. What strategies should be adopted to address these barriers?

Chapter 7

30. What additional supports, services or other changes are required to make the process of applying for an intervention order accessible and effective for people who need protection, and who apply for an intervention order on their own behalf?

31. Should most family violence intervention order applications be made by police? If so, are any further changes necessary to achieve this? What are the benefits and risks of this approach?

32. What should police do when the person in need of protection does not want an intervention order application to be made?

33. Are any changes needed to improve:

    - prosecution of applications by the police prosecutor;
    - provision of evidence by police witnesses in intervention order matters; and
    - gathering of evidence at family violence incidents?

34. Should section 13 of the *Crimes (Family Violence) Act 1987* contain an exception in relation to people in need of protection who have a guardian appointed under the *Guardianship and Administration Act 1986*?

35. In your experience, what approach do court staff and magistrates apply when determining where intervention order applications can be made?

36. Is the current law regarding where an intervention order application can be made appropriate? If not, what amendments should be made?

37. The proposed amendments to the *Crimes (Family Violence) Act 1987* will, if passed, require magistrates who are dealing with an intervention order application to consider and make orders in relation to any children who are family members of the parties and who may be at risk of family violence. Will these changes to the Act be adequate to ensure protection for the children of protected adults?

38. Should the *Crimes (Family Violence) Act 1987* allow courts to initiate an intervention order when hearing other proceedings, such as criminal proceedings or child welfare proceedings? If so, should this be made possible in respect of adults as well as children?

Chapter 8

39. Are there other directions, restrictions or conditions that should be specifically provided for in the *Crimes (Family Violence) Act 1987*? What are they and why should they be added?

40. Should intervention orders be more detailed and tailored to the particular circumstances of the parties? If so, how should this be achieved?

41. Should intervention orders that require the respondent to leave and stay away from the family home be made more frequently than they currently are? If so, what changes would best achieve this?

42. What other services and systems are needed in order to support the safe and effective use of ouster orders?

43. Have we accurately identified the issues relevant to mandating men's attendance at behaviour change programs as part of an intervention order? Should other issues be taken into account during the development of the proposed Family Court Violence Intervention project?

44. Does the current approach to dealing with child contact issues in family violence intervention order cases ensure adequate protection for children and protected adults? If not, what changes to the legislation and/or procedure would lead to more consistent protection without unnecessarily restricting children's contact with respondent parents?

45. The proposed amendments to the *Crimes (Family Violence) Act 1987* will, if passed, require magistrates to determine whether any Family Court orders are in place before making an intervention order in relation to a child. They also insert a note regarding magistrates' powers to vary or suspend Family Court contact orders. Will these amendments lead to more consistent protection for children and protected adults or are further changes needed?

46. When an application for an intervention order seeks protection for an adult and children, should the application be heard in:

    - the Magistrates' Court;
    - the Children's Court; or
    - separated so that the application relating to children is heard in the Children's Court while the application relating to the adult is heard in the Magistrates' Court?

47. What is the best way to ensure that magistrates are familiar with the nature and dynamics of family violence, and to ensure consistent decision making?

48. Should the *Crimes (Family Violence) Act 1987* provide additional guidance to magistrates about what matters must be taken into account when making an intervention order and when deciding which provisions to include in an intervention order?

49. Would the inclusion of an 'objects clause' improve interpretation and application of the *Crimes (Family Violence) Act 1987*?

50. Are there any problems with the use or threatened use of costs orders under the *Crimes (Family Violence) Act 1987* against either applicants or respondents. If so, what changes would address this?

Chapter 9

51. The Victoria Police Code of Practice for the Investigation of Family Violence articulates police members' obligations in dealing with breaches of intervention orders. Are other changes needed to improve police responses to breaches, including decisions about whether to lay charges and gathering of evidence to support prosecution of breaches?

52. What should the police response be where sufficient evidence exists to charge and prosecute a respondent for breach of an intervention order but the protected person wants no further action to be taken?

53. Are any further changes needed to clarify and improve the police response to breaches where the protected person has consented to the breach, or to a previous breach of the intervention order?

54. Should the *Crimes (Family Violence) Act 1987* specify different types/levels of breaches, with different maximum penalties? Would other changes to the penalty provisions in the Act make intervention orders more effective?

55. Should referral to a behaviour change program be a mandatory part of a sentence for breach of an intervention order?

56. Is diversion ever an appropriate way for the court to deal with breaches of an intervention order?

57. Are there any other options for monitoring a respondent's compliance with an intervention order, and should they be implemented?

Chapter 10

58. What changes are required to ensure that protected persons are informed about whether and when the intervention order made for their protection has been served and is enforceable?

59. Should the police be given greater powers to detain a person against whom a telephone intervention order is being sought, or against whom an order has been made but not served?

60. Is there a need to clarify the effect of an order for substituted service?

61. Should respondents be required to provide notice about whether they intend to contest an application for an intervention order? If so, what

changes will reduce distress experienced by persons seeking protection, while ensuring that the process is fair for all parties?

62. What can be done to improve the safety of people when they attend court to obtain an intervention order, or when they attend court as witnesses in intervention order proceedings?

63. Are there other aspects of the court environment or the facilities available at court that stop people from pursuing intervention orders? What should be done to address these matters?

64. Is legal representation readily available for people who have applied for a family violence intervention order?

65. Is it desirable that people seeking an intervention order have access to legal representation:

- If the respondent does not contest the application; and/or
- If the respondent contests the application?

66. Is legal representation readily available for respondents in family violence intervention order proceedings?

67. Is it desirable that respondents in intervention order proceedings should have access to legal representation. If so, why?

68. Is adequate and appropriate representation provided for children who attend the Children's Court as:

- persons in need of protection; and
- respondents

in family violence intervention order matters?

69. When the Magistrates' Court is considering an application for an intervention order in relation to a child, should separate representation be provided for the child? What practical and other issues need to be taken into account?

70. If you consider that children involved in Magistrates' Court proceedings should be provided with separate legal representation, should this representation be provided using the same model of representation as that provided in the Children's Court?

71. What additional supports, services or other changes are required to assist:

- people seeking protection; and
- respondents

during intervention order proceedings?

72. What would be the advantages and disadvantages of giving the Children's and Magistrates' Courts the power to:

- notify the Department of Human Services Child Protection Service when hearing an intervention order matter that raises protective concerns regarding a child; and
- invite the Department of Human Services Child Protection Service to intervene as a party in particular intervention order matters affecting a child's welfare?

73. What would improve the parties' understanding of the terms, effects and consequences of an intervention order when one is made or varied?

74. What would improve the parties' understanding of what happens during intervention order proceedings and the outcome of these proceedings generally?

75. Should the *Crimes (Family Violence) Act 1987* be amended to empower magistrates to stay or dismiss an application if satisfied that the proceeding is vexatious, or on any other grounds? What are the risks and benefits of such a provision?

76. Should the *Crimes (Family Violence) Act 1987* be amended to require that, before granting an intervention order following a cross application, the Court must be satisfied that the criteria for granting an intervention order at section 4(1) have been met?

77. Are there other changes to the legislation, or to court processes, that would improve the current approach to cross applications and mutual orders?

78. The proposed amendments to the *Crimes (Family Violence) Act 1987* will allow a magistrate to order that an order be varied or revoked on application by a respondent only if there has been a change in circumstances. Are other changes needed to prevent the revocation and variation provisions of the Act being misused by vexatious respondents?

Chapter 11

79. Do magistrates currently direct that evidence be given using alternative arrangements in intervention order cases? If so, how often?

80. Should the *Crimes (Family Violence) Act 1987* provide for the routine use of CCTV or other alternative arrangements in intervention order proceedings for:

- all children, whether or not the application is being heard in the Family Violence Division of the Magistrates' Court; and
- adults

on whose behalf an intervention order is sought?

81. Should the *Crimes (Family Violence) Act 1987* provide for the court to be routinely closed during:
    - hearing of applications to make, vary, revoke or extend an intervention order; and
    - proceedings for breach of an intervention order?

    Why or why not?

82. Should the *Crimes (Family Violence) Act 1987* be changed to prevent an unrepresented respondent or defendant from personally cross-examining protected persons or persons who are seeking protection:
    - in intervention order application proceedings; and
    - in criminal proceedings for breach of an intervention order?

    If so, what mechanisms should be put in place to protect the rights of the respondent or defendant?

83. Should the same provisions be put in place for other witnesses in intervention order proceedings? If so, which witnesses should receive this protection?

84. What is your experience of obtaining appropriate access to interpreters for intervention order proceedings?

85. Where both parties to an intervention order matter require an interpreter, should the provision of separate interpreters for each party be mandatory?

86. What mechanisms would improve access to independent, professional interpreters for people involved in intervention order proceedings?

87. How often are children required to give oral evidence and be cross-examined in intervention order proceedings in Victoria?

88. The proposed amendments to the *Crimes (Family Violence) Act 1987* will restrict when children may be called to give evidence in intervention order proceedings. Are any other changes needed to prevent children from giving evidence in family violence matters?

89. Are the current provisions at section 13A of the *Crimes (Family Violence) Act 1987*, which allow protected persons in certain, limited situations to provide their evidence by affidavit, used frequently?

90. The proposed amendments will allow the court to admit affidavit evidence in family violence intervention order proceedings. Are other changes needed to reduce the need for people in need of protection to attend court and testify in all matters?

91. Should the *Crimes (Family Violence) Act 1987* be amended to allow hearsay evidence to be given in a broader range of circumstances for adult witnesses? If so, in which circumstances should hearsay evidence be permitted?

92. Should the *Crimes (Family Violence) Act 1987* allow hearsay evidence to be given in an application by the guardian or administrator of a person in need of protection?

93. Should the *Crimes (Family Violence) Act 1987* contain different provisions in relation to the admission of hearsay evidence in criminal as distinct from civil intervention order cases?

94. Should there be a capacity to call expert witnesses to give broad contextual evidence about the nature, dynamics and effects of family violence in intervention order cases? Why or why not? If so, what changes would be required to enable this to occur?

Chapter 1
Introduction

BACKGROUND TO THE REVIEW

1.1 The Commission has been asked to review the *Crimes (Family Violence) Act 1987*, and to identify any procedural, administrative or legislative changes that

may be necessary to ensure the Act provides the best possible response to family violence.

1.2 The Crimes (Family Violence) Act established the intervention order system in Victoria and is the principal piece of legislation used in this state to protect people from family violence. The Act came into effect in December 1987 and since then several independent and government reviews have monitored its impact[3] and a number of important amendments have been made to it. Since its introduction, however, the Act has not been comprehensively reviewed to determine whether it provides the best possible legal response to family violence.

1.3 Family violence has received increasing public recognition and has been the subject of considerable research. In 2004 we know far more about the prevalence, nature, dynamics and effects of family violence than we did when the intervention order system was first developed. We now also have the opportunity to learn from the various legislative approaches to family violence that have been taken in different parts of Australia and the world.

1.4 A number of other important initiatives in relation to family violence are underway in Victoria, under the framework provided by the Victorian Government's Women's Safety Strategy.[4] It is timely, therefore, to review the intervention order system to ensure that the legislative response to family violence is based on the same principles and philosophy as other approaches to family violence, and that it complements other recent initiatives.

1.5 The most important reason for reviewing the Act, however, is that despite the legislation, many Victorians continue to experience violence and abuse by family members. Various commentators have called for a review of the intervention order system, as it is not providing effective protection for women and children who experience family violence.[5] As long as abuse against family members remains a problem, there is a need to assess and improve our legal response to family violence.

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3 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).

4 See paras 1.7–1.21 for more detail about these initiatives.

5 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.

CONTEXT FOR THE REVIEW

1.6 The Commission is conducting its review of the Crimes (Family Violence) Act during a time of unprecedented activity in relation to family violence. A number of important initiatives, each of which aims to improve responses to family violence, are underway in Victoria. Many of these initiatives intersect with the operation of the Act and the matters we are examining in this review.

WOMEN'S SAFETY STRATEGY

1.7 The Women's Safety Strategy was launched in October 2002 and sets the principles and policy directions for the Victorian Government's response to violence against women, including family violence. A broad range of initiatives intended to address family violence, including those described below, are being pursued under the framework provided by the Women's Safety Strategy.

DEVELOPMENT OF AN INTEGRATED RESPONSE TO FAMILY VIOLENCE

1.8 The Statewide Steering Committee to Reduce Family Violence was jointly convened in August 2002 by Victoria Police and the Office of Women's Policy. The Committee consists of a range of government and non-government representatives. The Committee's role is to provide advice about improving the responses to family violence of police, courts and all relevant service providers, and about the development of an integrated response to family violence. The Committee is currently developing a Best Practice Framework for an integrated response to family violence. Consultations on the Best Practice Framework will be held in early 2005.

VICTORIA POLICE CODE OF PRACTICE

1.9 In August 2001, Victoria Police began a review in relation to violence against women, including family violence. A review team was established to analyse all the 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.

1.10 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.

1.11 One of the recommendations in *A Way Forward* was that Victoria Police develop a code of practice for police response to family violence incidents. The Code of Practice for the Investigation of Family Violence was launched on 31 August 2004, and all Victoria Police members will be trained in the new code between September 2004 and September 2005. The code seeks to address some of the issues and concerns that we examine in this review. We will discuss the changes to practice and procedure that the new code is intended to bring about whenever relevant throughout this Consultation Paper.

INDIGENOUS FAMILY VIOLENCE STRATEGY

1.12 In the 2002–03 Victorian 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 the coordination of a statewide coordinator.

1.13 To advance the Indigenous Family Violence Strategy and to engage Indigenous communities in the development of 'community-led' strategies for addressing family violence, the Indigenous Family Violence Taskforce was established. Between 2001 and 2003, the taskforce conducted and funded a broad range of activities across Victoria aimed at developing community responses to family violence for inclusion in the strategy. The taskforce provided its final report to the Victorian Government in December 2003.

1.14 The government released its response to the taskforce's 28 recommendations on October 2004. In the response, the government announced it will establish an Indigenous Family Violence Partnerships Forum to oversee the development and implementation of a ten-year Indigenous Family Violence Plan.[6] The government response also reported current or proposed initiatives to address Indigenous family violence, including the establishment of three Holistic Family

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

Healing Centres, an Indigenous Men's Resource Advisory Service and funding for eight Indigenous Family Support Innovation Projects.[7]

FAMILY VIOLENCE DIVISION OF THE MAGISTRATES' COURT

1.15 In November 2002, the Victorian Government allocated funding to establish a Family Violence Division of the Magistrates' Court (the 'Family Violence Courts'). Since 2003, consultation has been undertaken and work conducted towards developing an appropriate model for these courts.

1.16 The aim of establishing Family Violence Courts is to bring specialist expertise and targeted resources together to improve the justice system's response to family violence, and to ensure the court works in an integrated way with police, health, housing and other support services. The Family Violence Courts also aim to simplify access to the justice system and will be able to deal with a range of legal matters that may arise from a family violence situation. The Family Violence Courts will be able to hear criminal proceedings for a summary offence, VOCAT (crimes compensation) applications and family law matters, as well as intervention order proceedings. Two demonstration courts, one in Heidelberg and one in Ballarat, are expected to start early in 2005.[8]

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

A summary offence is an offence heard by a magistrate, rather than a judge and jury.

1.17 To enable the establishment of the Family Violence Courts, various amendments to the Act have been proposed.[9] The Magistrates' Court (Family Violence) Bill 2004 proposes a range of amendments intended to improve various elements of the legislation. A number of these amendments relate to issues we are dealing with in this review. Wherever relevant, we will refer to the proposed amendments in this Consultation Paper.

FAMILY VIOLENCE COURT INTERVENTION PILOT PROJECT

1.18 This four-year pilot project, announced in July 2002, targets men who are subject to intervention orders for family violence. It aims to improve the safety of

7 Ibid 10–14.

8 Office of the Attorney-General, *Domestic Violence Courts for Heidelberg, Ballarat*, Press Release (13 June 2004).

9 Magistrates' Court (Family Violence) Bill 2004 (Vic).

women and children by tackling men's abusive behaviour towards their family members.

1.19 The project will pilot court-directed behaviour change counselling for men in Heidelberg and Ballarat. Support services will also be made available to women and children affected by the men's violence. If the amendments to the Act are passed, magistrates will be able to direct intervention order respondents, when making an intervention order against them, to attend an eligibility assessment and, if they are eligible, attend a behaviour change program.[10]

CHILD PROTECTION REFORMS

1.20 In June 2003, the Victorian Government announced a review of the framework for child protection policy, legislation and practice. The report from the first stage of this review, *Protecting Children—The Child Protection Outcomes Project*, was published in October 2003, and canvassed broad policy options for reform.[11] Consultation in relation to these broad policy options was overseen by a specially appointed expert panel, and led to a report, released in May 2004. The report outlines the principles that should underpin the child services and child protection system, and advice about key areas of action that should be included in the reform process.[12] These areas include replacing the *Children and Young Persons Act 1989* and the *Community Services Act 1970* with one broad-based Act, and exploring options for a less adversarial and more problem-solving orientation within the Children's Court.[13] This may include, for example, the introduction of alternative dispute resolution in some proceedings in the Family Division of the Children's Court.

1.21 More detailed options for reform were released for public comment in August 2004 in *Protecting Children: Ten Priorities for Children's Wellbeing and*

10 Magistrates' Court (Family Violence) Bill 2004 (Vic), clause 14, inserting new pt 2A into the *Crimes (Family Violence) Act 1987* (Vic).

11 Department of Human Services, Victoria, *Protecting Children: the Child Protection Outcomes Project* Final Report (2003).

12 Department of Human Services, Victoria, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004).

13 Ibid 48.

Safety in Victoria: Technical Options Paper.[14] The government has indicated it will introduce new child protection legislation in 2005.[15]

REVIEWING THE ACT IN THE CONTEXT OF CHANGE

1.22 As a result of the above developments, the Act and the way it is implemented will change while the Commission is conducting this review and before we report to the Attorney-General in June 2005. Other initiatives are likely to result in changes affecting the operation of the Act shortly after the review is finalised.

1.23 When conducting the review, the Commission will take each of these important initiatives into account and, whenever possible, we will examine the impact of changes that come into effect while our review is in progress.

SCOPE OF THE REVIEW

1.24 The full terms of reference for this review are set out at page xiv. The terms of reference require the Commission to consider whether the Act is based on a coherent philosophy and whether its approach to family violence is the best available to Victoria. This requires the Commission to look at the broader legal context in which the legislation operates and to analyse the philosophy that underpins the overall legal response to family violence in Victoria. We will therefore be looking at how the criminal law is imposed in relation to family violence, and how the intervention order system interacts with the criminal justice system. The terms of reference do not, however, enable us to review the general provisions of the *Crimes Act 1958* or the processes used in the administration of the criminal law as they relate to family violence.

1.25 Examining whether the Act is based on a coherent philosophy also requires us to examine what the purpose of the legislation should be and what legal approach is most likely to achieve this purpose. In Chapter 2 of this Paper we discuss the nature, prevalence and effects of family violence. Then, in Chapter 3, we address these broader

A jurisdiction is the territory over which judicial or State authority is exercised.

14 Community Care Division, Department of Human Services, *Protecting Children: Ten Priorities for Children's Wellbeing and Safety in Victoria* (2004).

15 Ibid 3; Sherryl Garbutt, Review of Child Protection Policy and Practice—The Way Forward Covering Statement from the Minister for Community Services <www.dhs.vic.gov.au/pdpd/childprot.htm> at 16 August 2004.

issues in relation to the aims and objectives of the justice system response to family violence, and explore alternative approaches that have been proposed or implemented in other jurisdictions.

1.26 In addition, the terms of reference require us to examine the specific provisions of the Act and the administrative mechanisms, processes and procedures that surround the operation of the legislation. In order to determine the full range of legislative, administrative and procedural changes that may be necessary to improve the intervention order system, we will examine:

- basic provisions of the Act and the interaction between the Act and other areas of the law (Chapter 4);
- some of the definitions and provisions in the Act that determine who may seek a family violence intervention order, what kind of behaviour they may seek protection from, and other important provisions in the Act (Chapter 5);
- matters that impede people's access to the legislation and affect their capacity to make an application for an intervention order (Chapter 6);
- how people enter the intervention order system, what is involved in applying for an intervention order and whether changes are needed to police applications (Chapter 7);
- aspects of the legislation, and the way it is interpreted and applied, that may impede its effectiveness (Chapter 8);
- whether orders made under the Act are adequately enforced, and whether there are ways to improve compliance with family violence intervention orders (Chapter 9);
- elements of police procedure and the court process, including access to support and representation at court, that affect parties' experiences of the intervention order system (Chapter 10); and
- issues related to the process of giving evidence during intervention order proceedings and what types of evidence may be used in intervention order cases (Chapter 11).

Evidence is any statement, object or other thing which proves the facts in a legal hearing or trial.

OUR PROCESS AND THE PURPOSE OF THIS PAPER

ADVISORY COMMITTEE

1.27 The Commission has established an Advisory Committee comprising individuals with expertise and experience in matters relevant to the review. The role of the Advisory Committee is to provide advice about our proposed approach and the directions we take during the course of the review.

1.28 In addition to the Advisory Committee, the Commission will convene specialist advisory committees to provide advice on particular issues as the review progresses. To date the Commission has established an Advisory Committee on issues affecting culturally and linguistically diverse communities and an Advisory Committee on issues affecting people with disabilities. The members of the advisory committees are listed in the front of this Consultation Paper.

1.29 The Commission is also involved in ongoing communication with a number of key stakeholders through our observer status on the Statewide Steering Committee to Reduce Family Violence and the Family Violence Division of the Magistrates' Court Reference Group.

CURRENT PROBLEMS WITH INTERVENTION ORDERS

1.30 The aim of the first phase of the review has been to make sure the Commission has identified the full range of relevant problems and issues that affect the current effectiveness of the Act. This was important to make sure that we include all relevant matters in the scope of our review.

1.31 In addition to researching legislation, articles and reports relevant to the intervention order system, the Commission conducted extensive face-to-face consultations between January and July 2004.

1.32 First, we held preliminary consultations with a range of individuals working in the area of family violence in Melbourne. Between February and July we travelled to each Department of Human Services region in Victoria, where we met with family violence workers, court staff, magistrates, lawyers, police and other relevant workers, family violence action groups, and women who have experienced family violence. During this time, we also held three larger consultations with workers in metropolitan regions. The list of consultations we conducted is in Appendix 1, at the back of this Consultation Paper. The submissions we have received to date are listed in Appendix 2.

CONSULTATION PAPER

1.33 Our first round of consultations helped us to identify the range of issues we must take into account during our review of the Act. Along with the research we have undertaken, these consultations have informed the content of this Paper. We refer to the issues raised and views expressed during our consultations throughout this Paper, including issues and views where there was no consensus among consultation participants. Where we attribute a view to a particular consultation, therefore, not all participants who attended that consultation necessarily agreed with the view.

1.34 The Commission is committed to inclusive law reform processes and it is important to us that all members of the community have the opportunity to express their views on this important area of the law. This Consultation Paper is designed to help you to give us your views about the intervention order system, and about how that system might be improved.

1.35 A summary of the Consultation Paper has been produced for those community members who wish to provide input into the review and who do not require the more detailed information included in this Paper.

1.36 We invite your comments on this Consultation Paper and seek your responses to the questions we have raised. Submissions are due by 28 February 2005. Information about how to make a submission is on page iii of this Paper.

THE PROCESS FROM HERE

DEVELOPING OUR RECOMMENDATIONS FOR REFORM

1.37 Following the release of this Paper, the Commission will conduct a second round of consultations involving more structured and targeted meetings, workshops and forums in relation to specific issues. These consultations will be used to develop and test our recommendations for reform as we work towards a set of final recommendations. We will continue to communicate with you about the progress of the review through our quarterly newsletters.

1.38 If you are not on our mailing list and have not received previous newsletters, please contact us with your details.

1.39 The feedback we receive from stakeholders during our consultations, combined with further research into approaches in other jurisdictions, will inform our final recommendations to the Attorney-General. These recommendations will

be included in a final report, which will be presented to the Attorney-General in mid 2005.

IMPLEMENTATION

1.40 All final reports by the Commission must be tabled in Parliament by the Attorney-General. The Government will then decide whether the Commission's recommendations will be implemented.

Chapter 2
What is Family Violence?

INTRODUCTION

2.1 When assessing how effectively the justice system addresses a particular social problem, it is important to be clear about the nature of the problem. In this Chapter we clarify the nature of family violence, which the intervention order system has been designed to address, and discuss the dimensions of family violence as a social harm. How prevalent is family violence? Who uses violence and who is subjected to it? What impact does family violence have on individual victims, their family and friends, and the community? Importantly, we look at the way society views family violence, and name some of the myths and misconceptions that influence our societal—and legal—responses to violence against family members.

DEFINING FAMILY VIOLENCE

2.2 Despite its prevalence, family violence can be difficult to define.[16] There is ongoing debate about what types of behaviour and relationships should be included in a definition of family violence.[17] Such debate has given rise to a multitude of possible definitions.[18] This definitional debate is both symbolically and practically important. At a symbolic level, defining a particular behaviour as 'family violence' indicates it is socially unacceptable. On a practical level, whether a certain behaviour or relationship is defined as family violence can affect whether a person experiencing violence can access support services and legal protection.[19]

2.3 In its policy framework for the Women's Safety Strategy, the Victorian Government adopts the following definition of domestic violence:

> 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.
>
> The term 'family violence' is preferred to 'domestic violence' because it incorporates violence that might occur between family members, such as violence between siblings or across generations, in addition to violence between partners. Use of the term family violence also reflects Indigenous communities' preference for the term because it more accurately reflects extended kinship ties and how the impact of violence affects all members of a family.[20]

2.4 Similar types of behaviour and relationships are included in the definition of family/domestic violence adopted by the Australian Government in its *Framework for Developing Approaches to Domestic Violence 2001–2003*:

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16 Domestic Violence and Incest Resource Centre, *What's in a Name?: Definitions and Domestic Violence* Discussion Paper No 1 (1998) 2; Lesley Laing, *Progress, Trends and Challenges in Australian Responses to Domestic Violence: A Background Paper to the Issues Paper Series* (2000) 1.

17 Therese McCarthy, *Public Health, Mental Health and Violence Against Women: Report Produced for VicHealth* (2003) 10. See also Domestic Violence and Incest Resource Centre (1998), above n 16.

18 Domestic Violence and Incest Resource Centre (1998), above n 16, 7.

19 Ibid 5.

20 Office of Women's Policy, Department of Premier and Cabinet, *The Women's Safety Strategy: A Policy Framework* (2002) 20.

> Domestic violence occurs when one partner in a relationship attempts by physical or psychological means to dominate and control the other. It is generally understood as gendered violence, and is an abuse of power within a relationship or after separation. In the large majority of cases the offender is male and the victim female. Children and young people are profoundly affected by domestic violence, both as witnesses and as victims.
>
> Many Aboriginal and Torres Strait Islander communities prefer the term 'family violence'. 'Family' covers a diverse range of ties of mutual obligation and support, and perpetrators and victims of family violence can include, for example, aunts, uncles, cousins and children of previous relationships.
>
> Domestic or family violence may involve a wide range of behaviours, including: physical abuse; sexual abuse; spiritual abuse; verbal abuse; emotional abuse; social abuse; and economic abuse.[21]

2.5 These definitions highlight that family violence is characterised by one person's use of violence to control, coerce and dominate another person.[22] Family violence is an abuse of power, in the sense that the person using violence is in a position of power in relation to the person who is subjected to violence.[23] The definitions also illustrate that family violence can involve physical abuse, but that it also includes verbal, emotional, social, sexual, economic and spiritual abuse.[24] The second definition also emphasises the impact that family violence can have on children who may witness and experience such abuse.[25]

WHO USES AND WHO EXPERIENCES FAMILY VIOLENCE?

2.6 Family violence affects people throughout the community—it is not restricted to a specific socioeconomic, racial or cultural population.[26] Family violence is, however, overwhelmingly used by men against women. In Australia, studies indicate that between 23% and 34% of women experience intimate

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21 Partnerships Against Domestic Violence, *Framework for Developing Approaches to Domestic Violence 2001–2003* <www.padv.dpmc.gov.au/01/framework_2.htm> at 20 September 2004.

22 University of South Australia, *Reshaping Responses to Domestic Violence* Final Report (2000) 21.

23 McCarthy (2003), above n 17, 10; Partnerships Against Domestic Violence, 'Framework for Developing Approaches', above n 21.

24 The different forms of family violence are discussed at paras 2.15–2.20.

25 See paras 2.27–2.29.

26 World Health Organization, *World Report on Violence and Health* (2002) 89.

partner violence during their lives.[27] Further, approximately 10% of Australian women are abused by a male relative other than an intimate partner.[28]

2.7 Men experience family violence at significantly lower rates than women. In a South Australian survey of men and women, 12.1% of men reported they had been subjected to violence by an intimate partner, compared with approximately 23% of women.[29] Victoria Police family violence incident reports show that 76.3% of incidents involved women who had been subjected to violence.[30]

2.8 It is predominantly men who use violence against family members. Approximately 78.1% of Victoria Police family violence incident reports involved men who had used violence.[31] Men's use of family violence is primarily directed towards women. Research has found that 67.1% of intimate partner violence involves men using violence against women, whereas only 31.3% of intimate

27 In 1996, the Australian Bureau of Statistics' national Women's Safety Survey found that 23% of women who had ever been in a married or de facto relationship had been subject to family violence: Australian Bureau of Statistics, *Women's Safety Australia 1996* Catalogue No 4128.0 (1996) 50. In 2004, however, the Australian Component of the International Violence Against Women Survey found that 34% of women who had ever had a spouse, partner or boyfriend had been subject to violence by their male partner: Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004) 44. Recently, Senator Kay Patterson announced that, in 2005, there will be a second national women's safety survey called the *2005 Personal Safety Survey*. Kay Patterson, Minister for Family and Community Services, *National Survey to Produce Data on Violence Against Women*, Press Release (17 May 2004).

28 Mouzos and Makkai (2004), above n 27, 68. The Women's Safety Survey also shows that 13.6% of women who experience physical violence are subject to this violence by a family member: Australian Bureau of Statistics (1996), above n 27, 23.

29 Epidemiology Branch, Department of Human Services, *Interpersonal Violence and Abuse Survey* (1999) 88. Survey data such as this must be considered with some caution. In this survey, male and female respondents were asked whether they had ever been subjected to certain types of physical and emotional abuse: ibid 86. By asking about specific incidents of violence, such studies do not reflect that family violence is not 'one isolated push or shove in a lifetime of a relationship…[but] a chronic syndrome characterised, not by episodes of violence, but the emotional and psychological abuse used by men to control their female partners': Kelsey Hegarty and Gweneth Roberts, 'How Common is Domestic Violence Against Women? The Definition of Partner Abuse in Prevalence Studies' (1998) 22 (1) *Australian and New Zealand Journal of Public Health* 49, 53. Such studies may therefore produce findings that suggest men and women experience violence at comparable rates by conflating isolated incidents with violence that occurs as part of a pattern of abuse and control.

30 Victoria Police, *Crimes Statistics 2002/03* (2003) 131.

31 Ibid.

partner violence involves women using violence against men.[32] With respect to fatal family violence, 75% of intimate partner homicides occur when men kill their female partner.[33] In contrast, women only commit 20% of intimate partner homicides.[34]

FAMILY VIOLENCE: A GENDERED HARM

2.9 A primary characteristic of family violence is that it is a gendered form of violence.[35] The statistics demonstrate that family violence is overwhelmingly used by men and experienced by women. The prevalence of men's use of violence against women reflects the gender imbalance in Australian society. Family violence is inseparable from this power imbalance: it is an abuse of women because they are women.[36] Acknowledging the gendered nature of family violence is important as it enables an analysis of the interrelationship between gender and masculinity and men's use of violence.[37] A gendered analysis does not prevent, however, an exploration of the contexts of family violence and the impact of race, culture, socioeconomic status, disability or sexuality on a person's experience of family violence.[38]

FAMILY VIOLENCE: RARELY A SINGLE INCIDENT

2.10 Finally, there is a third definition that is useful in depicting the dynamics of family violence:

> 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.[39]

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32 Epidemiology Branch (1999), above n 29, 137.

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

34 Ibid.

35 World Health Organization (2002), above n 26, 89.

36 Hilary Charlesworth and Christine Chinkin, 'Violence Against Women: A Global Issue' in Julie Stubbs (ed) *Women, Male Violence and the Law* (1994) 13–14.

37 Julie Stubbs, 'Introduction' in ibid 4.

38 Ibid.

39 Rhea Almeida and Tracy Durkin, 'The Cultural Context Model: Therapy for Couples with Domestic Violence' (1999) 25 (3) *Journal of Marital and Family Therapy* 313.

This definition emphasises that family violence is a pattern of behaviour that can involve the use of different types of abuse in conjunction.[40] Constant emotional degradation and verbal abuse, for example, may be used in the context of occasional physical violence. Family violence has been described as a cyclical process, in which there is an increase in relationship tension, followed by a phase of intense control that culminates in a violent explosion.[41] After the explosion, there are periods of remorse, promise making and a honeymoon phase, before the tension begins to build again. While this 'cycle of violence' may not reflect all circumstances of family violence, it does accord with the experience of many women.[42]

HOW COMMON IS FAMILY VIOLENCE?

2.11 Family violence is a widespread problem. The 1996 Australian Bureau of Statistics' (ABS) national Women's Safety Survey found that 23% of women who had ever been in a married or de facto relationship had experienced family violence.[43] In 2002–03, the Victoria Police dealt with at least 28 454 family violence incidents.[44] Younger women may be particularly affected, and comprise approximately 70% of women who access support services for family violence.[45] While family violence is not restricted to a particular socioeconomic, racial, cultural or educational population, it can disproportionately affect some groups. The available research suggests women with disabilities are subjected to family

40 Kelsey Hegarty, Elizabeth Hindmarsh and Marisa Gilles, 'Domestic Violence in Australia: Definition, Prevalence and Nature of Presentation in Clinical Practice' (2000) 173 (7) *eMJA: The Medical Journal of Australia* 363.

41 Women's Domestic Violence Crisis Service, *What's Love Got To Do With It?: Victorian Women Speak About Domestic Violence* Annual Report 2001–2002 (2003) 8.

42 Ibid.

43 Australian Bureau of Statistics (1996), above n 27, 50.

44 Victoria Police (2003), above n 30, 128. This number represents the number of Family Incident Reports submitted by Victoria Police. Family Incident Reports must be filed for any incident between family members attended by police or reported to police, including an incident involving any form of abuse such as homicide, verbal abuse, harassment or damage to property and verbal disputes where police assistance is sought but no criminal offence is identified; see Victoria Police, *Victoria Police Manual* (Quarter 1, 2004–2005) VPM Instruction 109–1 paras 9.1–2; Victoria Police, *Victoria Police Manual* (Quarter 2, 2004–2005) VPM Instruction 109–7 paras 4.1–4.2.

45 Victorian Community Council Against Violence, *Victorian Family Violence Database* First Report (2002) 10.

violence at twice the rate of other women,[46] and Indigenous people may be up to 45 times more likely to experience family violence than other people.[47]

2.12 Family violence in the context of an intimate relationship can begin or intensify at different stages of that relationship. Some women, for example, are subjected to family violence for the first time during pregnancy. Twenty per cent of women who said in the ABS Women's Safety Survey that they had experienced partner abuse were subject to violence for the first time during pregnancy, while 42% of women experienced violence while pregnant.[48] Abuse can also begin, continue or intensify after separation. The use or threat of violence towards women during child contact visits, and financial abuse, are common forms of post-separation violence.[49] Research shows that women who separate from their violent partners face a significant risk of fatal violence.[50]

2.13 Our discussion of the prevalence of family violence is qualified, however, by the fact that family violence is largely a hidden problem and is dramatically underreported. Approximately 40% of women subjected to violence by their current partner do not disclose their experience to anyone.[51] Women subject to physical assault are even less likely to report their experience to the police. The Women's Safety Survey found that approximately 95% of women abused by their current partner, and approximately 75% of women abused by their previous partner, did not report their last experience of abuse to the police.[52] The Australian Institute of Criminology survey found that only 14% of women victimised by an intimate partner reported the incidents to police or judicial authorities.[53]

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46 Carolyn Frohmader, *There is No Justice—There's Just Us: The Status of Women with Disabilities in Australia* (2002) 22; Laurie Powers, Mary Ann Curry, Mary Oschwald 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.

47 A Ferrante et al, *Measuring the Extent of Domestic Violence* (1996) cited in Judy Atkinson, 'A Nation is Not Conquered' (1996) 3 (80) *Indigenous Law Bulletin* 4 and Harry Blagg, 'Aboriginal Family Violence: Prevention and Crisis Intervention Issues' in Robyn Thompson (ed) *Working Indigenous Perpetrator Programs: Proceedings of a Forum, Adelaide, 4–5 August 1999* (1999) 155.

48 Australian Bureau of Statistics (1996), above n 27, 52.

49 University of South Australia (2000), above n 22, 24.

50 Jenny Mouzos, *Femicide: The Killing of Women in Australia 1989–1998* (1999) 12.

51 Australian Bureau of Statistics (1996), above n 27, 30.

52 Ibid 29. Approximately 10% of women who were physically assaulted by a boyfriend or date reported the last violent incident to the police: ibid.

53 Mouzos and Makkai (2004), above n 27, 112.

2.14 Various factors contribute to the hidden nature of family violence. It often occurs in private, which means that it may not be visible unless someone recognises or reports it. Secondly, as family violence has only been acknowledged as a public issue since the 1970s,[54] data is only available since this period. Before then, the gendered dichotomy between public and private spheres led to violence in the home being perceived as a private issue with which the State should not interfere. Thirdly, there is still no data collected on some occurrences of family violence—there is a notable absence of data on the abuse of people with disabilities,[55] violence in same-sex relationships and violence within particular cultural groups.[56] Lastly, people who are subject to violence may have various reasons for failing to disclose their experiences, which we will discuss in Chapter 4 of this Paper.

TYPES OF FAMILY VIOLENCE

2.15 Many women who experience family violence say that the most pervasive and damaging types of abuse are verbal and emotional.[57] Insulting or humiliating comments, in public or private, about a person's appearance or parenting skills are some examples of verbal abuse.[58] This type of abuse may involve the use of threats to harm a person or property. Emotional abuse can be manipulative behaviour, such as remaining silent for prolonged periods or unfairly blaming a person for adverse events.[59] Verbal and emotional abuse are harmful in isolation, but can also occur in connection with other types of abuse.

2.16 Social abuse is another common type of family violence. Social abuse can occur when one person restricts and supervises another person's social interactions. One woman explains:

> I had to be home at certain times. For example, he would come home at lunchtime

54 Laing (2000), 'Progress, Trends and Challenges', above n 16, 2.

55 Domestic Violence and Incest Resource Centre, *Triple Disadvantage: Out of Sight, Out of Mind: A Report on the Violence Against Women With Disabilities Project* (2nd ed, 2003) 25–26.

56 Kerry-Anne Collins, *Non-Spousal Domestic Violence* Research Bulletin No 10/98 (1998) 7; Zita Antonios, 'Opening Speech: Violence Against NESB Women' in *Not the Same: Conference Proceedings and a Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women* (1996) 6.

57 University of South Australia (2000), above n 22, 23; Consultation 9.

58 University of South Australia (2000), above n 22, 22.

59 Ibid.

> 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. This went on for seven years.[60]

The person using violence may prevent another family member from leaving the family home or punish them when they do so.[61] Social abuse can be so intrusive that people subject to abuse can feel as if they are still under surveillance when they are in public settings, such as their workplace.[62] This means that social abuse is extremely isolating and can greatly affect a person's ability to access external support.

2.17 Although family violence is not confined to physical abuse, physical violence can be part of an abusive relationship. A South Australian survey found that 38.6% of people who were subjected to family violence had suffered physical injuries.[63] Physical violence may be the threat or occurrence of interpersonal abuse, such as punching, strangling, the use of weapons or the denial of food, medical needs or warmth.[64] It may involve the use of physical force towards a person's property or a third party in order to harm or control the person subjected to violence. The use or threat to use violence towards pets, for example, is increasingly recognised as a type of physical abuse experienced by women in violent relationships.[65]

2.18 Sexual abuse is a type of physical family violence that receives less public recognition.[66] It is only relatively recently that sexual assault within marriage has been acknowledged as a serious crime, rather than a man's marital right.[67] Sexual abuse involves coercing another person to engage in a sexual act against their will. The nature of the coercion may be direct (such as physical violence or threats) or

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60 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 Intervention* (1998) 10.

61 University of South Australia (2000), above n 22, 22–23.

62 Ibid 24–25.

63 Epidemiology Branch (1999), above n 29, 147.

64 Hegarty, Hindmarsh and Gilles (2000), above n 40.

65 Eleonora Gullone, Judy Johnson and Anne Volant, *The Link Between Animal Abuse and Family Violence: A Victoria-Wide Study* Paper given to the VLRC by authors (2004) 3.

66 Melanie Heenan, *Just 'Keeping the Peace': A Reluctance to Respond to Male Partner Sexual Violence* (2004) 2.

67 Ibid 1; Domestic Violence and Incest Resource Centre (1998), above n 16, 21.

indirect (such as a woman's knowledge of the pattern of abuse that will continue if she refuses to engage in a sexual act).[68] The trauma associated with sexual assault can be especially intense for people who are sexually abused by an intimate partner and who continue to live with their abuser.

2.19 Economic or financial abuse can also have devastating effects on people in violent relationships. Financial abuse can occur when someone denies or restricts another person's use of money to purchase essential items, such as food, clothing or sanitary products:[69]

> I wasn't allowed to go to the supermarket by myself. This was actually really inconvenient for him as he worked eight hours a day and I was home with the baby during this time and could have easily gone. We had to wait until he came home from work and we could go together so that he could check that he was getting the best buy or what he wanted. He thought that if I went by myself I would skim money off the top of it, say I had $100 he would think I would spend $80 and keep the rest for myself. He would say buy home brand, it is cheaper, even for the child, but for him it had to be a good brand, good quality.[70]

After separation, a partner may withhold money for child support as a type of economic abuse.[71] This type of abuse can have damaging health consequences and can severely impede a person's ability to leave an abusive relationship.[72]

2.20 Family violence can also involve spiritual abuse, which is defined by the Victorian Indigenous Family Violence Task Force as follows:

> Spiritual or cultural abuse is about using power and control to deny a partner or family member their human, cultural or spiritual rights and needs. This form of abuse may also include the misuse of culture or religion as a reason for family violence. Another example is to insult or run down a person in relation to their cultural background or religious preference or practices.[73]

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68 University of South Australia (2000), above n 22, 22.

69 Coburg Brunswick Community Legal and Financial Counselling Centre, *'His Money or Our Money?' Financial Abuse of Women in Intimate Partner Relationships* (2004) 19.

70 Ibid 23.

71 Ibid 29.

72 Ibid ii.

73 Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003) 129.

One Indigenous woman explains the harm that spiritual abuse can cause:

> People get hurt physically—you can see the bruises and black eyes. A person gets hurt emotionally—you can see the tears and the distressed face—but when you've been hurt spiritually like that—it's a real deep hurt and nobody, unless you're a victim yourself, could ever understand because you've been hurt by someone that you hold in trust.[74]

FAMILY VIOLENCE: NOT JUST INTIMATE PARTNER ABUSE

2.21 Family violence is most common in the context of an intimate partner relationship. In 2002–03, most Victoria Police family violence incident reports involved the use of violence between people who were married or in a de facto relationship.[75] It is becoming increasingly acknowledged, however, that family violence can occur in a range of family relationships. Abuse can be used by siblings, grandparents or grandchildren, children, aunts and uncles, cousins, step relatives and relatives-in-law and other family members. Young people's (especially young males') use of abusive behaviour towards their parents (predominantly their mothers) is increasingly recognised as a problem.[76] Further, intimate partner violence is not confined to opposite-sex relationships.[77]

2.22 Even when the person using violence is not legally or biologically related to the person subjected to violence, the abusive behaviour may still constitute family violence. In some Indigenous and culturally and linguistically diverse communities, a non-related person may be considered part of the extended family. Abuse can also be experienced in circumstances outside the traditional conception of 'family'. People with disabilities may be subject to abuse by non-related carers in an institutional setting. Carers' use of violence is clearly an abuse of the power they have over the person they are caring for.

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74 A Tasmanian Aboriginal survivor of family violence quoted in J Atkinson, *Beyond Violence—Finding the Dream* (1990) cited in University of South Australia (2000), above n 22, 125.

75 Victoria Police (2003), above n 30, 132.

76 Natasha Bobic, *Adolescent Violence Towards Parents* (2004) 1; Department of Human Services, *Young People's Violence Towards Parents: A Scoping Paper of the Issues* (2002) 4.

77 Jude Irwin, 'Lesbian Domestic Violence: Unseen, Unheard and Discounted' (Paper presented at the Second Australian Women and Policing Conference, 7–9 July 1999, Emmanuel College, University of Queensland) 1; Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) *E Law—Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v3n4/vickers.html> at 31 August 2004, Section IA.

FAMILY VIOLENCE IN INDIGENOUS COMMUNITIES

2.23 An Indigenous person's experience of family violence can have unique characteristics. For example, in addition to the forms of violence discussed in paragraphs 2.15–2.19, there are other behaviours that may be considered abusive in Indigenous communities. In some communities, suicide, self-harm or a young person's anti-social behaviour can constitute family violence.[78] Moreover, in Indigenous communities, family violence does not always occur in private. It may be used in public and can be difficult to clearly separate from other forms of violence in Indigenous communities.[79] This means that family violence, similar to violence in general, can be seen as causally related to the traumatic impact of colonisation on Indigenous communities.[80] Colonisation also detrimentally affected the social status of women, who previously exercised societal authority.[81] Thus, Indigenous women's current exposure to a gendered form of violence, namely family violence, can be connected to the colonisation and dispossession of Indigenous communities across Australia.

THE EFFECTS OF FAMILY VIOLENCE

2.24 Family violence causes serious physical, mental and financial damage to the individuals who experience it, and can also harm their family, friends and the broader community. Intimate partner violence is the highest contributor to death, disability and illness for Victorian women aged 15–44 years of age.[82] The physical impact of family violence can be both immediate and long-term. Immediate physical injuries include bruising, fractures or death.[83] More than half of the women who were murdered between 1989 and 1998 were killed by an intimate partner.[84] Family violence can also cause permanent disabilities, such as vision or hearing impairments. Other long-term physical effects of violence are headaches,

78 Blagg (1999), above n 47, 154.

79 Partnerships Against Domestic Violence, *Indigenous Family Violence* Phase 1 Meta-Evaluation Report (2004) 41; Consultation 4.

80 Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000) 49.

81 Partnerships Against Domestic Violence (2004), above n 79, 26.

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

83 World Health Organization (2002), above n 26, 101.

84 Mouzos (1999), above n 50, 10–11.

chronic pain, irritable bowel syndrome and injuries to women's reproductive health, such as infertility and the contraction of sexually transmitted diseases.[85]

2.25 On a psychological or emotional level, people subject to abuse by a family member can suffer a loss of self-esteem or depression. They may develop an eating disorder or anxiety problems. Suicide can become a substantial risk for women who have been abused and they are nine times more likely than other women to consider or engage in self-harming behaviour.[86] These long-term mental health implications can be aggravated by the social impact of family violence, as many violent relationships isolate people from their family, friends and cultural supports. In addition, one of the common effects of family violence is that women subjected to violence feel responsible for, and ashamed about, their experience. This may be because the perpetrator tells them they are to blame for the abuse or because friends and family they tell about the abuse attribute blame to them.[87]

2.26 The economic impact of family violence can be severe. People who have been subjected to economic abuse may be financially destitute during and after the violent relationship.[88] People subjected to violence may have lost their jobs due to the abuse and the long-term impacts of such abuse may affect their future employability.[89] People who leave violent relationships may also find themselves homeless.[90] From a community perspective, responses to family violence, such as legal, medical and support services, cost the community $1.5 billion each year.[91]

CHILDREN AND FAMILY VIOLENCE

2.27 Family violence also negatively affects children, whether they are the direct targets of abuse—either as the sole target or when violence against children occurs in conjunction with inter-adult family violence—or are exposed to violence against a parent or other family member. Research indicates that there is a significant overlap between intimate partner abuse and child abuse, such that co-

85 See VicHealth (2004), above n 82, 21; World Health Organization (2002), above n 26, 101.

86 GL Roberts et al, 'Domestic violence in the Emergency Department: 1. Two case control studies of victims' (1997) 19 *General Hospital Psychiatry* 5 cited in VicHealth (2004), above n 82, 20.

87 University of South Australia (2000), above n 22, 32–3.

88 Coburg Brunswick Community Legal and Financial Counselling Centre (2004), above n 69, 35.

89 Crime Prevention Victoria, *Women's Experience of Crime and Safety in Victoria 2002* 6–7.

90 Women's Domestic Violence Crisis Service (2003), above n 41, 29.

91 Victorian Community Council Against Violence (2002), above n 45, 3.

existence of partner abuse and child abuse is estimated to be between 30% and 60%.[92]

2.28 A large number of children witness, or are otherwise exposed to, violence against their mothers. In Australia, one-quarter of children have witnessed violent behaviour towards their mother or stepmother.[93] The ABS Women's Safety Survey found that 46% of women who reported violence in a previous relationship said their children witnessed them being abused.[94] Victoria Police data shows large numbers of children are present at family violence incidents that come to the attention of the police.[95]

2.29 Living with inter-adult family violence can cause a range of negative short- and long-term effects. In infants and children, these effects can include 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.[96] This has led many to name exposure to inter-adult family violence as a form of child abuse in its own right.[97]

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92 Lesley Laing, *Children, Young People and Domestic Violence* (2000) 5, 16; Jeffrey Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (Revised 1999) Violence Against Women Online Resources <www.vaw.umn.edu> at 12 May 2004; Adam Tomison, 'Child Abuse and Other Family Violence from a Case Tracking Study' (1995) (41) *Family Matters* 33.

93 David Indermaur, *Young Australians and Domestic Violence* (2001) 2.

94 Australian Bureau of Statistics (1996), above n 27, 52. In addition, 61% of women who reported violence by a current partner had children in their care at some time during the relationship, and 38% of these women reported that their children had witnessed the violence.

95 Unpublished Victoria Police data for 2002–03 indicates that 28 453 family violence incidents were reported to police. Children under 5 years of age were present at 25% of those incidents. In total, 9876 children under 5 years were present, 8007 children under 10 years were present, and a further 8494 young people between the ages of 10 and 16 were present: see unpublished data extracted from LEAP on 30 August 2004, provided to the Commission by the Statistical Services Division, Victoria Police. The Commission gratefully acknowledges the assistance provided by Victoria Police, in particular Uma Rao and Chris Maloney from the Statistical Services Division, Victoria Police.

96 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, 26–28; Joy Osofsky, 'The Impact of Violence on Children' (1999) 9 (3) *The Future of Children* 33; World Health Organization (2002), above n 26, 103.

97 See, eg, Adam Tomison, *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence* (2000) 8; Victorian Community Council Against Violence (2002), above n 45, 3.

MYTHS AND MISCONCEPTIONS ABOUT FAMILY VIOLENCE

2.30 As the Women's Domestic Violence Crisis Service of Victoria observes:

> Domestic violence is difficult to talk about. As a flipside of the same coin, domestic violence is a part of one of our most valued institutions, the family.[98]

Over time, our understanding of the prevalence, characteristics, dynamics and effects of family violence has increased substantially. Awareness of the problem has grown, and family violence is—at least for some—less difficult to talk about. Societal attitudes towards family violence have also changed since the days when '"domestics" were largely regarded as a private matter and violence within the family a male prerogative'.[99]

2.31 However, many stereotypes and misconceptions about family violence still carry significant cultural weight. These misconceptions are important to acknowledge because they remain part of the social context in which the intervention order system operates. They also continue, in varying degrees, to shape the justice system's response to family violence. Some persistent misconceptions about family violence include the beliefs that:

- physical violence is the only form of family violence that is unacceptable or damaging;[100]
- sexual abuse in an intimate relationship is not a real, or a serious, crime;[101]
- family violence is an acceptable part of some cultures;[102]
- if a person leaves an abusive relationship, the violence will stop;[103] and
- women who have been subjected to intimate partner violence are characteristically weak, vulnerable and passive.[104]

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98 Women's Domestic Violence Crisis Service, above n 41, 4.

99 Domestic Violence & Incest Resource Centre, *Developing an Integrated Response to Family Violence in Victoria—Issues and Directions* (2004) 4.

100 See paras 2.2–2.5.

101 See para 2.18.

102 Blagg (1999), above n 47, 153; Anne Seitz and Terry Kaufman, *Too Shameful to Talk About: Ethnic Communities' Perceptions of Family Violence and Child Sexual Abuse: Phase 1: Cambodian, Chinese Laotian, Vietnamese* (1993) 104.

103 See para 2.12.

104 While women who have experienced family violence have often been portrayed in this way, most commonly through the notion of 'learned helplessness', considerable research exists to demonstrate that many women living with violence are engaged in a constant process of making careful decisions,

2.32 Throughout this Consultation Paper, we discuss many elements of the intervention order system that are, or may be, influenced by these myths. Wherever relevant we discuss how common misconceptions affect the accessibility and operation of the intervention order system, and ask for your suggestions about how the impact of these myths can be reduced.

in difficult circumstances, about their safety, and challenging the use of violence in many, varied ways. This has been described as 'active negotiation and strategic resistance'; see Ruth Lewis, Russell Dobash, Rebecca Emerson Dobash 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) 191.

Chapter 3
Justice System's Response to Family Violence

INTRODUCTION

3.1 Throughout the Consultation Paper, we look in detail at the Crimes (Family Violence) Act, the supports and services necessary to enable people to use the intervention order system, and the processes and procedures used to implement the system. Before we examine ways in which our current intervention order system might be improved, it is important to ask whether the system is based on the best possible approach.

3.2 The terms of reference for the Commission's review of the Act require us to consider whether it 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. This aspect of the review focuses less on the specific elements of the current Act, and more on whether the Act and the justice system employ the most effective approach to address family violence in our community.

3.3 In this Chapter we will discuss the Victorian justice system's approach to family violence, looking at both the criminal justice system and the intervention order system, before examining alternative approaches that have been proposed or adopted in other jurisdictions.

3.4 When considering law and justice system reforms, it is important to acknowledge that the justice system can comprise only one part of an effective response to family violence. Without complementary community-based responses, supports and initiatives, including initiatives that achieve widespread attitudinal change, the justice system will never adequately prevent family violence or fully meet the needs of people who have experienced it.[105]

3.5 There are, however, sound reasons to reorient the law and the justice system so that it can address family violence in an appropriate way. The law has a powerful symbolic as well as practical function in defining the parameters of acceptable behaviour. In some cases it provides the only available avenue for redress or protection, and provides the authority for the State to intervene in relationships in which there is a substantial imbalance of power between the individuals. For these and other reasons, the law has been a key focus of the women's movement and other family violence advocates. The imperative to reform the justice system remains strong.

VICTORIAN JUSTICE SYSTEM'S APPROACH TO FAMILY VIOLENCE

3.6 In Victoria, as in other parts of Australia and the world, there has been a considerable shift in the justice system's response to family violence over time.[106]

105 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 306–307; Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40 *British Journal of Criminology* 14, 33.

106 When considering contemporary legal responses to family violence, it is worth recalling that certain forms of family violence have been lawful during Anglo-Australian legal history. Under the old common law, a husband was allowed to beat his wife provided he did it with a stick no bigger than his thumb: *Davis v Johnson* [1979] AC 264 at 270–1, per Lord Denning cited in Graycar and Morgan (1990), above n 105, 277. More recently, until the 1980s, Victorian legislation expressly provided that rape in marriage was not a breach of the criminal law: *Crimes Act 1958* (Vic) s 62(2) as

In Australia both arms of the justice system—namely the criminal and the civil law—have undergone changes in response to growing recognition of family violence as a widespread social problem.

CRIMINAL JUSTICE SYSTEM

3.7 The criminal law imposes standards of behaviour within our society by prohibiting certain conduct. Criminal offences are punished by the state, and the criminal law is enforced by state agencies, namely the police, prosecutors, courts and correctional services. These agencies and institutions are responsible for charging, prosecuting and punishing those who break the criminal law.

3.8 Many forms of family violence are, and have always been, criminal offences. By the 1970s and 1980s, however, it was increasingly acknowledged that the criminal law was rarely applied to criminal behaviour in the home.[107] The call for family violence to be recognised and treated as a crime was a central theme of early family violence advocates, and has influenced many policy and justice system reforms in countries such as the United Kingdom, the United States and Canada. As we discuss at paragraph 3.26, many workers, advocates and commentators continue to call for crimes against family members to be treated in the same way as other less private forms of violence.

VALUE OF A CRIMINAL JUSTICE SYSTEM RESPONSE TO FAMILY VIOLENCE

3.9 In enforcing behavioural norms, the criminal law is 'a powerful agency of public disapproval and reprobation'.[108] It is capable, therefore, of sending a strong message to the community that family violence is not acceptable and will not be tolerated.[109] In addition to its symbolic value, the criminal justice system can lead to the punishment of people who use violence and arguably, has a deterrent effect. Where family violence is severe and/or the person using violence is persistent, the criminal justice system may provide the optimum protection for a person seeking

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amended by *Crimes (Sexual Offences) Act 1980* (Vic), *Crimes (Amendment) Act 1985* (Vic) and *Crimes (Sexual Offences) Act 1991* (Vic).

107 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); The Law Reform Commission [Australia], *Domestic Violence* Report No 30 (1986).

108 Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions* (2001) 2.

109 Robyn Holder and Nicole Munstermann, 'What do Women Want? Prosecuting Family Violence in the A.C.T.' (Paper presented at the Expanding Our Horizons conference, 18–22 February 2002, University of Sydney) 1.

to escape abuse, in that criminal justice intervention can result in the imprisonment of the person who uses violence.

3.10 Criminal law characterises family violence offences as a wrong committed against the community as a whole. Enforcing the criminal law, therefore, is not the responsibility of the individual who has been subjected to violence but rather the responsibility of the State through its law enforcement agencies—police and prosecutors.

LIMITATIONS OF A CRIMINAL JUSTICE SYSTEM RESPONSE

3.11 In Victoria, as elsewhere, the introduction of the intervention order system occurred in response to the recognition that various aspects of the criminal law rendered it unable to provide adequate protection for people who experienced family violence. In particular:

- some family violence, such as verbal harassment or excessive social or financial control, does not constitute a criminal offence;
- the prosecution of criminal offences requires that the behaviour be proved beyond reasonable doubt. This can be more difficult in family violence situations than in some other situations, because the victim is often the only witness to the offence;
- the criminal law cannot play an effective preventive role, because it operates retrospectively to punish criminal behaviour after it has occurred; and
- the criminal law is not flexible enough to suit the variety of problems arising from family violence. For example, it cannot be applied to prevent an offender from returning to the family home.

Beyond reasonable doubt This is the standard of proof in criminal cases and requires the magistrate to find a defendant not guilty, unless the evidence presented leaves no doubt that the defendant is guilty.

3.12 Another factor that can affect the criminal justice system's response to family violence is the fact that police and prosecutors alone are responsible for enforcing the criminal law. These agencies decide, for example, 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 in court. The person who has experienced violence is confined to the role of witness for the prosecution. This problematic positioning of the victim in criminal cases can be exacerbated when police officers and prosecutors do not ensure that the people

who have experienced violence are kept informed and supported, or that they fully understand the process and the outcome of their cases.[110]

3.13 The fact that these agencies, rather than individuals, are responsible for enforcing the criminal law gives rise to one of the most common concerns regarding the traditional response to family violence from the criminal justice system. Some police members' attitudes towards family violence—attitudes encapsulated in the phrase that a family violence incident is 'just a domestic'—may prevent family violence matters from coming within the realm of the criminal justice system in the first place.

3.14 A related issue is that the interests and motivations of criminal justice agencies are often different from those of the people who seek protection from violence. Women may use the justice system as a resource to manage the violence, in what has been called 'a complex process of "active negotiation and strategic resistance"' as they try to survive and eliminate the violence in their lives.[111] This use of the system, which may involve women withdrawing complaints, refusing to cooperate as witnesses and making repeat reports at points of crisis, does not always accord with the traditional interests of criminal justice agencies. These agencies have focused largely on arrest and successful prosecution as their measures of success.[112]

3.15 Finally, the criminal justice system may simply not seem an appropriate source of intervention for some people, because they do not want to involve the police or to invoke a system that may result in the criminalisation of their partner or family member. This issue can affect all people, but is a particular concern for Indigenous people.[113] Indigenous communities are already over-represented in the criminal justice system, and many Indigenous people see law enforcement agencies as sources of discrimination and persecution rather than assistance.[114]

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110 Lewis et al (2000), above n 104, 195–196.

111 Ibid 180.

112 Jane Ursel, '"His Sentence is My Freedom": Processing Domestic Violence Cases in the Winnipeg Family Violence Court' in Leslie Tutty and Carolyn Goard (eds) *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners* (2002) 45.

113 See also paras 6.10, 6.21.

114 Partnerships Against Domestic Violence, *Crisis Intervention in Aboriginal Family Violence* Summary Report (2000) 9; Department of Aboriginal and Torres Strait Islander Policy and Development (2000), above n 80, 227–234, 248; Elizabeth Hoffman House, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* Consultation Outcomes, Reports and Recommendations (2004) 32.

3.16 Some people also consider the criminal justice system to be ill-suited to a form of violence between parties who will, in many cases, continue to live together or have some contact, especially if there are children of the relationship. Where partners remain together after criminal justice intervention, for example, some penalties will impact as much on the family members who have been subjected to violence as on the person who has used violence.[115]

CIVIL JUSTICE SYSTEM

3.17 The civil justice system enables individuals to take legal action against other individuals whom they think have wronged them.[116] This contrasts with the criminal justice system, in which the State initiates action against an individual accused. A court dealing with a civil claim may make a range of orders to compensate the person who has been wronged, or to prevent future violation of their rights.

3.18 Civil protection or intervention order systems have been introduced in many jurisdictions specifically to address family violence. These systems allow an individual to obtain a court order, on the civil standard of proof (the balance of probabilities), which protects the individual from future abuse, harassment or other harm. While usually referred to as civil systems, the intervention order systems that have been developed are more accurately described as hybrid systems, because they incorporate both a civil and a criminal justice element. Breaching a civil order is a criminal offence, therefore the civil orders can only be enforced using the criminal justice system. In Victoria, a civil/hybrid system—the intervention order system—was introduced in 1987 through the Crimes (Family Violence) Act.

Standard of proof refers to the level to which a fact must be proven—in a criminal case the standard of proof is 'beyond reasonable doubt' and in civil cases it is on the 'balance of probabilities.

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

115 For example, where a fine is imposed, or where people who have used violence are incarcerated and their income-earning capacity is limited, it will impact on the financial position of the rest of the family: see Heather Douglas and Lee Godden, 'Intimate Partner Violence: Transforming Harm into a Crime' (2003) *E Law—Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v10n2/godden102nf.html> at 20 September 2004 para 37; Hoyle and Sanders (2000), above n 105, 15.

116 Rob White and Santina Perrone, *Crime and Social Control: An Introduction* (1997) 69.

VALUE OF A CIVIL JUSTICE SYSTEM RESPONSE

3.19 The civil system enables the justice system to intervene in relation to a broader range of behaviour than legislatures here and elsewhere have been willing to include in the criminal law. It also enables intervention to occur without a claim being proved beyond reasonable doubt. In a civil system a lower standard of proof applies and facts must be proven only on the balance of probabilities. In addition, civil orders purport to operate prospectively to restrain future conduct, rather than merely responding to past incidents of violence.

3.20 Some argue that a civil system can provide people who are experiencing violence with a tool to manage the abuse, and allows them to have relative control over proceedings.[117] People who need protection are able to act as participants in the system rather than recipients of it, as in the criminal justice approach.[118]

3.21 Finally, there is some evidence to suggest that civil orders can deter some people from continuing to use violence against a family member. While, as we discuss below, no studies suggest that civil orders operate to prevent all violence, some indicate that the imposition of a civil order can at least reduce the use of abusive and threatening behaviour.[119] Some studies suggest that civil orders may be likely to work, for example, on men who have had no previous contact with the criminal law, who do not want to be seen to step outside the law and who fear the shame or the impact on their social status or their employment if they are named as having done so.[120]

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117 Lewis et al (2000), above n 104, 198–200.

118 It should be noted that this aspect of the civil system is reduced if police act on policies requiring them to apply for orders on behalf of women, even where the women want no action taken: see our discussion of this issue at paras 7.55–7.58.

119 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); Margrette Young, Julie Byles and Annette Dobson, *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.

120 Humphreys and Thiara (2003), above n 119, 209; Andrew Klein, 'Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work' in Eve Buzawa and Carl Buzawa (eds) *Do Arrests and Restraining Orders Work?* (1996) 200, 202.

LIMITATIONS OF A CIVIL JUSTICE SYSTEM RESPONSE

3.22 While they may reduce some respondents' use of violence, the most significant criticism of civil 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 between the parties.[121]

3.23 In the civil/hybrid system, responsibility for tackling violence is divided between the person in need of protection and the State—upon which that person must rely if the order is to be enforced. Although individuals who need protection may obtain an order without help from the State, the enforcement of civil orders is dependent on the police, prosecutors and the courts. Therefore, enforcement of intervention orders can be hampered by many of the factors that prevent the criminal law from being applied to crimes of violence within the family.[122] This reliance on agencies that are perceived to respond inconsistently and inadequately to breaches, and to family violence in general, was probably the greatest concern raised during our consultations.

3.24 Finally, while some view the civil system as enabling people who have experienced violence to be active participants, others consider that by requiring those affected by violence to initiate and pursue legal action the system places 'an unfair burden on victims of abuse'.[123]

VICTORIA: DOES THE PRACTICE MATCH THE THEORY?

3.25 The Victorian justice system therefore offers both a criminal and a civil response to family violence. Although the civil intervention order system was introduced 'because existing criminal law remedies [could not] properly cope with family violence', it was not intended that intervention orders be used instead of

121 See, eg, Adele Harrell and Barbara E Smith, 'Effects of Restraining Orders on Domestic Violence Victims' in Buzawa and Buzawa (1996) 'Do Arrests and Restraining Orders Work?', above n 120, 229–33, 240–1.

122 We discuss concerns about enforcement of intervention orders in the Victorian context in detail in Chapter 9.

123 See, eg, Scottish Executive Social Research, *An Evaluation of the Protection from Abuse (Scotland) Act 2001* (2003) 87.

the criminal law.[124] Rather, it was intended that the Crimes (Family Violence) Act should operate alongside the criminal law and that criminal charges should be laid when there was enough evidence to secure a conviction.[125] While all behaviour that is in breach of the criminal law should be prosecuted by the State and dealt with in the criminal courts, people who have grounds to fear future violence also have access to the civil system, through which they can obtain a civil order to proactively restrain their family member from using abusive behaviour.

3.26 In practice, however, many people still think police do not treat family violence as being as serious, or as worthy of police attention, as other forms of criminal violence.[126] The civil system—the intervention order system—appears to be used instead of the criminal law in all but the most severe cases of physical violence against a family member. Some consultation participants said that in their experience some police are likely to refer a woman to court to obtain an intervention order rather than investigate or lay charges for a criminal offence.[127]

3.27 There has been no local research undertaken to determine whether these views are accurate in the Victorian context. Research conducted in Queensland, however, suggests that such concerns are valid in that jurisdiction. As part of the study, all protection order applications made under the *Domestic Violence (Family Protection) Act 1989* (Qld) in the Brisbane Registry of the Magistrates' Court for the year 2001 were analysed. The researchers examined all the applications and identified which were based on allegations of conduct that would also constitute a breach of the criminal law, such as assault, assault with bodily harm, sexual assault or imprisonment. They found that 37.8% of applications were based on allegations of three or more categories of criminal violence and 69.7% were based on allegations of more than one form of criminal violence.[128] Only 0.4% of these files, however, resulted in prosecution for a criminal offence. The researchers concluded that family violence is not, in practice, treated as criminal behaviour

124 Victoria, *Parliamentary Debates*, Legislative Council, 25 March 1987 , 564 (James Kennan, Attorney-General).

123 Ibid 565.

126 Consultations 3, 6, 7, 21, 27, 29, 33.

127 Consultations 1, 7, 9, 12, 26, 29, 33, 38.

128 The forms of violence included in protection order applications included the use of weapons (22.7% of applications), assault (59.4%), assault causing bodily harm (19.6%) and death threats (15.6%): see Heather Douglas and Lee Godden, *The Decriminalisation of Domestic Violence* (2002) 21–2.

and that civil protection orders are often relied upon as an alternative to the criminal law.[129]

3.28 The research cited above is not the only Australian study to suggest that the criminal law may not applied to many criminal offences that occur in the context of family violence. A study conducted in the ACT before the introduction of the Family Violence Intervention Program found that in a three month period, only 6% of domestic violence incidents resulted in a charge.[130]

3.29 Victoria Police crime statistics show that in the financial year 2002–03, criminal charges were laid in 11.4% of cases where police submitted a Family Incident Report.[131] As the table below illustrates, the proportion of charges laid where Family Incident Reports were submitted has remained consistent in the past ten years. In 2002–03, the most common charges arising from family violence incidents were charges of assault (56.9%), charges related to justice procedures (22.2%), which includes breaches of intervention orders, and charges of property damage (12.3%).[132]

FAMILY INCIDENT REPORTS AND CRIMINAL CHARGES LAID

	93–94	94–95	95–96	96–97	97–98	98–99	99–00	00-01	01–02	02–03
Reports Submitted	13485	14164	15613	19255	20580	21251	19598	21 622	23457	28454
Charges Laid as % of Reports	10.7%	11.4%	12.6%	10.6%	10.5%	10.8%	10.8%	8.0%	11.9%	11.4%

3.30 Without local research similar to that conducted in Queensland, it is difficult to ascertain whether a similar 'decriminalisation' of family violence has

129 Ibid 58. The researchers note that their research was preliminary in scope and that further research is required.

130 Community Law Reform Committee of the Australian Capital Territory, *ACT Domestic Violence Research: Report to the ACT Community Law Reform Committee* Research Paper 1 (1993) 71.

131 Victoria Police (2003), above n 30, 128. Victoria Police Policy requires that police submit a Family Incident Report for any incident attended by police or reported to police that involves family members and relates to any form of abuse (including verbal abuse, emotional abuse and harassment), a verbal dispute, a threat made to a family member or a breach of an intervention order. The Family Incident Report must be submitted regardless of the police response to the matter: see Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109–1 paras 9.1–9.2; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109–7 paras 4.1–4.2.

132 Victoria Police (2003), above n 30, 130.

occurred in Victoria.[133] As we will discuss below, however, the new Victoria Police Code of Practice for the Investigation of Family Violence emphasises that '[t]he primary response of police in reports of family violence is the pursuit of criminal charges where appropriate'.[134]

ALTERNATIVE JUSTICE SYSTEM APPROACHES

3.31 While many commentators and advocates call for improvements to the current justice system and want changes that will match practice with existing legislation and policy, others call for an exploration of alternative approaches. During our consultations many Indigenous participants noted that the current justice system has little to offer Indigenous people who experience violence.[135] Other participants said we need a new, more flexible system that is better equipped to deal with the complex and diverse range of behaviour that can constitute family violence.[136] In this section, we discuss some of the approaches that have been proposed or implemented in other parts of Australia and the world.

STRENGTHENING THE CRIMINAL JUSTICE RESPONSE

3.32 As we have noted, many forms of family violence already constitute criminal offences in Victoria. Victoria Police have also recently moved towards initiating criminal action in a greater proportion of family violence cases. The new Code of Practice for the Investigation of Family Violence emphasises that Victoria Police have a 'pro-arrest policy', that police will investigate all reported incidents of family violence, will use their powers of arrest where appropriate,[137] and that:

> Where a criminal offence is involved, police will pursue criminal options and prepare a brief of evidence, even if the victim is reluctant for charges to be pursued. A supervisor will authorise any charges based on the available evidence and the likelihood of obtaining a conviction.[138]

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133 As we will discuss below, there is no consensus about whether a stronger application of the criminal law is the most appropriate approach: see paras 3.32–3.40.

134 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) para 4.1.1.

135 Consultations 4, 14, 15, 17, 22, 26, 28, 34.

136 Consultations 4, 22, 26, 28, 37, 39.

137 Victoria Police (2004), above n 134, para 4.2.1.

138 Ibid, para 4.3.2.

The Code provides that police are not permitted to encourage victims to request that no further action be taken. It also states that where a victim signs a statement of no complaint, this does not preclude police from pursuing charges.[140]

Statement of no complaint means telling the police you no longer wish them to act on the complaint that you made. Depending on the seriousness of the charge and the availability of other evidence the police may still continue with the charge.[139]

3.33 Other jurisdictions have taken additional steps to extend or strengthen their criminal response to family violence.

PRO-ARREST, PRO-CHARGE AND PRO-PROSECUTION POLICIES

3.34 The call for family violence to be treated as a crime has led, in some jurisdictions, to policies that encourage or mandate arrest, charge and prosecution as primary interventions in certain family violence incidents.

3.35 Pro-arrest policies provide that where reasonable grounds exist to believe that a family member has committed an offence against another, the family member who has used violence must be arrested and charged.[141] Pro-charge policies require that charges be laid whenever the available evidence discloses an offence. Similarly, pro-prosecution policies generally require an accused to be prosecuted whenever there is a reasonable prospect of conviction and where it is in the public interest to prosecute. These policies require police and prosecutors to make decisions about whether a violent family member should be arrested, whether charges should be laid, or whether prosecution should proceed regardless of the wishes of the person who has experienced violence.

3.36 Pro-arrest, charge and prosecution 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 and

139 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 112-2 para 7, VPM Instruction 108-4 para 9.2.

140 Ibid.

141 We use the term 'pro-arrest', 'pro-charge' and 'pro-prosecution' polices to encompass a range of different policies that vary in relation to the amount of discretion left to the relevant law-enforcement agency and the approach taken to victims who do not want any criminal action taken. This includes policies referred to as 'pro-arrest', 'presumptive arrest', 'mandatory arrest', 'assertive prosecution' and 'no-drop' policies.

prosecutorial mishandling of family violence matters by reducing the discretion available to staff in these criminal justice agencies.[142]

3.37 A further objective of most pro-arrest and pro-charge policies is to reduce the individual's future use of violence. The introduction in the 1980s of pro-arrest and pro-charge policies throughout the United States, Canada and other Western countries was influenced by the Minneapolis Domestic Violence Experiment.[143] The findings of this study, published in 1984, suggested that arrest was more likely to deter future violence than other milder forms of police intervention, such as counselling those who used violence or sending them away from home for several hours.[144] The Minneapolis Domestic Violence Experiment was followed by replication studies in six other states, designed to test the Minneapolis findings.[145] These replication studies provided results that were more ambiguous about the effect of arrest.[146] Whether arrest is an effective deterrent, and how the deterrent value is affected by what happens after arrest, continue to be subjects of considerable debate.[147] Similarly, debate continues about other aspects of such policies, including whether:

- the process of compelling people to participate in criminal justice processes empowers people who have experienced violence and protects them from

142 Eve Buzawa and Carl Buzawa (eds) *Domestic Violence: The Changing Criminal Justice Response* (1992) xii–xiii.

143 Alissa Pollitz Worden, 'The Changing Boundaries of the Criminal Justice System: Redefining the Problem and the Response in Domestic Violence' (2000) 2 *Criminal Justice* 215, 234; Robyn Holder (2001), above n 108, 13; Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 *Harvard Law Review* 1849, 1859. At the same time as the Minneapolis study, a Canadian study by Peter Jaffe reached similar conclusions in relation to a mandatory charging policy: see E Jane Ursel, *Report on Domestic Violence Policies and Their Impact on Aboriginal People* Submitted to: Aboriginal Justice Implementation Commission (2001) 5.

144 Lawrence Sherman and Richard Berk, *The Minneapolis Domestic Violence Experiment* (1984) Police Foundation <www.policefoundation.org/pdf/minneapolisdve.pdf> at 6 October 2004.

145 For discussion and analysis of the replication studies, see Janell Schmidt and Lawrence Sherman, 'Does Arrest Deter Domestic Violence?' in Buzawa and Buzawa (1996) 'Do Arrests and Restraining Orders Work?', above n 120, 45–8.

146 Ibid; Eve Buzawa and Carl Buzawa, *Domestic Violence: The Criminal Justice Response* (2nd ed,1996) 112–20.

147 Joel Garner and Christopher Maxwell, 'What Are the Lessons of the Police Arrest Studies?' (2000) 4 (1) *Journal of Aggression, Maltreatment and Trauma* 83.

retaliation from their abuser, or whether it leads to their re-victimisation and disempowerment;[148]

- pro-arrest, pro-charge and pro-prosecution approaches are appropriate given that they may increase the use of violence in some situations;[149]
- imposing a stronger criminal justice response to family violence compounds disadvantage faced by Indigenous women, migrant women, low-income women and others whose communities suffer discrimination in the criminal justice system;[150]
- imposing such policies results in the arrest and prosecution of women who are the victims of violence, because of gender neutral policies applied by law enforcement personnel who lack understanding of family violence dynamics;[151] and
- such policies may deter some women from contacting the police when they need assistance.[152]

3.38 Pro-charging and pro-prosecution policies are still in place in all provinces and territories in Canada and in many states in the United States.[153] In Australia, the most significant steps towards implementing a stronger criminal justice response to family violence have been taken in the ACT.

3.39 The ACT Family Violence Intervention Program is a coordinated criminal and community response, which combines assertive arrest, charge and prosecution policies with a range of innovations designed to increase inter-agency cooperation, improve police investigation and evidence gathering, and increase support and

148 Hanna (1996), above n 143, 1865–6; Linda Mills, 'Killing Her Softly: Intimate Abuse and the Violence of State Intervention' (1999) 113 *Harvard Law Review* 550; Tammy Landau, 'Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against the Prosecution' (2000) 7 *International Review of Victimology* 141.

149 Hoyle and Sanders (2000), above n 105, 23.

150 Laureen Snider, 'Towards Safer Societies: Punishment, Masculinities and Violence Against Women' (1998) 38 (1) *British Journal of Criminology* 1. Concerns about the stronger criminal justice approach being adopted by Victoria Police were raised during our consultation with the Victorian Aboriginal Legal Service: Consultation 34.

151 Margaret Martin, 'Double Your Trouble: Dual Arrest in Family Violence' (1997) 12 (2) *Journal of Family Violence* 139.

152 Alisa Smith, 'It's My Decision, Isn't It? A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws' (2000) 6 (12) *Violence Against Women* 1384, 1386–98.

153 Federal-Provincial–Territorial Ministers Responsible for Justice, *Final Report of the Ad Hoc Federal–Provincial–Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (2003) 10.

advocacy for people who have experienced violence.[154] In addition, the program's pro-prosecution approach is complemented by the appointment of a specialist family violence prosecutor and witness assistant. The approach resulted in an increase of 320% over four years in the number of cases prosecuted that involve a family violence offence, and an increase in the number of guilty pleas entered in family violence matters from 24% in 1998–99 to 61% in 2000–01.[155]

3.40 Other smaller scale initiatives in Australia have focused on strengthening particular aspects of the criminal justice response to family violence. For example:

- The 'NDV' pilot project in South Australia focused on improving police responses to reduce repeat victimisation, using a tiered program of increasing levels of police intervention at each police attendance with the same family.[156] The model for the NDV project, which was based on a project implemented in Killingbeck, England, also required police to make arrests and lay charges where possible, to gather evidence and to take comprehensive statements.
- Police in NSW and Queensland have introduced evidence-gathering approaches and are trialing the use of instant cameras to gather evidence at family violence incidents.[157]
- The Tasmanian Government's forthcoming Safe at Home package of reforms, a multifaceted attempt to strengthen the criminal justice response to family violence, is described as a 'pro-arrest, pro-prosecution response'. Proposed elements of the approach include a victim safety response team that will conduct investigations and gather evidence, as well as additional prosecutors to cover the increased workload arising from the pro-arrest, pro-prosecution approach.[158]

154 Keys Young, *Evaluation of ACT Interagency Family Violence Intervention Program: Final Report* (2000); ACT Government, *ACT Family Violence Intervention Program 2000–2002: Update—August 2003* Publication No 03/1021 ; Holder (2001), above n 108, 14,16–7.

155 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.

156 Office of the Status of Women, *Access to Justice: Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2003) 72–6.

157 Holder (2001), above n 108 , 13.

158 Women Tasmania, *Safe at Home* Issue 1 (August 2004) <www.women.tas.gov.au/news/safeathome.html> at 30 September 2004, 2–3.

ADAPTING THE CRIMINAL LAW

3.41 Another way in which some jurisdictions have attempted to improve the criminal justice system's response to family violence is by creating new offences, or providing for harsher sentences when offences are committed against a family member.

3.42 The introduction of stalking offences is one example of an attempt to criminalise some forms of family violence that were not previously prohibited by the criminal law, although most Australian anti-stalking laws were not drafted to deal only with family violence situations. Stalking laws were introduced throughout Australia in the 1990s and, except the New South Wales laws, all apply to stalking by non-family members. [159]

3.43 In other countries, new criminal offences have been created specifically to prohibit acts of family violence. In Spain, for example, a 1999 amendment to the penal code introduced the specific crime of 'domestic abuse'. The Spanish penal code now states that '[a]ny person who customarily wields physical or mental violence' against a family member is guilty of an offence.[160] This charge can be made in conjunction with other charges and, importantly, recognises the systematic nature of family violence by referring to abuse that is used 'customarily'.[161]

3.44 Another form of offence was introduced into the Swedish penal code in 1998. The crime of committing a 'gross violation of a woman's integrity' is defined as repeated criminal acts (including assault, unlawful threat or coercion and sexual or other molestation) directed by men at women with whom they are

159 Although stalking is reported to police at a reasonably high rate, only a small number of cases result in prosecution: see Emma Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (2000) xiii. For a discussion of the introduction of stalking laws to deal with family violence in the United States, see 'Legal Responses to Domestic Violence' (1993) 106 (7) *Harvard Law Review* 1498, 1534–5.

160 Art 153 of the 1995 Spanish Penal Code (as amended by Organic Act 14/1999) quoted in *Human Rights*: *Equality Between Women and Men: Violence Against Women* Council of Europe <www.coe.int/T/E/Human_Rights/Equality/04._Violence_against_women/EG(2001)03rev+2.asp> at 3 May 2004.

161 The provision stipulates that in evaluating the customary nature of the violence, the court should have regard to the number of proven acts and their proximity to one another. The article notes that the accused need not have been prosecuted for the violent acts that may, in combination, constitute domestic abuse. Further, the acts that may, in combination, constitute domestic abuse may be committed against a combination of family members so that a person may be guilty of an offence against art 153 if he has used violence against a woman and her child; see ibid.

or have been in a cohabiting relationship.[162] The acts must have been part of a repeated violation of the woman's integrity and 'suited to seriously damage her self-confidence'.[163] This means that a man may be charged with an additional offence and subject to additional penalties if he commits criminal acts as part of a process of domestic abuse. The creation of a specific family violence offence is not unique to European jurisdictions. In the United States, many states have created a separate criminal offence for family violence.[164]

3.45 An alternative approach is to provide for additional penalties where a general offence is committed against a family member, rather than to create specific offences for family violence. In South Australia, for example, the maximum penalty for common assault against a family member is three years, compared with two years for assault committed against non-family members.[165] The Western Australian Government has introduced amendments that will, if passed, provide for a longer sentence if a crime is committed against a person with whom the accused is in a domestic relationship or if a child was present when the offence was committed.[166] In Canada, Bill C-41, which came into force in 1996, amended the criminal code to require the courts to take into account the abuse of a spouse or child as an aggravating factor in sentencing.[167]

Rehabilitative Approaches

3.46 Legal responses to family violence increasingly involve the use of rehabilitative programs. Under a rehabilitative approach, a person who has used violence can volunteer or be ordered by the court to attend a behaviour change program. Rehabilitative programs aim to help people to acknowledge that their abusive behaviour is unacceptable and to develop the awareness and skills to stop using violence.[168] Rehabilitative programs may be used as part of the criminal or the civil legal process.

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162 Swedish Government Offices, *Violence Against Women: Government Bill 1997/98:55* Fact Sheet (1999) 2.

163 Ibid 2.

164 Buzawa and Buzawa (1996), 'Domestic Violence', above n 146, 124–5.

165 *Criminal Law Consolidation Act 1935* (SA) s 39.

166 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 62, inserting new s 221.

167 See *Criminal Code*, RSC 1985, c C-46, s 718.2(a).

168 Buzawa and Buzawa (1996) 'Domestic Violence', above n 146, 213; White and Perrone (1997), above n 116, 118.

DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM

3.47 In the criminal justice system, rehabilitative programs can be part of a diversionary approach in which a person is diverted away from the formal legal process to a treatment or behaviour change program. A person may be diverted at various stages of the criminal process.

3.48 In Connecticut, people charged with certain family violence offences can attend a program after they have been charged, but before trial.[169] If they successfully complete the program, the charges against them are withdrawn. A similar model of diversion operates in Victoria, although it is not usually available to people charged with family violence offences.[170] In Victoria, diversion occurs after people have been charged, but before they have been tried for the charge. The case against them must have been proven, and they must have admitted guilt. If they successfully complete the conditions set by the court, which can include attendance at a program, the charges are removed from the system.[171]

3.49 Alternatively, in the Canadian jurisdiction of Ontario, people who plead guilty to certain family violence offences can be ordered to attend a rehabilitative program as a bail condition.[172] If they receive an adequate program report, this can be used to reduce their sentence and, in practice, the prosecution generally advises that the sentence should be conditionally discharged.[173]

3.50 Given the continuing call for family violence to be acknowledged as a crime, there is debate about whether diversionary approaches are appropriate. Some consider that diverting people who use violence may undermine the seriousness of the behaviour.[174] A diversionary approach may be especially problematic if there are incentives to attend a program—such as having charges

169 *Family Law* 46b CONN GEN STAT § 38c(g) (2003) cited in 'Legal Responses to Domestic Violence' (1993), above n 159, 1542.

170 Diversion is generally available only for minor offences and only for first offences. The overriding consideration is whether diversion is appropriate in the circumstances of the case, and incidents involving violence are generally not considered to be suitable for diversion.

171 See *Criminal Justice Diversion Program* The Magistrates' Court of Victoria <www.magistratescourt.vic.gov.au> at 20 October 2004, follow links to 'Specialist Court Jurisdictions' and 'Diversion Programs'.

172 Federal–Provincial–Territorial Ministers Responsible for Justice, above n 153, 42.

173 Ibid.

174 'Legal Responses to Domestic Violence' (1993), above n 159, 1543. By comparison, participants in several consultations suggested that diversion programs should be considered for family violence offences: Consultations 31, 34.

withdrawn or receiving a lighter sentence—that are not related to a desire to change violent behaviour.[175]

REHABILITATIVE PROGRAMS AND CRIMINAL JUSTICE INTERVENTION

3.51 Within the criminal justice system, attendance at a rehabilitative program may also be ordered as part of a sentence if a person is found guilty or pleads guilty to an offence. As part of the ACT Family Violence Intervention Program, the court can refer people to a treatment program as part of their sentence,[176] whereas in South Australia people can have their bail extended in order to attend a 'stopping violence group' before the trial.[177]

3.52 In Victoria, rehabilitative programs may be ordered as part of formal sentencing options, such as community-based orders and intensive correctional orders.[178] A community-based order allows the magistrate or judge to combine a punitive element—hours of unpaid community work—with a rehabilitative element—requiring the offender to attend treatment or programs.[179] Intensive corrections orders follow a similar though more heavily structured and supervised regime as they are actually a sentence of imprisonment served in the community.[180] Rehabilitative programs are now also routinely offered within the custodial setting so can be undertaken while completing a sentence of imprisonment.

3.53 The specific counselling or programs the court can include in community-based orders depends on whether appropriate services are available and willing to work with corrections in supervising compliance with the order. In Victoria, no men's behaviour change programs are funded to receive court-referred offenders, although it is proposed to make such programs available when making a civil order.[181]

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175 Federal–Provincial–Territorial Ministers Responsible for Justice (2003), above n 153, 70.

176 Holder and Mayo (2003), above n 155, 9.

177 *Magistrates' Court Violence Intervention Program* Courts Administration Authority South Australia <www.courts.sa.gov.au/courts/magistrates/violence_intervention.html> at 30 September 2004.

178 See paras 9.44–9.48 for more discussion about these options and their potential use in relation to family violence offences.

179 *Sentencing Act 1991* (Vic) s 36 allows the making of a community-based order. Section 37 outlines the 'core conditions' for supervision by Community Corrections during the order, and s 38 outlines the 'program conditions', which include unpaid community work and attendance at programs.

180 *Sentencing Act 1991* (Vic) ss 19–21.

181 See para 3.55.

3.54 Another possible option may be to legislate to create very specific sentencing orders to rehabilitate those who use violence against family members, such as programs that have been developed to rehabilitate drug-addicted offenders.[182]

REHABILITATIVE OPTIONS IN THE CIVIL JUSTICE SYSTEM

3.55 Rehabilitative programs are also used in civil legal processes. Under this approach, when the court makes an intervention order it attaches a condition requiring the person who has used violence to attend a program. In New Zealand, the court must direct a person to attend a program whenever it makes a protection order.[183] As discussed in Chapter 1, a similar approach has been proposed by the Victorian Government in the Magistrates' Court (Family Violence) Bill 2004. Under the proposed amendments, a court must direct a person to be assessed for and, if eligible, attend counselling whenever the court makes an intervention order.[184]

COMMUNITY-BASED APPROACHES

3.56 A number of people we talked to, particularly in our consultations with Indigenous Family Violence Action Groups and Indigenous workers, suggested that there is a need to incorporate less formal, community-based alternatives into the justice system's response to family violence.[185] The importance of a community-led approach to Indigenous family violence was also an overarching theme of the Victorian Indigenous Family Violence Taskforce's Final Report.[186]

3.57 Community-based approaches aim to integrate community institutions into the justice system's response to particular conduct.[187] They aim to provide a more positive way of dealing with offending, to operate in a less coercive or intrusive manner than the formal justice system, and to enable people to remain part of their community.[188]

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182 In relation to drug treatment orders, see *Sentencing Act 1991* (Vic) ss 18X–ZS.

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

184 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 14, inserting new ss 8C, 8D into the *Crimes (Family Violence) Act 1987* (Vic).

185 Consultations 28, 37, 38, 39.

186 Victorian Indigenous Family Violence Taskforce (2003), above n 73.

187 White and Perrone (1997), above n 116, 176–177.

188 Ibid 177.

3.58 Community-based alternatives can be incorporated in various ways and at different stages in the justice process, from community crime prevention and policing to community-led court processes and community-based sanctions. They may divert individuals from the formal justice system or operate in addition to it. Community-based approaches to family violence may include:

- community-based prevention strategies, including anti-violence education and measures that build community capacity and address cultural loss and healing needs [189]—the Victorian Government has announced, as part of its response to the Indigenous Family Violence Task Force's final report, the establishment of three holistic family healing centres;[190]
- the provision of 'cooling-off', 'sobering up' or 'time-out' centres, where men who use violence can go, or can be taken, when there is a risk they will use violence against a family member, and where they can access support and information;[191]
- the provision of community-based, local 'safe houses' to which women and children can go temporarily when they know they are at risk of violence;[192]
- community involvement in 'policing' against family violence, for example, through night patrols[193] or in setting standards of behaviour acceptable for community members and determining what the response to breaches of those standards should be;[194] and
- community involvement in resolving situations of family violence.

189 Elizabeth Moore, *Not Just Court: Family Violence in Rural New South Wales: Aboriginal Women Speak Out* (2002) paras 6.1–6.2; Blagg (1999), above n 47, 156–164; see also Consultations 28, 26, 37.

190 Victorian Government (2004), above n 6,11.

191 This option was advocated in a number of our consultations: see Consultations 26, 28, 37, 39. It was also included as a recommendation of the Indigenous Family Violence Taskforce: see Victorian Indigenous Family Violence Taskforce (2003), above n 73, 153.

192 Community-based safe houses have been set up in a number of communities in some Australian jurisdictions, such as Queensland; see Partnerships Against Domestic Violence (2000), 'Crisis Intervention', above n 114, 18.

193 The operation of Aboriginal women's night patrols to police local anti-alcohol by-laws and to ensure women's and children's safety are discussed in ibid 15.

194 The Indigenous Family Violence Taskforce discusses the notion that the role of 'Community Justice Panels' could be extended, in the context of family violence, to establish a code of conduct and determine consequences for breach of the code: see Victorian Indigenous Family Violence Taskforce (2003), above n 73, 148.

We discuss those community-based alternatives that involve community members in resolving family violence situations below, in the context of our discussion of restorative justice approaches.

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.

3.59 Community-based approaches address the demands of some Indigenous consultation participants and commentators, who call for responses that:

- do not require families to separate and do not force either the person who has used violence or the person who has experienced violence to leave the community;[195]
- ensure family members' safety while also addressing the underlying causes of Indigenous family violence and the healing needs of Indigenous people;[196]
- recognise that Indigenous family violence often has a greater and more obvious impact on the community as a whole,[197] and often occurs in a community context rather than more private settings;[198] and
- maximise community engagement in, and ownership of, the resolution of family violence within Indigenous communities, thereby contributing to community empowerment.[199]

195 The Indigenous Family Violence Taskforce refers to the separation of individuals from the community as 'the standard and limited response (which) is seen as a repetition of the historic causes of community dysfunction and family breakdown that produce family violence': ibid 200.

196 Consultations 32, 37, 39.

197 Domestic Violence Prevention Unit, *Pilot Counselling Programs for Mandated and Non-Mandated Indigenous Men—Research and Program Development* (2001) 3; Partnerships Against Domestic Violence, *Attitudes to Domestic and Family Violence in the Diverse Australian Community: Cultural Perspectives* (2000) 26. See also Consultations 4, 14.

198 Partnerships Against Domestic Violence (2004), above n 79, 41.

199 Moore (2002), above n 189, para 6.1; Partnerships Against Domestic Violence (2000), 'Crisis Intervention', above n 114, 16.

RESTORATIVE JUSTICE APPROACHES

3.60 'Restorative justice' refers to a range of practices that can occur at different stages of the criminal or—more rarely—civil justice system. While there is no single agreed definition of restorative justice, in this Paper we use it to describe a process that brings together people who have a stake in a specific crime or wrongdoing to resolve how to deal with the consequences of the wrongdoing.[200] 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'.[201] Some common models of restorative justice are family conferencing, victim–offender mediation and circle sentencing.[202]

Family conferencing involves family members who have used or experienced violence sitting down with a mediator to discuss their experiences and coming up with solutions to stop the violence. Victim–offender mediation is a similar process but just involves the victim, perpetrator and mediator.

Circle sentencing This type of sentencing is used by so me Indigenous Canadian communities. The defendant's community and the person who has experienced violence make recommendations to the sentencing judge.

3.61 Although there has been an emerging increase in the application of restorative justice approaches generally, few attempts have been made in Australia to apply restorative justice practices to family violence or other forms of gendered violence.[203] Whether or not restorative justice practices are, or can be made, appropriate for responding to gendered violence is a controversial issue.[204]

3.62 Those who advocate a restorative justice approach to family violence often highlight the problems associated with the criminal justice system and suggest that restorative justice approaches may:

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200 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) 4.

201 John Braithwaite, 'Shame and Criminal Justice' (2000) *Canadian Journal of Criminology* 281, 293.

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

203 For a discussion of some initiatives that apply restorative justice practices to gendered harms, see Julie Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (2004) 9–12.

204 Ibid 1, 6; Lana Maloney and Graham Reddoch, *Restorative Justice and Family Violence: A Community-Based Effort to Move from Theory to Practice* <www.sfu.ca/cfrj/fulltext/maloney.pdf> at 21 January 2004, 3.

- provide opportunities for people who have experienced violence to tell their story, participate in a less formal process and play an active part in determining what consequences should flow from the violence;[205]
- reduce re-offending;[206]
- encourage people who use violence to admit and take responsibility for their behaviour;[207]
- be better suited to situations where the parties will reconcile or continue some form of relationship after the intervention;[208]
- be more appropriate and effective for dealing with the use of family violence by and against marginalised members of the community, including Indigenous people, who do not want the offender to be incarcerated;[209] and
- empower Indigenous people and communities as integral contributors to the process of addressing family violence.[210]

3.63 Some of the major concerns about the application of restorative approaches to family violence cases are that such approaches may:

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205 Sarah Curtis-Fawley and Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates* 20; Kathleen Daly, 'Restorative Justice and Gendered and Sexualised Violence: Part 1 (Context and Overview of RJ) and Part 2 (Applications to Gendered and Sexualised Violence)' (Paper presented at the Queensland Centre for the Prevention of Domestic and Family Violence, 10–12 November 2003, Central Queensland University, Mackay).

206 Strang and Braithwaite (2002), above n 200, 2–4.

207 Curtis-Fawley and Daly, above n 205, 21–2; Daly (2003), above n 205.

208 Federal–Provincial–Territorial Ministers Responsible for Justice (2003), above n 153, 31; Harry Blagg, 'Restorative Justice and Aboriginal Family Violence: Opening a Space for Healing' in Strang and Braithwaite (2002), above n 200, 198.

209 Blagg (2002), above n 208, 191, 198; Partnerships Against Domestic Violence (2000), 'Attitudes to Domestic and Family Violence', above n 197, 31; Curtis-Fawley and Daly, above n 205, 8.

210 Department of Aboriginal and Torres Strait Islander Policy and Development (2000), above n 80, 255. The Indigenous women interviewed in Heather Nancarrow's research with Indigenous and non-Indigenous women thought that restorative justice would achieve a more holistic response to family violence and that it may be more effective in sending a message to the community that violence is wrong: see Heather Nancarrow, *In Search of Justice in Domestic and Family Violence* (Unpublished MA Thesis, Griffith University, 2003) 44–45. This differed from the finding of one study conducted in Canada with Indigenous women, who were concerned that such approaches could be manipulated by offenders 'who may "stack" the process with friends and supporters and avoid responsibility for their actions': see Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (1999) 143.

- re-victimise people who have experienced family violence and fail to address the imbalance of power between the parties;[211]
- fail to take into account the specific characteristics of family violence, namely that it occurs in intimate relationships and typically involves multiple incidents over an extended period of time;[212] and
- lead to the re-privatisation of family violence, and undermine attempts to convey the serious, unacceptable nature of violence against women and children.[213]

Restorative justice approaches may rely on idealised notions of community and assume that community participation will lead to people who have used violence being shamed into changing their behaviour. Critics point out that participants in family or community group conferencing are as likely to legitimise or excuse men's use of violence against women and children as they are to condemn it.[214]

3.64 Although relatively few in number, there are some examples of restorative justice practices being used in relation to family violence and other forms of gendered violence. In Canada, for example, Aboriginal sentencing circles have been used within the criminal justice system in relation to various offences, including family violence.[215] Circle sentencing occurs at the later end of the criminal justice system, once guilt has been established, and usually replaces a court sentencing hearing. A sentencing circle is a process by which an Indigenous person who has used violence is sentenced by a judge after the judge has heard recommendations from the person's community members and the person or people who experienced the violence.[216] Sentencing circles often take place in the

211 Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?' in Strang and Braithwaite (2002), above n 200, 236–237; Curtis-Fawley and Daly, above n 205, 22–23; Stubbs (2004), above n 203, 14–15.

212 Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Strang and Braithwaite (2002), above n 200, 43–44.

213 Busch (2002), above n 211, 232; Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in Strang and Braithwaite (2002), above n 200, 129.

214 Busch (2002), above n 211, 241–242; Coker (2002), above n 213, 139–141; Rashmi Goel, 'No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases' (2000) 15 *Wisconsin Women's Law Journal* 293, 322, 326–327.

215 Research and Statistics Division, Department of Justice, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives* (2001), 110–3.

216 Melani Spiteri, 'Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice Within a Western Framework' (Paper presented at 'Dreaming of a New Reality',

offender's own community. Healing circles, which may or may not incorporate sentencing circles, are another process that has been used by Aboriginal Canadians who live in close-knit communities, usually as an alternative to court-imposed sanctions.[217]

3.65 In Australia, Indigenous participation in sentencing procedures has occurred informally in remote communities, and more formally in Indigenous courts in many states.[218] Many of the more formal mechanisms that allow for Indigenous community input, including Victoria's Koori Courts, do not deal with family violence related offences. However, circle sentencing is being piloted in NSW in relation to family violence, as well as other offences.[219] Another example of an arrangement which enables local Indigenous people to participate in law and justice processes is the Ali-Curung Law and Order Plan in the Northern Territory, which involves an agreement between the Ali-Curung community and a range of government and justice agencies.[220] One aspect of the project provides for elders to be involved in court matters involving family violence, allowing the community to have an input into the consequences of family violence offences.[221]

3.66 Other restorative justice models for dealing with family violence can operate earlier in the justice process or as an alternative to it. They include:

- Family group decision-making conferences, which aim to result in plans agreed to by all parties. Examples of family group conferencing have been used primarily in relation to child maltreatment, but usually in cases that also involve some partner abuse.[222]

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the Third International Conference on Conferencing Circles and Other Restorative Practices, August 8–10, 2002, Minneapolis, Minnesota).

217 See, eg, the Hollow Water Community Holistic Circle Healing Project, described in Berma Bushie, *Community Holistic Circle Healing: A Community Approach* International Institute for Restorative Practices <www.iirp.org/library/vt/vt_bushie.html> at 5 October 2004.

218 Elena Marchetti and Kathleen Daly, *Indigenous Courts and Justice Practices in Australia* (2004).

219 For a discussion of the model used and the findings of the preliminary evaluation report, see Stubbs (2004), above n 203, 13.

220 The Ali-Curung project has claimed a 53% reduction in family violence incidents: see Partnerships Against Domestic Violence (2000), 'Crisis Intervention', above n 114, 17.

221 Terri Stewart and Greta Jubb, 'Intervention in sexual assault and domestic violence experienced by Indigenous Australians' (Paper presented at the Home Truths Conference, 15–17 September 2004, Melbourne).

222 See the Family Group Decision-making Project, Newfoundland and Labrador, Canada, discussed in Joan Pennell and Gale Burford, 'Feminist Praxis: Making Family Group Conferencing Work' in Strang and Braithwaite (2002), above n 200, 108–29; and the North Carolina Family Group

- Family violence victim–offender mediation or conferencing, such as that piloted in Austria. An evaluation of the model used in Austria, which was designed to empower the weaker partner and encourage each partner to recognise the other's story, found that the process 'could offer support to victims of domestic violence where a process of seeking change and empowerment had already commenced prior to the VOM [victim-offender mediation]'.[223]
- Court connected facilitated decision-making, in which parties (with or without input from a broader range of community and family members) are supported to negotiate an agreement about the imposition of a court protection or intervention order, or about the terms of an order. The agreement could then be enforceable as a court-imposed order.[224]

INTEGRATED RESPONSES AND SPECIALIST COURTS

3.67 In this Chapter we have discussed a range of responses to family violence. In practice, many of these responses have been supported by strategies of inter-agency integration or coordination, or the establishment of specialist courts. Inter-agency approaches aim to increase the effectiveness of existing responses to family violence by ensuring they are based on a consistent philosophy.[225] They focus on promoting cooperation and dialogue between support providers, police, court personnel, correctional staff and counselling or treatment providers.[226] During our consultations, many participants said increased coordination and monitoring is needed,[227] although we also heard about examples of local agencies working together to improve coordination.[228]

Conferencing Project, USA, discussed in Laura Mirsky, 'Family Group Conferencing Worldwide: Part Three in a Series' (2003) *Restorative Practices E Forum* 1 and Stubbs (2004), above n 203, 10.

223 Stubbs (2004), above n 203, 11. A number of participants in our consultations suggested that some intervention order applications should be dealt with through mediation, although it was not clear what form of mediation was being proposed: Consultations 6, 38, 39.

224 Moore (2002), above n 189, para 6.3. In the author's consultations with Indigenous women, it was conveyed that such mechanisms were inappropriate for family conflicts that have resulted in criminal violence, and also that they should augment, rather than replace, existing criminal and civil options for protecting women and children. This option was suggested in several of our consultations: see Consultations 34, 37.

225 Domestic Violence and Incest Resource Centre (2004), above n 99, 10.

226 Ibid 24–25.

227 Consultations 23, 28, 33, 36, 37.

228 Consultations 10, 14, 16, 21, 26.

3.68 The first inter-agency strategy was developed in Duluth, Minnesota in 1981.[229] The Duluth model standardised legal and support service responses to family violence by ensuring they adopted a shared philosophy.[230] It also established the importance of monitoring the progress and outcome of cases, and facilitating the exchange of information between agencies involved with the legal process.[231] With respect to people who use violence, the Duluth model emphasised accountability through the use of legal sanctions and court-mandated rehabilitation programs.[232]

3.69 While most inter-agency strategies are influenced by the Duluth model, there are differences across jurisdictions. One distinction is between 'coordinated' and 'integrated' strategies. Coordinated strategies require agencies to adopt a shared philosophy and cooperate and communicate with each other, while retaining their own institutional identities.[233] Integrated approaches involve a more comprehensive collaboration, where agencies are transformed into components of a multidisciplinary response, which has a separate identity to each individual agency.[234]

3.70 Another difference is between strategies that support a criminal justice focus, and those that do not. Some inter-agency strategies that centre upon the development of a specialist family violence court and a pro-prosecution policy essentially reform criminal justice responses to family violence. A good example is in Winnipeg, Manitoba where there is a specialist family court, as well as a special prosecutorial unit and probation unit.[235] There are also support and advocacy programs for people subject to violence.[236] The objectives of the Winnipeg program are to improve the criminal justice process by ensuring fast case processing and improved prosecutorial practice and sentencing.[237]

229 Elizabeth Taylor, *Churchill Fellowship Report 2002* (2002), 10.

230 Holder (2001), above n 108, 19–20.

231 Taylor (2002), above n 229, 10, 12.

232 Holder (2001), above n 108, 20.

233 Domestic Violence and Incest Resource Centre (2004), above n 99, 11.

234 Ibid.

235 Federal–Provincial–Territorial Ministers Responsible for Justice (2003), above n 153, 40.

236 Ibid.

237 Ibid 40–41. E Jane Ursel, 'The Winnipeg Family Violence Court' (1994) 14 (12) *Juristat* , 2.

3.71 In Australia, the ACT's Family Violence Intervention Plan (FVIP) is an example of an integrated strategy that also has a criminal justice focus.[238] Core elements of the FVIP are the adoption of a shared philosophy between government and non-government agencies, the establishment of specialised family violence processes, a commitment to case management and the use of education programs as a sentencing alternative.[239]

3.72 This differs to the Western Australian approach, which is still an integrated model, but one that operates in both criminal and civil legal spheres.[240] Under the Western Australian Joondalup Family Violence Court model, people subject to violence receive legal support and referral when they apply for a restraining order.[241] The criminal justice elements of the model include a specialised family violence police unit, specialised family violence magistrates, prosecutors and defence lawyers and a commitment to case management.[242]

3.73 In Queensland, the Gold Coast Domestic Violence Integrated Response Project is another integrated program with a civil and criminal focus. There is a domestic violence office at the court that provides a secure waiting area and assistance with protection order applications, advocacy and referral.[243] The Project also uses the police fax-back system, which requires police who attend a family violence incident to fax (with the abused party's consent) a description of the incident to the domestic violence service who then provide follow-up assistance.[244]

3.74 Our discussion of inter-agency strategies is only a snapshot of the approaches being used in Australia and overseas.[245] It provides some context,

238 Holder and Mayo (2003), above n 155, 8.

239 Ibid 9. Office of the Status of Women (2003), above n 156, 31–32. See also paras 3.46–3.55.

240 Office of the Status of Women (2003), above n 156, 59. Court Services Division—Department of Justice and Crime Prevention and Community Support Division—West Australian Police Service, *Joondalup Family Violence Court* Final Report (2002) 1.

241 Katalin Kraszlan and Rebecca West, 'Western Australia Trials a Specialised Court' (2001) 26 (4) *Alternative Law Journal* 197, 198; West Australian Police Service, above n 240, 2.

242 West Australian Police Service, above n 240, 4–5; Kraszlan and West, above n 241, 198.

243 Office of the Status of Women (2003), above n 156, 41–42.

244 Ibid 41.

245 International strategies include the Hamilton Abuse Intervention Pilot Project (NZ) (which is no longer a pilot project), the Quincy District Court (Massachusetts, USA), the Lexington County Criminal Domestic Violence Court (South Carolina, USA) and the Dade County Court (Florida, USA). In Australia, approaches in other jurisdictions are the Domestic Violence Integrated Information Project (Tas), the Northern Violence Intervention Project (SA) and the Atunypa Wiru Minyma Uwankaraku Project (NT/WA/SA).

however, for the current movements in Victoria to adopt an integrated inter-agency approach and to establish a specialist court. As we discussed in Chapter 1, the Statewide Steering Committee to Reduce Family Violence is developing a best practice framework to implement an integrated response to family violence. It plans to conduct consultations on proposed models for an integrated approach. Further, the Victorian Government is funding two specialist Family Violence Courts to be established in early 2005.[246] Elements of the proposed Family Violence Courts in Victoria include:

- court specialisation, involving specially skilled magistrates, court staff, police prosecutors, legal counsel and court liaison workers;
- provision for various legal matters connected to a person's experience of family violence to be dealt with at the same time, or within the same court;
- separate court liaison workers for applicants and defendants;
- special arrangements for witnesses to give evidence;
- enhanced security; and
- strategies to address discrimination or cultural bias against Indigenous and culturally and linguistically diverse communities within the operation of the court.[247]

The term defendant is used to describe an accused person in criminal proceedings.

3.75 There has also been support for a Koori Court that deals specifically with family violence matters.[248]

AIMS OF THE CRIMES (FAMILY VIOLENCE) ACT

3.76 When considering what legal approach should be taken in relation to family violence, it is important to identify what the justice system is intended to achieve. Is the primary aim to:

- protect people from family violence;
- make people who use violence against family members accountable;

246 See paras 1.18–1.19.

247 Information provided to the Commission by Court Services, Department of Justice, October 2004.

248 Victorian Indigenous Family Violence Taskforce (2003), above n 73, 150; also Consultation 37.

- support and empower people who have been subjected to family violence;
- encourage people who use violence to change their behaviour; or
- punish people who use violence against family members?

We are interested in receiving your views about what objectives should guide the justice system's approach to family violence generally. More particularly, because we are responsible for reviewing the civil/hybrid aspect of the Victorian justice system's response to family violence, we would like to receive your views about what that legislation should aim to achieve and what approach it should use.[249]

? QUESTION(S)

1. Given the information on approaches outlined in this Chapter, are any significant changes required to the Victorian justice system's response to family violence? Are there any other approaches that we should consider?

2. What should the primary purposes of the *Crimes (Family Violence) Act 1987* be, for example, protection, punishment or rehabilitation? Which approaches are most likely to achieve these purposes?

249 Whether the purpose of the *Crimes (Family Violence) Act 1987* (Vic) should be enshrined in the legislation is discussed at paras 8.66–8.69.

Chapter 4
The Victorian Intervention Order System

INTRODUCTION

4.1 This Chapter provides information about the Crimes (Family Violence) Act, the history of the legislation, and its basic provisions. It also contains information about some of the other areas of the law that interact with the Crimes (Family Violence) Act. This is intended to place our review of the Act in historical context and to outline how the intervention order system currently operates.

4.2 In addition, we discuss the fact that the Act is used to obtain stalking intervention orders under section 21A(5) of the *Crimes Act 1958*, and ask whether this creates any negative consequences for the way that family violence matters are dealt with.

THE CRIMES (FAMILY VIOLENCE) ACT

BACKGROUND TO THE ACT

4.3 Before the Act was introduced, limited legal options were available for people who experienced or feared family violence. Although the criminal law prohibited various offences involving personal violence, it was rarely applied to criminal behaviour in the home and various features of the criminal law rendered it unable to fulfil an effective protective role in relation to family violence.[250]

4.4 Besides the criminal law, two other remedies were available in some circumstances. Injunctions, which could be issued under the *Family Law Act 1975* (Cth), were only available to women who were or had been married to the person from whom they needed protection. Further, because the power in the Family Law Act to attach a power of arrest to an injunction was rarely used, Family Court injunctions were difficult to enforce.[251]

4.5 The other option involved applying to the Magistrates' Court for an order requiring the violent family member to enter into a recognisance, or agreement, to 'keep the peace'. Such an order could be made under the *Magistrates' (Summary Proceedings) Act 1975*. A keep-the-peace order could not be granted without the violent family member being present, however, and could not be granted unless

250 See, eg, Women's Policy Co-ordination Unit (1985), above n 107, para 6.17, chs 7–9; The Law Reform Commission [Australia] (1986), above n 107, para 25.

251 Women's Policy Co-ordination Unit (1985), above n 107, paras 8.13–14.

physical violence had occurred or been threatened. In addition, a keep-the-peace order could not exclude the violent family member from the family home.

4.6 The Crimes (Family Violence) Act, with its new system of intervention orders, was intended to address the limitations of existing legal responses to family violence. It implemented the legislative recommendations from a 1985 Victorian Government Discussion Paper, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*.[252] By 1985, other jurisdictions around Australia were also acknowledging the inadequacy of the legal system in addressing family violence, and some jurisdictions had already introduced similar intervention order systems.[253]

4.7 The key features of the Act, and similar statutes that were introduced around Australia in the 1980s and 1990s, were that:

- magistrates were empowered to make an order against a person if satisfied on the civil standard of proof (the balance of probabilities) that the person had caused or threatened family violence and might do so again;
- orders typically provided that the respondent not approach, harass or harm the protected person;
- interim orders could be made urgently and without the respondent being present or notified; and
- once an order was made, it was a criminal offence to breach the order.

Interim orders are temporary orders that are issued until a hearing can be conducted to decide whether a final intervention order is made.

AMENDMENTS TO THE ACT SINCE 1987

4.8 A number of amendments have been made to the Act since it was introduced.[254] The most significant amendments have:

252 The discussion paper was the product of four years of work by a Domestic Violence Committee, established by the Victorian Government, Department of the Premier in 1981, a Legal Remedies Sub-committee of the Domestic Violence Committee and the Women's Policy Co-ordination Unit: see ibid i–iii.

253 See, eg, *Crimes (Domestic Violence) Amendment Act 1982* (NSW); *Justices Act Amendment Act (No 2) 1982* (SA); *Peace and Good Behaviour Act 1982* (Qld); *Justices Amendment Act (No 2) 1982* (WA); *Justices Amendment Act 1985* (Tas).

254 The *Crimes (Family Violence) Act 1987* (Vic) has been amended by: *Firearms (Amendment) Act 1988* (Vic); *Crimes (Family Violence) (Amendment) Act 1988* (Vic); *Children and Young Persons Act 1989* (Vic); *Magistrates' Court (Consequential Amendments) Act 1989* (Vic); *Crimes (Family Violence)*

- expanded the range of people able to seek the protection of an intervention order to include people who experience violence perpetrated by a broad range of relatives (in 1990), by people with whom they have had an intimate relationship (in 1994), and by same-sex partners (in 2001);
- enabled magistrates to make an order for substituted service so that an intervention order may take effect even where the respondent cannot be promptly located and served with the order (in 1990);

An order for substituted service occurs 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. To serve a document means to physically hand it to the person named in the document.

- provided for increased procedural flexibility in relation to orders made for the protection of children and young people under 17 years of age (in 1990 and 1997);
- provided for the registration and enforcement of interstate intervention orders (in 1992) and New Zealand protection orders (in 1997);
- strengthened provisions regarding the seizure and confiscation of firearms in a respondent's possession (in 1988 and 1992) and the revocation of a respondent's firearms licence (in 1992 and 1996);
- enabled the police to apply for an urgent interim intervention order outside business hours by telephone or facsimile machine (in 1992);
- increased police powers to enter and search premises without a warrant in order to locate a person who has assaulted a family member (in 1992);

A warrant is a court document that allows police to arrest the accused or bring him or her before the court.

- extended the application of the Act so that it may be used in relation to stalkers, even where the stalker is not a family member (in 1994);
- enabled magistrates to make an order lasting for longer than 12 months (in 1994) and to make orders of indefinite duration (in 1997);

(Amendment) Act 1990 (Vic); *Crimes (Family Violence) (Further Amendment) Act 1992* (Vic); *Crimes (Amendment) Act 1994* (Vic); *Firearms Act 1996* (Vic); *Law and Justice Legislation Amendment Act 1997* (Vic); *Crimes (Family Violence) (Amendment) Act 1998* (Vic); *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic); *Children and Young Persons (Appointment of President) Act 2000* (Vic); *Statute Law Amendment (Relationships) Act 2001* (Vic) and the *Crimes (Family Violence) (Amendment) Act 2003* (Vic).

- increased the penalties for breaching an intervention order, and introduced additional penalties for second and subsequent breaches (in 1994); and
- clarified that intervention orders can be made by consent without the court being satisfied that there are grounds for the order and without the court requiring the respondent to admit the particulars of the complaint (in 2003).

PREVIOUS REVIEWS

4.9 Although there has been no comprehensive review of the Crimes (Family Violence) Act since it was introduced, various important pieces of work have reviewed aspects of the legislation. These include:

- Dr Rosemary Wearing's 1992 study, *Monitoring the Impact of the Crimes (Family Violence) Act 1987*, aimed to evaluate the impact of the *Crimes (Family Violence) Act 1987* in the first four years of its operation.[255] The study involved interviews with magistrates, court clerks, police, and women who had experienced family violence, as well as detailed analysis of police records and court data. The study provides a valuable body of information about the practices and perceptions of those responsible for administering the Act, against which we can compare practices and attitudes of those in the same roles today. The study drew a number of conclusions about ways in which magistrates, police, court staff and others could function differently to improve the effectiveness of the Act.
- Another study by Dr Wearing in 1996, *Monitoring the Crimes (Family Violence) Act 1987: A Study of Those Who do Not Proceed*, also examined the impact of the Act.[256] It focused on applications for intervention orders that were withdrawn or struck out, and specifically examined differences between applications where the police applied for the order, and those where the person seeking protection was the applicant. The study identified the many factors that can contribute to a person's decision not to proceed with an intervention order application.
- A government working party that was convened in 1995 developed uniform practices and procedures in relation to the Act. The work

255 Wearing (1992), above n 3.

256 Wearing (1996), above n 3.

undertaken by this group led, in 1997, to a number of significant amendments to the Act.[257]

- The development of the Model Domestic Violence Laws in 1999 included an analysis of the Victorian legislation.[258] This project, conducted by a working group of Commonwealth, state and territory officials, aimed to develop model legislation to encourage consistency across Australian jurisdictions. We will refer to the working group's recommendations and to the provisions of the model laws where they are relevant to issues discussed in this Paper.

THE CRIMES (FAMILY VIOLENCE) ACT AS IT CURRENTLY OPERATES

COVERAGE OF THE ACT

4.10 The Act enables people who are at risk of family violence to obtain an intervention order against a violent family member (the respondent).

4.11 Most family violence intervention orders continue to be sought by, or on behalf of, women and girls, and most orders are sought against male respondents. In 2002–03, 71.8% of people for whom a finalised family violence intervention order was sought were female[259] and 81.2% of respondents to finalised applications were male.[260]

4.12 'Family member' is defined broadly in the Act and includes a wide range of relatives, anyone with whom the person seeking protection has had an intimate relationship and anyone who is ordinarily a member of that person's household.[261] The majority of people who seek a family violence intervention order are seeking

257 Victoria, *Parliamentary Debates,* Legislative Assembly, 23 April 1997, 832 (Jan Wade, Attorney-General). The Commission has been unable to access the working documents developed by this group.

258 The Victorian legislation was used as the starting point for the development of the model laws; see Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* Report (1999) i, 1.

259 Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria: Intervention Order Statistics 1998/99–2002/03* (2004) 71. In this publication, an application, or complaint, for an intervention order is 'finalised' when an intervention order is made or the application is refused, struck out, withdrawn or revoked: 16. We note that the 20.2% of males for whom an intervention order was sought included male children.

260 Ibid 73.

261 *Crimes (Family Violence) Act 1987* (Vic) s 3. For the full list of relationships included in the term 'family member' see para 5.26.

protection from someone with whom they have had a domestic partnership or an intimate relationship. In 2002–03, 54.5% of people included in a family violence intervention order application were in this category.[262] A further 4119 (14.5%) people included on family violence intervention order applications were the children or stepchildren of the respondent.[263]

WHAT IS AN INTERVENTION ORDER?

4.13 An intervention order is a civil order that restrains the behaviour of the respondent in some way. When making an order, the court can impose any restrictions or conditions on the respondent that the magistrate considers necessary or desirable.[264] Common terms that are included in intervention orders prohibit the respondent from approaching the protected person, from going to the protected person's residence or workplace, and from contacting, harassing, threatening or intimidating the protected person.[265]

4.14 An intervention order may be made for a specific or indefinite period. Unless an intervention order states that it is to remain in force for a certain period, it will remain in force until it is revoked or set aside by a later court decision.[266]

WHEN MAY AN ORDER BE MADE?

4.15 A court may make an order against a respondent if it is satisfied on the balance of probabilities that the respondent has assaulted a family member or caused damage to his or her property, or has threatened to do so and is likely to do so again. Alternatively, the court may make an order if it is satisfied that the respondent 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.[267]

262 The percentage amount had been calculated by the Commission, based on information from Department of Justice Victoria (2004), above n 259, 45.

263 Ibid 45.

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

265 *Crimes (Family Violence) Act 1987* (Vic) s 5.

266 *Crimes (Family Violence) Act 1987* (Vic) s 6.

267 *Crimes (Family Violence) Act 1987* (Vic) s 4(1).

4.16 If the respondent consents to an intervention order being made, the court may make the order without being satisfied that the above grounds are proven.[268]

How Do People Obtain an Intervention Order?

4.17 Applications for intervention orders are made to the Magistrates' Court or, if either the person in need of protection or the person against whom the order is sought is under 17 years of age, the application may also be made to the Children's Court.[269] For the past eight years, the number of applications for a family violence intervention order finalised each year has remained consistent (approximately 15 000 applications each year).[270] In 2002–03, 15 294 applications were finalised.[271]

4.18 Since 1997 it has been possible to use one application to seek an intervention order protecting more than one person. This means, for example, that a woman may seek an order covering both herself and her children. Consequently, the total number of people included in intervention order applications is greater than the number of applications finalised—in 2002–03, 20 496 people were included in finalised applications for a family violence intervention order.[272]

4.19 Most people in need of protection from family violence apply for the order themselves by going to their local Magistrates' Court and completing an application, called a 'complaint', with the help of a court registrar.[273] Once

A court registrar is a staff member at court who carries out the court's

268 *Crimes (Family Violence) Act 1987* (Vic) s 14. The Magistrates' and Children's Courts do not collect information on how many family violence intervention orders are made by consent.

269 *Crimes (Family Violence) Act 1987* (Vic) s 3A. Under proposed amendments to the *Crimes (Family Violence) Act 1987* (Vic), applications in respect of young people aged 17 years will also be able to be heard in the Children's Court: see Children and Young Persons (Age Jurisdiction) Bill 2004 (Vic) clause 34, inserting a new definition of 'child' in s 3(1) and clause 35, substituting '18 years' for '17 years' in s 3A(1).

270 Department of Justice Victoria (2004), above n 259, 60–1; Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria: Intervention Order Statistics 1994/95–2000/01* (2002), 76–7.

271 Department of Justice Victoria (2004), above n 259, 61.

272 Ibid 71.

273 In 2002–03, 74.4% of all finalised applications for a family violence intervention order were made by the person seeking protection: see Department of Justice Victoria (2004), above n 259, 61.

the application is made, the registrar decides whether to issue a summons for the respondent to attend a hearing, or whether to issue a warrant for his or her arrest.

A summons is a formal request from a court to attend a hearing or trial.

4.20 When a summons is issued, the court arranges for the police to serve it on the respondent, along with a copy of the complaint. Alternatively, if the registrar thinks that the safety or property of the person seeking protection are seriously threatened, he or she may issue a warrant for the police to arrest the respondent.[274]

4.21 The Act provides that police may apply for an intervention order on behalf of a person at risk of family violence.[275] In recent years there has been a significant increase in the number of applications for an intervention order sought by police—since 2000–2001 the proportion of finalised applications made by police has increased from 13.2% to 24%.[276]

INTERIM ORDERS

4.22 The Act enables people in need of protection to obtain an interim order without the respondent knowing about the application or being present at the initial hearing.[277] The Act also states that the police may apply for an interim order by telephone or facsimile if it is needed urgently outside ordinary business hours, or if the distance from the nearest court is so great that it is not practicable to make the application in person.[278]

4.23 Interim orders made in the respondent's absence become effective as soon as they are served on the respondent. Once served, an interim order has the same force as a final intervention order and it is a criminal offence to breach it.[279] When served with interim orders, respondents are also given a copy of the complaint and a hearing date to attend court and, if they want, contest the order.

HOW DOES AN INTERIM ORDER BECOME FINAL?

4.24 The applicant must return to court for the hearing date and, at that time, finds out whether or not the respondent will contest the application. If not, the

274 *Crimes (Family Violence) Act 1987* (Vic) s 9(1)(b).

275 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(a).

276 Department of Justice Victoria (2004), above n 259, 61.

277 *Crimes (Family Violence) Act 1987* (Vic) s 8(1).

278 *Crimes (Family Violence) Act 1987* (Vic) s 8(4).

279 *Crimes (Family Violence) Act 1987* (Vic) s 22(1).

magistrate will hear the application and make a decision about whether or not to make an intervention order based on the information provided by the applicant and any witnesses. If the respondent contests the order, the magistrate will conduct a hearing and make a decision based on the information provided by both sides. The respondent also has the option of agreeing to the order while not admitting that the allegations included in the application are true.[280]

4.25 In 2002–03, family violence intervention orders were made in 54.4% of applications.[281] The remainder of the applications were struck out (23.3%), withdrawn (16.8%), refused (5.3%) or revoked (0.2%).[282]

4.26 If the magistrate decides to make an order, he or she may include any terms or conditions that appear necessary or desirable in the circumstances.[283] The order will specify that it lasts for a certain period of time or for an indefinite duration, which means it will last until it is revoked or set aside on appeal.[284]

Breaching an Intervention Order

4.27 If respondents breach the terms of the intervention order, they commit a criminal offence. The respondent may therefore be arrested and charged and, if convicted, may be fined or sentenced to imprisonment.[285] Because breaching an intervention order is a criminal offence, protected persons must rely on the police to take action in relation to breaches of an intervention order. If a breach also involves some other offence, such as an assault, the respondent may be charged with both the breach offence and the assault.

Magistrates' Court Family Violence and Stalking Protocols

4.28 The Magistrates' Court Family Violence and Stalking Protocols were introduced in December 2002 and revised in November 2003. They are intended

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

281 This represented a decrease from 59.7% in 2001–2002 and was the lowest proportion of applications to result in a final order being made since 1994–1995: see Department of Justice Victoria (2004), above n 259, 63; Department of Justice Victoria (2002), above n 270, 79.

282 Department of Justice Victoria (2004), above n 259, 63.

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

284 *Crimes (Family Violence) Act 1987* (Vic) s 6.

285 *Crimes (Family Violence) Act 1987* (Vic) s 22(1). First offences carry a maximum penalty of 240 penalty units and/or imprisonment for up to two years. For subsequent offences the maximum term of imprisonment is five years.

to guide the court's procedure in relation to intervention orders and ensure that Magistrates' Courts' practice when dealing with intervention order matters is consistent, transparent and responsive.[286] The protocols provide guidelines for the courts in relation to many aspects of the court process. We will discuss particular protocols when they are relevant to issues under consideration in this Paper.

INTERVENTION ORDERS AND OTHER AREAS OF THE LAW

4.29 The Crimes (Family Violence) Act is not the only legislation that affects people who experience or use family violence. When considering the operation of the Act, it is important to keep in mind various other areas of the law.

CRIMINAL LAW

4.30 As noted earlier, the criminal law is relevant not just in relation to breaches of orders, but because it should operate in parallel with the civil system to address family violence.[287] Where violence has been threatened or used by one person against another, the person using violence may be charged with a range of criminal offences. These offences are applicable regardless of the context of the violence, as in Victoria we do not have specific offences relating to assault of a family member. The *Crimes Act 1958* and the *Summary Offences Act 1966* contain various provisions to cover the range of threatened or actual physical violence that may be used when one family member is violent towards another, including minor assaults, sexual assaults, threats to kill or to cause serious injury, and murder.

4.31 Various issues regarding the application of the criminal law to family violence have been raised in our consultations. As discussed at paragraphs 3.25 and 3.28, many people believe that criminal charges are rarely laid in relation to family violence incidents. It is thought that the more common police response is either to refer the family member in need of protection to court to apply for an intervention order, or to apply for an intervention order on the person's behalf.

4.32 One of the factors that affects the application of the criminal law to family violence incidents is the need for a high level of evidence. Under the criminal law,

286 Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (2003), ii.

287 As discussed at paras 3.7–3.8, the criminal law involves action by the State against an individual who is thought to have committed a criminal offence. The civil law is generally characterised as legal action by one individual against another.

the court must be satisfied of the evidence against an accused 'beyond reasonable doubt' before that person can be convicted. Under the civil law, the court must only be satisfied of the evidence on the 'balance of probabilities'. These differing standards are referred to as the 'standard of proof'. The civil standard of proof is much easier to satisfy. In some cases of family violence it can be difficult to meet the higher standard of proof because, unlike offences that occur in the public domain, it is less likely there will be witnesses or other independent evidence of a person's violent behaviour.

4.33 However, police do not consistently treat a family violence incident as a crime scene, which means they do not actively gather evidence to support a future prosecution.[288] Attendance can be seen more as serving a peacekeeping function, rather than an investigatory one. In Chapter 9 we will discuss some of the issues related to evidence and police process, as they affect prosecution of breaches of intervention orders.

Stalking Provisions of the Crimes Act

4.34 The other way that the family violence provisions interact with the criminal law is through the stalking provisions in section 21A of the Crimes Act. Section 21A was introduced in 1994 and creates the offence of stalking.[289] Stalking is defined as engaging in a course of conduct as listed in the Act—such as following people, contacting them or loitering near their home or workplace—which is done with the intention of causing physical or mental harm or of arousing apprehension or fear in the victim for his or her safety or another person's safety.[290]

4.35 Section 21A(5) of the Crimes Act allows the court to make an intervention order under the Crimes (Family Violence) Act if satisfied on the balance of probabilities that the respondent has stalked another person and is likely to continue to do so. In that case, the Crimes (Family Violence) Act has effect as if the respondent and person seeking protection were family members.

4.36 Our terms of reference do not include stalking. However, in most of our initial consultations the issue of stalking-related intervention orders has been

288 Consultations 1, 7, 10.

289 *Crimes Act 1958* (Vic) s 21A(1)–(4A) as amended by *Crimes (Amendment) Act 1994* (Vic).

290 *Crimes Act 1958* (Vic) s 21A(2).

raised.[291] Court staff expressed frustration that the stalking provisions are being used in ways that were not intended, mainly by people who have disputes with neighbours or by schoolchildren in the context of arguments with other schoolchildren.[292] Disability service providers raised stalking orders as a particular problem in terms of neighbours routinely obtaining orders against people with disabilities, and the difficulty for people with particular disabilities in understanding and therefore complying with the terms of the order.[293]

4.37 There is a perception that these types of applications both clog the system and delay the processing of family violence matters, and also that use of orders for this purpose causes them to be viewed less seriously by the community.[294]

4.38 Consultations highlighted that these orders also cause frustration among police, who are required to enforce them in the same way as family violence orders.[295] Various justice system personnel also seem to think most applications under the Act are stalking applications.[296] This is not borne out by court data—in fact, just over one-quarter of all intervention order applications are stalking applications[297]—but demonstrates the level of frustration that is felt in dealing with matters of this kind.

4.39 Some service providers believe the use of the Crimes (Family Violence) Act for stalking matters has caused certain magistrates, court staff, registrars and police to treat people seeking family violence intervention orders less seriously and with greater scepticism and impatience.[298]

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291 Consultations 1, 2, 6, 7, 8, 12, 19, 30, 33, 36, 39.

292 Consultations 6, 8, 38.

293 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

294 Consultations 2, 19, 25.

295 Consultation 23.

296 Consultations 8, 38.

297 In 2002–03, 26.9% of intervention order applications were made pursuant to the stalking provisions of the *Crimes Act 1958* (Vic) and 73.1% of applications were for family violence intervention orders: see Department of Justice Victoria (2004), above n 259, 26. However, the number of stalking applications finalised each year is increasing. Between 1998–1999 and 2002–03 the number of applications for an intervention order made under the stalking provisions of the *Crimes Act 1958* (Vic) increased by 32%: see Department of Justice Victoria (2004), above n 259, 82.

298 Consultations 2, 19, 23, 25.

? QUESTION(S)

3. Should stalking intervention orders be dealt with under separate legislation? Why or why not?

BAIL

4.40 The Crimes (Family Violence) Act provides that the *Bail Act 1977* applies to a respondent in proceedings under the Crimes (Family Violence) Act in the same way as it applies to a person who has been charged with an offence.[299] Under the Bail Act there is a presumption that people being held in custody will be granted bail, although that presumption is subject to a number of exceptions.

4.41 The Bail Act provides that where a respondent is accused of breaching an intervention order and, in breaching the order, used violence or threatened to use violence, the court is not to grant bail unless the accused shows why it should be granted.[300] If the court grants bail in these circumstances, the judge or magistrate must provide their reasons for doing so.[301]

FIREARMS

4.42 If applicants tell the court or police when applying for an intervention order that the respondent has a gun and may use it against them, a warrant can be issued by the court for the police to enter the respondent's house, conduct a search, and remove any firearms.[302]

4.43 Clearly, the risk of death or serious harm is increased if a violent family member has access to firearms. The Act recognises this by requiring the magistrate making an interim order to ask whether the respondent has a gun licence.[303] If so, the magistrate may suspend the licence and the respondent is then required to surrender any guns he or she owns. If the respondent does not surrender them, the police can seize them.[304]

299 *Crimes (Family Violence) Act 1987* (Vic) s 19.

300 *Bail Act 1977* (Vic) s 4(4).

301 *Bail Act 1977* (Vic) s 4(4).

302 *Firearms Act 1996* (Vic) s 146.

303 *Crimes (Family Violence) Act 1987* (Vic) s 8(1C).

304 *Crimes (Family Violence) Act 1987* (Vic) s 8(1D), (1E).

4.44 When a final order is made the respondent's gun licence is automatically cancelled—whether or not the intervention order mentions firearms.[305] If the intervention order does specifically revoke the respondents' licences, they are prohibited from having a gun licence for the duration of the order, and for five years after the order expires.[306] If respondents need a firearm for work, they can apply to the Magistrates' Court to get the licence back. The police and the applicant for the intervention order must both be notified of this application, and can object to the licence being given back.

FAMILY LAW

4.45 The *Family Law Act 1975* (Cth) is federal legislation that deals with various issues arising from relationship breakdown, including property division and divorce between people who are married, and issues about the care of children. Therefore, particularly where the parties to intervention order proceedings have children, it is possible they will also at some stage be involved in family law proceedings.

CHILD CONTACT ISSUES

4.46 The most common interaction between the Family Law Act and the Crimes (Family Violence) Act arises in relation to orders about child residence and child contact. Under the Family Law Act, the Family Court has the power to make orders about where children live after their parents separate. The Family Court can also make orders about when and where children will have contact with a non-residential parent, or with a step-parent or any other person with an interest in the child's care, welfare and development.

4.47 It is possible that a Family Court contact order may conflict with an intervention order made under the Crimes (Family Violence) Act. For example, a contact order may stipulate that a father collects the child from the mother's residence, while the intervention order prevents him from going within 200 metres of that residence. The intervention order may also prohibit the father from

305 This is because the *Firearms Act 1996* (Vic) s 3 defines 'prohibited person' to include a person who is a respondent to an intervention order. Section 46 (1) of that Act requires the Chief Commissioner to cancel the licence immediately upon becoming aware that the person is now 'prohibited'.

306 *Crimes (Family Violence) Act 1987* (Vic) s 5(1A). The magistrate may order forfeiture to the Crown of any firearms possessed, used or carried by the respondent: *Firearms Act 1996* (Vic) s 151.

contacting or approaching the child, while the Family Court order may state that the child should have weekly contact with the father.

4.48 If there is an intervention order in place when the Family Court is making orders for child contact, the Family Court must, if possible, make orders that are consistent with the existing intervention order.[307]

4.49 If both a Family Court contact order and an intervention order are in place and the two orders are inconsistent, the contact order prevails.[308] This means the intervention order remains in place but is invalid to the degree that it conflicts with the contact order. In this situation, child contact must continue as provided for in the Family Court order.

4.50 However, if a contact order had already been made before the Magistrates' Court considers an application for either an interim or a final intervention order, the magistrate has the power to make, suspend or change the Family Court order provided certain conditions are met.[309] When making a final intervention order the magistrate also has the power to discharge the Family Court contact order.

4.51 We will discuss some of the issues relating to child contact and the effectiveness of intervention orders in Chapter 8.[310]

FAMILY COURT INJUNCTIONS

4.52 As mentioned at paragraph 4.4, the Family Law Act provides a process for obtaining a personal protection injunction.[311] A Family Court injunction can be used instead of a family violence intervention order, although a more limited range of people can seek protection through the Family Law Act.[312] In addition, the process of obtaining a Family Court injunction is more complex and getting injunctions enforced can be more difficult. As a result, Family Court injunctions are used far less frequently as a way of dealing with family violence than Crimes (Family Violence) Act intervention orders.

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307 *Family Law Act 1975* (Cth) s 68K.

308 *Family Law Act 1975* (Cth) s 68S.

309 *Family Law Act 1975* (Cth) s 68T.

310 See paras 8.29–8.44.

311 *Family Law Act 1975* (Cth) pt VII div 9, pt XIV.

312 The *Family Law Act 1975* (Cth) cannot be used by adults who experience family violence unless they are or have been married to the person from whom they seek protection, or the parties have been in a relationship and Family Court proceedings in relation to the children are underway.

CHILDREN AND YOUNG PERSONS ACT

4.53 Rather than intersecting with the Crimes (Family Violence) Act, the *Children and Young Persons Act 1989* establishes a parallel system for dealing with one form of family violence—child abuse. Both Acts allow for legal intervention in situations where children are at risk of violence from family members, although the basis for, and nature of, the interventions differs under each Act.

4.54 The Crimes (Family Violence) Act allows an intervention order to be made for the protection of a child from a parent or other family member where the court is satisfied the family member has assaulted, threatened to assault or otherwise acted in one of the ways described in section 4(1) of the Act and is likely to do so again.[313] Young people over 14 years of age may apply for an intervention order on their own behalf with the leave of the court.[314] Others who may apply for an intervention order on behalf of a child include the police, one of the child's parents, or any other person with the written consent of a parent of the child or with the leave of the court.[315]

4.55 The Crimes (Family Violence) Act also allows a parent who is applying for an intervention order to include a child on the same application if the application arises from the same or similar circumstances.[316] In 2002–03, over one-fifth (22.2%) of persons for whom a finalised intervention order application was sought were aged under 15 years.[317] A further 6.9% of persons for whom protection was sought were 15 to 19 years of age.[318] Unfortunately, court data cannot provide information about how many of these children were included on their parent's applications and how many were the sole subject of an application.

4.56 The Children and Young Persons Act sets out the circumstances in which the Department of Human Services (DHS) may become involved in children's affairs, and what legal action may be taken when children are in need of protection. The Act provides various definitions of when a child is in need of protection. The key elements of these definitions are that the child has suffered or

313 'Family member' is defined in section 3 of the *Crimes (Family Violence) Act 1987* (Vic).

314 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(iv).

315 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(i)–(iii). A guardian of the child may also apply if a guardianship order is in place under the *Guardianship and Administration Act 1986* (Vic): see *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(e).

316 *Crimes (Family Violence) Act 1987* (Vic) s 7(4).

317 Department of Justice Victoria (2004), above n 259, 76.

318 Ibid.

is likely to suffer significant harm, and the child's parents have not protected the child or are unlikely to do so.[319] The Act also empowers the Children's Court to make various types of protection orders in relation to a child. For example, the court may make an order requiring a parent or other person to make an undertaking,[320] making the DHS responsible for the child's supervision,[321] or granting custody of the child to a third party for up to 12 months.[322]

4.57 It is therefore possible that a child may be the subject of an intervention order under the Crimes (Family Violence) Act and an order under the Children and Young Persons Act. People who work with women say that fear of, or actual, intervention from the DHS Child Protection Service is a significant concern for women who have experienced violence by a partner. During our consultations we heard many instances of women being told by the Child Protection Service that a protection application would be made in relation to the child unless the woman separated from her partner and sought an intervention order against him. These issues are discussed in Chapter 6.[323]

MIGRATION LAWS

4.58 The *Migration Act 1958* (Cth) is federal legislation that sets out the class of spouse/partner visas[324] which enable people to reside in Australia, provided they can show that their relationship with their Australian spouse or partner is 'genuine and continuing'.[325] However, where such a relationship breaks down and the cause can be shown to be family violence,[326] there are special provisions in the *Migration Regulations 1994* (Cth) which enable the person who has experienced violence to

319 The definition of when a child needs protection is set out in s 63, *Children and Young Persons Act 1989* (Vic).

320 *Children and Young Persons Act 1989* (Vic) s 89.

321 *Children and Young Persons Act 1989* (Vic) s 91.

322 *Children and Young Persons Act 1989* (Vic) ss 96–7.

323 See para 6.9.

324 The term 'spouse/partner visa' will be used throughout this section to refer to the class of visas relating to those applying for visas on the basis of being in a married, de facto or independent relationship with an Australian citizen or permanent resident. The *Migration Act 1958* (Cth) provides for classes of visas that are set out in the *Migration Regulations 1994* (Cth). These include spouse, partner and interdependent visas: see *Migration Regulations 1994* (Cth) regs 1.15A, 109A and sch 1.

325 See *Migration Act 1958* (Cth) s 237; *Migration Regulations 1994* (Cth) regs 1.15A, 109A.

326 'Domestic violence' is the term used in the *Migration Regulations 1994* (Cth). The term 'family violence' will be used throughout this section for reasons of consistency.

obtain permanent residency despite the end of the relationship.[327] Issues relating to migration law may therefore arise in applications under the Crimes (Family Violence) Act, particularly where the person seeking protection is in Australia on a spouse/partner visa and does not yet have permanent residency status allowing him or her to remain in Australia indefinitely.

4.59 Obtaining an intervention order is one of the ways to prove that family violence was the cause of the relationship breakdown for the purposes of the Migration Regulations.[328] In these situations, obtaining intervention orders will be difficult as they are often contested by the respondent.[329] Our consultation participants suggested that if magistrates are uncertain about whether the application is motivated by a desire for protection or for the purposes of a visa application, they will not grant the intervention order.[330]

4.60 Where a person applying for an intervention order is on a spouse/partner visa and has made or needs to make an application under the family violence provisions of the Migration Regulations, it is common for the respondent's lawyer to argue that the intervention order is only being sought to assist the applicant to obtain permanent residency.[331] However, obtaining an intervention order is only one of several available ways to show that family violence was the cause of relationship breakdown for the purposes of the Migration Regulations. There are usually far more direct ways for a person who has experienced family violence to substantiate that violence for the purposes of the Migration Regulations, for example, by obtaining statutory declarations.[332] The availability of other evidentiary methods mean that it is not likely that people in this situation will seek an intervention order unless they need the protection it offers. However, because

327 See *Migration Regulations 1994* (Cth) div 1.5 and sch 2.

328 See *Migration Regulations 1994* (Cth) div 1.5, reg 1.21(1)(d).

329 See Consultations 41, 18.

330 Consultation 41.

331 Ibid.

332 Obtaining statutory declarations from two 'competent persons' such as a social worker, doctor or other professional person who has expertise in the area of family violence assistance is another means of providing the appropriate evidence. This evidentiary system is set out in the *Migrations Regulations 1994* (Cth) div 1.5. The evidentiary system of statutory declarations overcomes the difficulties associated with proving family violence occurred when there are no independent witnesses. The special provisions relating to family violence in the *Migration Regulations 1994* (Cth) are set out in div 1.5 as deeming provisions. This means that where the statutory declarations meet the requirements of the *Migration Regulations 1994* (Cth), it is the competent person, not the decision-making body, who deems that family violence has occurred.

this is not understood by all magistrates, it would appear that some applicants are being denied protection.[333]

4.61 It is also of concern that people in need of protection who have outstanding visa applications may be discouraged from applying for protection in the form of an intervention order even though they are fearful of further family violence. People who have made a visa application under the family violence provisions of the Migration Regulations may be concerned that if they apply for an intervention order and are unsuccessful it may undermine their visa application.[334]

4.62 Finally, where people on spouse/partner visas leave their partner because of family violence but are not aware of the family violence provisions in the Migration Regulations, they are unlikely to seek help through the legal system. In this situation, uncertainty about options for obtaining an ongoing visa or residency status may prevent people from using the intervention order system.[335]

333 Consultations 18, 41.

334 While the Multicultural and Indigenous Affairs Department of Immigration, '7.2 Conflicting Information' *Procedures Advice Manual: Guidelines for Officers Administering Migration Regulations*, Vol 3 (2004) stipulates that conflicting information is not to be taken into account in considering a visa application, and this is the process followed by the courts (see *Cakmak v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 257, at 20, 40, 52), it is within the discretion of the decision-making body (Department of Immigration and Multicultural and Indigenous Affairs or the Migration Review Tribunal) to make an assessment of the applicant's general credibility. An unsuccessful intervention order application could contribute to an unfavourable assessment of credibility, which may undermine a visa application.

335 Consultations 18, 41.

Chapter 5
Using the Intervention Order System

INTRODUCTION

5.1 Who is able to use the family violence intervention order system, and what kind of behaviour they can use the system to seek protection from, is determined by definitions contained in the Crimes (Family Violence) Act. In this Chapter we will look at these definitions, and ask whether they provide adequate protection for everyone who needs it. We will also discuss issues that have been raised about the types of orders that may be made, the duration of intervention orders, and how they can be changed or revoked.

GROUNDS FOR OBTAINING AN INTERVENTION ORDER

5.2 Section 4 of the Act states that an intervention order may be made in relation to a person (the respondent) if the court is satisfied that:

- the respondent has assaulted a family member or caused damage to the property of a family member and is likely to do so again;
- the respondent has threatened to assault a family member, or to cause damage to a family member's property and is likely to carry out the threat; or
- the respondent 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.

5.3 Although the grounds for obtaining an intervention order are reasonably broad, concerns were raised in many of our consultations that the grounds do not ensure that all people who need protection from family violence can obtain it under the Act.

NON-PHYSICAL VIOLENCE AND ABUSE

5.4 It is now widely acknowledged that family violence encompasses a broad range of behaviour, including threatened or actual physical violence, as well as conduct that does not involve physical violence. As discussed in Chapter 2, family violence includes verbal harassment, 'put downs' and patterns of controlling behaviour that limit people's social contact, their economic independence or some other aspect of their lives.[336]

336 See paras 2.15–2.16, 2.19.

5.5 The difficulty of obtaining legal protection from non-physical violence and abuse was raised in almost every consultation we held with service providers.[337] The information obtained in these consultations suggests it is common for some police, registrars and other court staff to tell women they cannot obtain an order unless they are at risk of physical violence. As we discuss in Chapter 7, court registrars and clerks play a key role in assisting people who need protection to complete their intervention order applications.[338] When registrars tell potential applicants they can only obtain an order if they have been physically assaulted, it is likely to prevent some applicants from seeking an order.

5.6 Our consultations have also indicated that when women apply for an intervention order because they need protection from non-physical violence, some magistrates refuse to make an order. One example given involved a young woman who sought an intervention order in relation to repeated psychological abuse, and was told that as she had not been assaulted she did not have grounds for an order under the Act.[339]

5.7 One submission we received noted that other abusive behaviours, such as threats to abscond with a child or being imprisoned against one's will, are not clearly covered by section 4(1) of the Act. The submission also stated that people who require protection from a respondent who has just been released from jail find it difficult to obtain an intervention order because there is no recent abusive conduct.[340]

5.8 The Magistrates' Court does not record information about the reasons people apply for intervention orders. It is therefore difficult to know how many people currently seek intervention orders for non-physical violence, and how many are successful.

5.9 Other jurisdictions that provide for family violence intervention orders have different grounds for obtaining an order. The NSW legislation includes conduct that intimidates the applicant or a person with whom the applicant has a domestic relationship.[341] 'Intimidation' is defined as:

(a) conduct amounting to harassment or molestation, or

337 Consultations 1, 5, 8, 9, 12, 13, 19, 20, 21, 32, 33, 36.

338 See paras 7.15–7.27.

339 Consultations 11, 20.

340 Submission 8.

341 *Crimes Act 1900* (NSW) s 562AE(1).

> (b) the making of repeated telephone calls, or
>
> (c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.[342]

5.10 The South Australian *Domestic Violence Act 1994* lists various types of behaviour as constituting grounds for a restraining order, but 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.[343]

Both the South Australian and NSW grounds focus on the likely, 'reasonable' effect of the respondent's behaviour on the person seeking protection, rather than attempting to describe an exhaustive list of the types of behaviour that constitute family violence.

5.11 By comparison, the Queensland *Domestic and Family Violence Protection Act 1989* defines domestic violence as including 'intimidation or harassment' and provides examples of what might constitute intimidation and harassment, such as '[r]epeatedly telephoning an ex-boyfriend at home or work without consent (whether during the day or night)', and '[r]egularly threatening an aged parent with the withdrawal of informal care...'.[344]

5.12 The New Zealand *Domestic Violence Act 1995* states that an order may be made if the respondent has used or is using domestic violence against the applicant or a child of the applicant's family. 'Domestic violence' is defined as including physical abuse, sexual abuse, and psychological abuse (including but not limited to intimidation, harassment, damage to property, threats of physical, sexual or psychological abuse).[345] The New Zealand legislation also states that apparently minor conduct may be taken into consideration as grounds for an order if it constitutes part of a pattern of behaviour from which the applicant needs protection, [346] and that:

342 *Crimes Act 1900* (NSW) s 562A(1).

343 *Domestic Violence Act 1994* (SA) s 4(2).

344 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(c).

345 *Domestic Violence Act 1995* (NZ) s 3(2).

346 *Domestic Violence Act 1995* (NZ) s 14(3).

> [a] number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.[347]

5.13 Unlike the Victorian Act, the legislation in New Zealand and in Australian jurisdictions such as Queensland[348] and the ACT[349] contain a definition of 'family violence' or 'domestic violence'.[350] Some consultation participants suggested that including a definition of family violence in the Victorian Act would improve implementation and serve a useful educative purpose.[351]

? QUESTION(S)

4. Are the grounds for obtaining an intervention order at section 4(1) of the *Crimes (Family Violence) Act 1987* adequate?

5. Should 'family violence' be defined in the legislation? In particular, should the *Crimes (Family Violence) Act 1987* specifically provide that forms of abuse other than actual or threatened physical abuse constitute family violence, and should those other forms of violence give grounds for an order to be made?

CHILDREN AND YOUNG PEOPLE WHO WITNESS FAMILY VIOLENCE[352]

5.14 In this review, we are particularly concerned about the extent to which the current intervention order system protects children from family violence. As discussed in Chapter 2, children are present in a significant proportion of family

347 *Domestic Violence Act 1995* (NZ) s 3(4)(b).

348 *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

349 *Protection Orders Act 2001* (ACT) s 9(1).

350 The NSWLRC has recommended that a definition of 'domestic violence' be included in pt 15A of the *Crimes Act 1900* (NSW): see NSW Law Reform Commission, *Apprehended Violence Orders* Report 103 (2003) 85–91.

351 Consultation 12.

352 We use the term 'witness' here to distinguish between the position of children who are the primary targets of violence in the family and the position of children exposed to violence against their family members. We acknowledge that the term does not appropriately capture the notion that children are affected by violence and do not use the term in other contexts: see Laing (2000), 'Children, Young People and Domestic Violence', above n 92, 1.

violence situations and research indicates that children's exposure to inter-adult family violence can result in a range of serious, negative effects.[353]

Current Position of Children Exposed to Violence

5.15 The Act is not clear about whether an order may be made in relation to a child when the child has not been the primary target of the respondent's violent behaviour. The Act only enables a magistrate to make an intervention order for more than one family member if the magistrate is satisfied that the criteria for making an order are proven in relation to each family member.[354] To make an order for children who witness family violence, a magistrate must find that the respondent has 'behaved in an offensive manner towards a family member [the child] and is likely to do so again'.[355] This requires the magistrate to find that abusing a child's family member in the child's presence is 'behaving in an offensive manner towards' the child.

Issues Raised in Consultations

5.16 Participants in a number of our consultations said some women find it difficult to obtain an intervention order for their children if the children have not been directly assaulted or threatened by the respondent.[356] We were told that some magistrates say in court that they do not consider witnessing violence perpetrated by the respondent against another family member to be grounds for making an intervention order for the child.[357]

5.17 Other consultation participants said some magistrates seem to automatically include a woman's children when making an order to protect her.[358] It appeared from our consultations that the courts do not apply a consistent approach as to whether witnessing family violence constitutes grounds for granting an intervention order for a child.

353 See paras 2.27–2.29.

354 *Crimes (Family Violence) Act 1987* (Vic) s 4(3).

355 *Crimes (Family Violence) Act 1987* (Vic) s 4(1)(c).

356 Consultations 1, 8, 20, 27, 33.

357 Consultations 1, 33; Submission 8.

358 Consultations 21, 25.

OTHER JURISDICTIONS

5.18 The New Zealand Domestic Violence Act specifically states that a person who:

- causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
- puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring,

psychologically abuses that child, and has used domestic violence against the child.[359]

5.19 Proposed amendments to the family violence statute in Western Australia will also, if passed, specify that children exposed to violence against a family member have grounds for an order.[360] 'Exposed' is defined to include hearing or seeing the act of abuse, or witnessing physical injuries resulting from the abuse.[361]

THE MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

5.20 The proposed amendments to the Victorian Act will provide that a court may make an intervention order in respect of a child if satisfied that:

- the child has heard or witnessed violence (of the kind described in section 4(1) of the Act); and
- the child is a family member of either the person who has used violence or the person who has been subjected to violence.[362]

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359 *Domestic Violence Act 1995* (NZ) s 3(3). Section 3(3) also provides that the family member who suffers the abuse witnessed by a child cannot be considered to have caused the child's exposure to the violence. The NSWLRC has recommended that a similar provision be inserted into the *Crimes Act 1900* (NSW): see NSW Law Reform Commission (2003), above n 350, 91.

360 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 11, inserting new s 11B. Proposed s 11B states that a restraining order may be made for the benefit of a child if the court is satisfied the child has been exposed to an act of domestic violence against a family member of the child, or if it is reasonably feared that the child will be exposed to an act of domestic violence against a family member.

361 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 5, inserting new definitions into s 3.

362 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 10, inserting new s 4A(1) into the *Crimes (Family Violence) Act 1987* (Vic).

5.21 Under this amendment, the court will be empowered to make an order for child 'witnesses', whether or not they are dealing with an application in relation to the child.

? QUESTION(S)

6. The proposed amendments to the *Crimes (Family Violence) Act 1987* will allow intervention orders to be made in respect of children who have 'heard or witnessed' family violence. Are any further changes needed to increase protection of children who are at risk of exposure to family violence?

VIOLENCE TOWARDS PETS AND OTHER ANIMALS AS A FORM OF FAMILY VIOLENCE

5.22 The use of animal abuse as a form of family violence has become more widely acknowledged in recent years. Overseas studies of women who owned pets during the period they experienced family violence have found that a majority reported threatened or physical violence by the violent family member towards the animal.[363] The violence towards the pet in these situations was another means by which the violent family member could hurt or control the women.

5.23 A recent Victorian study compared the experiences of 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 six per cent and zero per cent respectively in the community sample.[364]

5.24 This issue was considered by the drafters of the Model Domestic Violence Laws.[365] The Model Domestic Violence Laws provide that a court may make a

363 Eleonora Gullone, 'The Relationship Between Animal Abuse and Family Violence' (2002) (2) *Domestic Violence and Incest Resource Centre Newsletter* 3, 7; Frank Ascione, Claudia Weber and David Wood, 'The Abuse of Animals and Domestic Violence: A National Survey of Shelters For Women Who Are Battered' (1997) 5 (3) *Society Animals.*

364 Gullone et al (2004), above n 65, 7–8.

365 See para 4.9.

protection order if the respondent has committed an act of domestic violence and is likely to do so again.[366] An 'act of domestic violence' is defined to include:

> causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person's property.[367]

Proposed amendments to the ACT's family violence legislation will, if passed, include animal violence offences directed at a pet of the person seeking protection in the new definition of 'domestic violence'.[368]

? QUESTION(S)

7. Should the grounds for obtaining an intervention order under the *Crimes (Family Violence) Act 1987* include actual or threatened abuse of animals?

WHO CAN USE THE ACT?

WHO IS A FAMILY MEMBER?

5.25 Whether people are able to use the Act to obtain an intervention order depends on whether they have been subjected to violence by someone who falls within the Act's definition of 'family member'. Unlike the legislation in some jurisdictions,[369] use of the Act is not restricted to partners and children of violent family members. Rather, it covers violence that occurs between a broad range of family members. Consultation participants who commented on this issue supported retaining a broader and more inclusive approach.[370]

5.26 'Family member' is defined broadly in the Act, so that a person may seek an intervention order against:

- a current or former spouse or domestic partner;

366 Domestic Violence Legislation Working Group (1999), above n 258, 58–65.

367 Ibid 18–23.

368 Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 8, amending s 9(1)(f).

369 See, eg, *Domestic Violence Act 1994* (SA) s 3.

370 Consultations 6, 12, 17, 21, 22, 31, 37.

- a person with whom they have or have had an intimate personal relationship;
- a relative;
- a person with whom they normally or regularly live (if the person seeking protection is a child);
- a person who is ordinarily a member of their household; or
- a guardian (if the person seeking protection is a child).[371]

Guardian refers to a person who is legally appointed to protect the rights of another person.

Relatives include parents, grandparents, step-parents, children, grandchildren, stepchildren, siblings, half-siblings, uncles, aunts, nephews, nieces and cousins. 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.[372]

5.27 This definition of family member may not, however, cover everyone who may be involved in family violence. Our consultations suggested that the scope of the Act is limited in a number of ways.

The Need to Recognise Broader Concepts of 'Family'

5.28 The Act 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.[373] Similar issues apply in certain non-English speaking background (NESB) communities.[374]

5.29 The definitions of 'relative' used in some other Australian jurisdictions accommodate broader concepts of family in various ways. For example, the definition used in the Northern Territory *Domestic Violence Act 1992* includes 'a relative according to Aboriginal tradition or contemporary social practice'.[375]

371 *Crimes (Family Violence) Act 1987* (Vic) s 3.

372 *Crimes (Family Violence) Act 1987* (Vic) s 3.

373 Consultations 22, 24, 28.

374 Consultations 12, 32.

375 *Domestic Violence Act 1992* (NT) s 3(2)(a)(vii). Similarly, the NSWLRC has recommended that the definition of a 'domestic relationship' be expanded to include 'relationships according to indigenous customs': see NSW Law Reform Commission (2003), above n 350, 93–97.

5.30 The Queensland legislation takes a different approach and defines a person's 'relative' as 'someone who is ordinarily understood to be or to have been connected to the person by blood or marriage'.[376] The legislation in Queensland therefore avoids including an exhaustive list of recognised relationships. The definition also includes:

> (a) a person whom the relevant person regards or regarded as a relative; or
>
> (b) a person who regards or regarded himself or herself as a relative of the relevant person.[377]

It provides '[e]xamples of people who may have a wider concept of a relative':

1. Aboriginal people.
2. Torres Strait Islanders;
3. Members of certain communities with non-English speaking backgrounds.
4. People with particular religious beliefs.[378]

5.31 We invite submissions about the most appropriate way to define 'family member' and 'relative' to ensure that everyone who needs protection from family members can use the Act.

Violence by Carers of People With a Disability

5.32 In addition to being exposed to violence by partners and other family members, people with disabilities may have a range of paid and unpaid carers and may be dependent on these people for intimate physical care, practical and emotional support, and social interaction. Research shows that an unacceptably high proportion of women with disabilities experience violence and abuse by carers, both in institutionalised and domestic settings.[379] Many women with an intellectual disability, for example, live in institutions, group homes or other forms of supported accommodation where they may be more likely to experience violence in their own home than people who live in more 'traditional' family

376 *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(2).

377 *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(4).

378 *Domestic and Family Protection Act 1989* (Qld) s 12B(4). This provision is similar to a component of the definition of 'relative' in the Model Domestic Violence Laws at s 4(2)(c): Domestic Violence Legislation Working Group (1999), above n 258, 24. Proposed amendments to the ACT legislation use a similar approach: see Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 9, inserting new s 10A.

379 See para 2.11.

homes.[380] Similarly, many women with physical disabilities have been shown to experience abuse by carers and personal assistance attendants.[381]

5.33 While carers who use violence may not usually be considered 'family members', the context in which the violence occurs and the characteristics of the violence may be identical to partner abuse and other forms of abuse that are more widely recognised as family violence. The violence is perpetrated in the domestic environment by people in a relationship of trust or power over the person experiencing violence. Abuse by personal carers is particularly damaging, however, because it can affect a person's ability to engage in daily life as well as his or her wellbeing and safety.[382] A number of commentators have criticised the law's failure to provide redress for the types of violence that women with disabilities most commonly experience.[383]

5.34 While other remedies may be more appropriate in some instances of carer abuse, people with a disability may also require an intervention order against a carer. People with a disability cannot use the Act, however, to obtain an intervention order against a carer who is not a family member unless the carer lives with them, or unless the court makes a finding that they have 'an intimate personal relationship' with the carer.

5.35 This is not the case in some other jurisdictions, such as Queensland[384] and NSW,[385] where the legislation specifically includes carers. In NSW, people who

380 Anne Lawrence and Sally Robinson, 'Access to Injustice?: Domestic Violence and Women with Intellectual Disabilities in Australia' 8 (1) *Polemic* 34.

381 Mary Ellen Young, Margaret Nosek, Carol Howland et al, 'Prevalence of Abuse of Women with Physical Disabilities' (1997) 78 *Archives of Physical Medicine and Rehabilitation* S34, S37; Powers et al (2002), above n 46, 4, 8.

382 Powers et al (2002), above n 46, 4.

383 See, eg, Frohmader (2002), above n 46, 23.

384 Section 11A (1) of the Queensland legislation provides that 'domestic relationship' includes 'an informal care relationship'. An informal care relationship exists if one person is dependent on another (a carer) who helps the person in an activity of daily living: see *Domestic and Family Violence Protection Act 1989* (Qld) s 12C.

385 The definition of 'domestic relationship' in the NSW legislation includes a relationship involving one person's dependence on the ongoing paid or unpaid care of the other person: *Crimes Act 1900* (NSW) s 562A(3)(e). The NSWLRC has recommended the definition of carer be clarified to include a foster carer, so that the relationship between a foster carer and the natural parent of the child be considered a 'domestic relationship': see NSW Law Reform Commission (2003), above n 350, 93–97.

live in the same residential facility are also considered to be in a 'domestic relationship' for the purposes of the legislation.[386]

? QUESTION(S)

8. Is the definition of 'family member' adequate? If not, what other kinds of relationship should be added?

ASSOCIATES OF PROTECTED FAMILY MEMBERS

5.36 In some family violence situations, the family member who uses violence will encourage an associate, such as a friend or a new partner, to harass and intimidate the other family member. In these situations people seeking protection cannot use the Act unless they also have a recognised 'family member' relationship with the associate.

5.37 In such cases, where abuse is perpetrated by a former spouse's new partner or by a relative's friend, there is no recognised family relationship between the person using violence and the person in need of protection. The only option available to the person in need of protection in this situation 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.[387]

5.38 Family violence legislation in some jurisdictions enables a person in need of protection 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 the protected person.[388]

5.39 Another situation that is not covered by the Act is where a friend or other associate of the protected person is threatened or abused by the respondent because of their association with the protected person. Although there is no Victorian data about how often this occurs, a 1997 study of the effectiveness of

386 *Crimes Act 1900* (NSW) s 562A(3)(d).

387 Such an order is made possible by the *Crimes (Family Violence) Act 1987* (Vic) s 5(1)(f). In some situations the person in need of protection may also be able to seek an intervention order under the stalking provisions of the *Crimes Act 1958* (Vic) s 21A. This will only be possible when the person seeking protection can demonstrate that the associate has engaged in a 'course of conduct' with the intention of causing physical or mental harm to the victim or of arousing the victim's fear.

388 See, eg, *Domestic Violence Act 1995* (NZ) s 17.

protection orders in NSW found that the only form of negative behaviour to increase after an order had been made involved approaches by respondents to the family, social and work networks of the protected person.[389]

5.40 Legislation in some jurisdictions enables an order to be made for the protection of the family member and the family member's associates in circumstances where the respondent has threatened or caused them injury, property damage, intimidation or harassment.[390]

? QUESTION(S)

9. Should the *Crimes (Family Violence) Act 1987* enable intervention orders to be made against associates of a respondent when the associate has threatened or engaged in violent behaviour towards the protected person?

10. Should the *Crimes (Family Violence) Act 1987* enable intervention orders to be made for the protection of a protected person's associates when the respondent has threatened to or has engaged in violent behaviour towards the associates?

CHILDREN AS RESPONDENTS

5.41 In 2002–03, 371 finalised applications for an intervention order were made against a child respondent under 18 years of age.[391] Of these, 183 resulted in an intervention order being made. The New Zealand protection order legislation does not allow protection order applications to be made against people under 17 years of age.[392] It has been suggested that a similar prohibition should be considered in Victoria, or that consideration should be given to disallowing the making of an intervention order against a child except in exceptional circumstances. In Western Australia, proposed amendments to the family violence

389 New South Wales Bureau of Crime Statistics (1997), above n 119, vii, 64.

390 See, eg, *Domestic and Family Violence Protection Act 1989* (Qld) s 21.

391 Unpublished court data provided to the Commission by Court Services, Department of Justice on 21 October 2004. The Commission gratefully acknowledges the assistance provided by the Department of Justice, in particular Kelly Burns and Noel Moloney from Court Services.

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

legislation will, if passed, allow intervention orders to be made against a child for no longer than six months.[393]

5.42 The argument in support of this approach is that an intervention order is a serious order, that serious criminal law consequences result if a respondent breaches an order and that alternative approaches to dealing with the use of violence by children and young people may be more appropriate.

? QUESTION(S)

11. Should the *Crimes (Family Violence) Act 1987* be amended to limit the court's ability to make an intervention order against a child or young person under 18 years of age?

INTERIM ORDERS

5.43 The Act allows the court to make an interim intervention order until a final decision is made about the 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 protected person's safety or to preserve the protected person's property.[394] The availability of interim orders is an important aspect of the intervention order system because it provides people with some legal protection between the time the respondent learns of the intervention order application and when the final intervention order is granted or refused.[395]

5.44 The Magistrates' and Children's Courts collect information about whether an interim intervention order was made in relation to finalised applications for an intervention order. However, this information has not been published in the Department of Justice intervention order statistics publications.[396] It is therefore difficult to ascertain how many people apply for interim orders, and how many are successful.

393 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 35, inserting new s 50A.

394 *Crimes (Family Violence) Act 1987* (Vic) s 8(1).

395 Like an intervention order, an interim intervention order does not take effect until it has been served on the respondent: *Crimes (Family Violence) Act 1987* (Vic) s 22.

396 Department of Justice Victoria (2002), above n 270; Department of Justice Victoria (2004), above n 259.

LACK OF KNOWLEDGE ABOUT INTERIM INTERVENTION ORDERS

5.45 It was suggested in our consultations that some people who need an intervention order, particularly those who go directly to the Magistrates' Court without accessing any initial support or legal advice, do not know they can apply for an interim order.[397] The Magistrates' Court form on which applications for an intervention order must be made—Form 1—does not include a question about whether the applicant requires urgent protection.[398] Similarly, the information provided to applicants at court does not alert an applicant to the possibility that she or he may seek an interim order.[399] We are interested in your views about what might be done to ensure that all family members who might need immediate protection are aware that they may seek an interim order.

? QUESTION(S)

12. What might be done to ensure that everyone who requires the more immediate protection of an interim intervention order is aware they may apply for one?

EXTENSIONS OF AN INTERIM ORDER

5.46 If a hearing date is adjourned for some reason, such as not being able to serve the complaint and summons on the respondent, the person seeking protection can apply for an extension of the interim order.[400] In most cases, the extension is granted. In several situations described to us, however, women have been refused an extension of an interim order because the application for extension was heard before a different magistrate who disagreed that there were grounds for the interim order.[401]

397 Consultation 1.

398 Under rule 6 of the *Magistrates' Court (Family Violence) Rules 2000*, an application, or 'complaint', for an intervention order must be made in Form 1. See also Magistrates' Court of Victoria (2003), above n 286, 25–26.

399 See 'Magistrates' Court of Victoria, Information for the Aggrieved Family Member or Victim of Stalking' in Magistrates' Court of Victoria (2003), above n 286, 30–31.

400 *Crimes (Family Violence) Act 1987* (Vic) s 16.

401 Consultations 9, 12, 33.

? QUESTION(S)

13. Should the *Crimes (Family Violence) Act 1987* provide that, if it expires, an interim order should be extended until the application for an intervention order is finalised, unless the circumstances of the protected person have changed?

THE NEED FOR ORAL EVIDENCE

THE CURRENT POSITION

5.47 Section 8(2) of the Act provides that, unless an interim order is sought by the police outside business hours, the court can only make an interim intervention order if the application is supported by oral evidence.[402] In most cases, this means that people seeking protection must attend court and give evidence about what they have experienced and why their safety or their property will be at risk if they do not obtain an interim order.

5.48 By comparison, the NSW legislation allows the court to accept affidavit evidence tendered on behalf of the person in need of protection if the person is unable to be present for any good reason and if the court is satisfied that the matter requires urgent consideration.[403] This makes it easier for people to obtain an interim order if they are injured or if, as a result of their experiences of violence, they are so traumatised they are unable to attend court to give evidence. In New Zealand, the court makes temporary protection orders under the Domestic Violence Act 1995 on the basis of affidavit evidence. Applications for a temporary order are made 'on the papers' by the magistrate in chambers, that is, without requiring the applicant or other parties to appear in court.[404]

An affidavit is a written statement made under oath out of court.

on the papers are when a decision is made based on written material, ie without the parties present or giving oral evidence, while magistrate in chambers refers to when a magistrate makes a decision out of the court.

402 *Crimes (Family Violence) Act 1987* (Vic) s 8(2).

403 *Crimes Act 1900* (NSW) s 562BB(3).

404 Section 84 of the *Domestic Violence Act 1995* (NZ) provides that the court may receive any evidence it thinks fit in proceedings under the Act, other than criminal proceedings.

THE MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

5.49 The Magistrates' Court (Family Violence) Bill 2004 (Vic) proposes to replace section 8(2) of the Act to allow after-hours interim orders to be made provided the application is supported by oral or affidavit evidence.[405]

5.50 The Bill also proposes to insert a new provision enabling a court to admit affidavit evidence despite any rules of evidence to the contrary, except in stalking proceedings arising under section 21A of the *Crimes Act 1958*.[406] This provision would, however, allow a person who has given evidence by affidavit to be called as a witness and cross-examined, with the leave of the court.[407]

Cross-examination is when a witness is questioned by the lawyer from the opposing side. So a witness called by the applicant is cross-examined by the respondent or the respondent's lawyer.

? QUESTION(S)

14. The proposed amendments will, if passed, remove the requirement that family violence interim intervention orders be supported by oral evidence. Are further changes needed to increase the likelihood that interim orders will be granted without the person seeking protection being required to give oral evidence?

PROCESS BY WHICH AN INTERIM ORDER BECOMES A FINAL ORDER

5.51 If an interim order is made the court will summons the respondent to appear at a hearing on a certain date. If the respondent does not attend the hearing the court may hear the application and make a decision about whether or not to grant a final order in his or her absence.[408] For a final order to be made at this stage, the magistrate must hear evidence and make a decision about whether

405 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 13, amending s 8(2) of the *Crimes (Family Violence) Act 1987* (Vic). Under the proposed s 8(2), applications for stalking interim intervention orders will still require oral evidence.

406 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21A(1) into the *Crimes (Family Violence) Act 1987* (Vic). This provision does not apply to applications for stalking intervention orders pursuant to s 21A of the *Crimes Act 1958* (Vic).

407 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21A(2) into the *Crimes (Family Violence) Act 1987* (Vic).

408 *Crimes (Family Violence) Act 1987* (Vic) s 12.

there are grounds for a final intervention order to be made. This means the applicant must attend court on the hearing date and argue the need for an intervention order again, after having already done so to obtain the interim order. When the person in need of protection is not the applicant, the person in need of protection will also usually have to attend court and give evidence a second time.

5.52 An alternative approach, which also reduces the need for repeat attendance at court by the person in need of protection, is used in some other jurisdictions. Under the *Domestic Violence Act 1995* (NZ), for example, when a temporary protection order is made respondents are entitled to give notice that they intend to defend the order. If no such notice is given after three months, the order automatically converts to a final order.[409] This approach reduces the number of times that people seeking protection from family violence have to attend court. It also removes the need to give evidence and argue the need for protection at two separate hearings.

5.53 A similar approach is proposed in the Domestic Violence and Protection Orders Amendment Bill 2004 (ACT). Under these amendments, if an interim order is made in the respondent's absence, the respondent is sent an 'endorsement copy' of the order with instructions about how to complete it. The interim order becomes final:

- if the respondent completes the 'endorsement copy' and indicates that he or she does not object to the interim order becoming final; or
- if the respondent does not return the 'endorsement copy' to the Magistrates' Court at least seven days before the return date for the application for the final order.[410]

Under this approach, the court will only conduct a hearing in relation to a final order if the respondent notifies the court, within a specified period, that he or she objects to the interim order becoming a final order.[411]

5.54 Some consultation participants viewed such an approach unfavourably because of concerns it would disadvantage respondents with low literacy or who do not read English.[412]

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409 *Domestic Violence Act 1995* (NZ) s 76. See also *Restraining Orders Act 1997* (WA) ss 31–32.

410 Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 28, inserting new s 51A(1)–(4).

411 Ibid clause 28, inserting new s 51A(5).

412 Consultations 3, 5, 34.

? QUESTION(S)

15. Should the *Crimes (Family Violence) Act 1987* provide for a process by which an uncontested interim order automatically converts to a final order in certain circumstances? If so, when should this occur?

AFTER-HOURS INTERIM ORDERS

ACCESSING INTERIM ORDERS OUTSIDE BUSINESS HOURS

5.55 The availability of after-hours interim intervention orders is especially important because the majority of family violence incidents occur at night and a greater number occur on weekends.[413] The Act enables a member of the police force to apply for an interim intervention order by telephone or facsimile machine before 9am or after 5pm on any weekday, or on a weekend or public holiday.[414] Only the police may use this process to apply for interim orders.

5.56 During our consultations, the most common concern raised about after-hours applications was that some people who need an interim intervention order outside ordinary business hours find the police reluctant to apply for one. Current police policy states that police must apply for an intervention order wherever a criminal offence is involved or the safety, welfare or property of a family member appears to be endangered by another. It also requires police to seek a complaint and warrant where there is a need for immediate action.[415] As after-hours applications for an interim intervention order are usually made urgently to protect a family member's immediate safety, such applications should be issued in the form of a complaint and warrant.[416] As we discuss in Chapter 7, it seems this policy is not consistently applied, for either after-hours interim applications or other intervention order applications.[417] There is little court or police data available regarding the number of interim intervention orders the police apply for after-

A complaint is a formal accusation of a crime occurring.

413 Victoria Police (2003), above n 30, 133; Victoria Police, *Crime Statistics 2001/02* (2002) 133.

414 *Crimes (Family Violence) Act 1987* (Vic) ss 8(4)–(10).

415 *Crimes (Family Violence) Act 1987* (Vic) s 9(1); Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-4, para 6.1; see also Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-4, para 6.1.

416 This means that the police must arrest the respondent.

417 See paras 7.36–7.45.

hours. The only available data that may provide some indication of the number of after-hours orders sought by police is information about the time of day that police members leave family violence incidents where they have sought a complaint and warrant.[418]

5.57 It is particularly problematic if the police refuse to apply for an after-hours order on behalf of a person who needs protection, because that person has no other way to obtain an interim order. A number of consultation participants gave examples of clients who had contacted the police during the night for help with an urgent intervention order and were told they would have to go to the court and apply for an interim order themselves the next weekday morning.[419]

IMPROVING ACCESS TO AFTER-HOURS ORDERS

Allowing People Besides Police to Apply for After-Hours Orders

5.58 There are several options for improving people's access to interim intervention orders outside ordinary business hours. One suggestion involves enabling persons other than the police to apply for an urgent interim intervention order outside business hours.[420] The South Australian legislation allows telephone applications to be made by persons other than police officers, such as certain family violence workers, if the applicant is introduced by a member of the police force and establishes his or her identity and official position in a manner acceptable to the court.[421]

Improving Consistency of Police Action

5.59 Another option would be to improve consistency of police response to persons who require an interim intervention order outside business hours. The new Victoria Police Code of Practice for the Investigation of Family Violence provides that an interim order 'may be sought…where police are required to take immediate action'.[422] This still leaves discretion to individual officers. The code of practice does not specifically address police obligations regarding after-hours

418 This information has been provided by Victoria Police and is attached in Appendix 3.

419 Consultations 1, 5, 12, 23, 33.

420 Consultation 12.

421 *Domestic Violence Act 1994* (SA) s 8(1)(a)(ii).

422 Victoria Police (2004), above n 134, para 5.4.1.

applications, except to state that police may apply for an interim order 'after-hours by contacting the after-hours registrar'.[423]

5.60 By comparison, the NSW legislation places a duty on police officers to apply for a telephone interim order if they believe a family violence or child abuse offence has recently been committed, is being committed, is imminent or is likely to be committed.[424] The NSWLRC has recommended police also be required to apply for a telephone interim order if the respondent is charged with a domestic violence offence, unless an order is already in place.[425]

Improving Process for Police After-hours Applications

5.61 Police members who participated in our consultations also raised concerns about the process they must use when applying for an interim intervention order by telephone.[426] Police must complete a 'form of complaint' setting out the grounds on which the order is sought before applying for the order by telephone.[427] The 'form of complaint' must be signed in front of a supervising officer.

5.62 Police members in some regional areas said that when attending a family violence incident that is some distance from the police station, this requirement is problematic and time consuming.[428] Travelling back to the police station can take several hours. If there are no grounds to arrest the violent family member without a warrant being obtained, that person is left behind and has the opportunity to destroy family property and/or leave the area to avoid service of any intervention orders.[429] In such cases the police usually also have to take the family members in need of protection, generally women and children, back to the station with them for their protection. This process results in the removal of the protected family members from the home, and maximises disruption to these family members.[430]

5.63 Various suggestions to streamline the process were made. One option is to enable police officers to obtain an interim order by telephone without completing

423 Ibid.

424 *Crimes Act 1900* (NSW) s 562H (2A)–(2B).

425 NSW Law Reform Commission (2003), above n 350, 136–142.

426 Consultation 20; Submission 5.

427 *Crimes (Family Violence) Act 1987* (Vic) s 8(5).

428 Consultations 10, 20.

429 Consultations 10, 20; see also Submission 5.

430 Consultations 20, 27.

a 'form of complaint' prior to making the application. The legislation could be amended to require that telephone application proceedings be tape recorded, as is the case in South Australia, to provide a record of the basis for the application.[431]

Introducing New Police Holding Powers

5.64 Another option that has been considered by some members of Victoria Police is to introduce a new power for police to detain or remove a person while they obtain an interim intervention order or a complaint and warrant.

5.65 The police already have a power to arrest the respondent in some situations, and for these situations a new holding power is not necessary. This is the case where the police have a power to arrest the person under sections 458 and 459 of the *Crimes Act 1958*—such as where the person has been found committing an offence or the police have a reasonable belief that the person has committed an indictable offence. In other situations, however, the police have no power to detain a person and, as was suggested by police during our consultations, a prospective respondent has an opportunity to abscond while the police are obtaining the interim order.[432]

5.66 Several other jurisdictions provide police with powers to detain and hold people while they are applying for an interim order. In Western Australia, a police officer may detain a prospective respondent for up to two hours while a telephone application is made.[433] NSW police also have the power to detain a person while making a telephone application for an interim order in relation to that person, if the person refuses to remain at the scene of the incident until the application is made.[434] In Queensland, a police officer who has reasonable grounds to suspect that an act of domestic violence has been committed and that a person is in danger of personal injury, or a person's property is in danger of being damaged, may take the respondent into custody until an application for a temporary order is decided or other arrangements made to safeguard the person in need of protection.[435]

Empowering Police to Issue Interim Orders

431 *Domestic Violence Act 1994* (SA) s 8(2)(b).

432 See para 5.62.

433 *Restraining Orders Act 1997* (WA) s 22.

434 *Crimes Act 1900 (NSW)* s 562H(12).

435 *Domestic and Family Violence Protection Act 1989* (Qld) s 69.

5.67 Another suggestion made is that senior police be empowered to issue interim intervention orders, either by telephone or in person.[436] Until now, no jurisdiction in Australia has allowed police to issue intervention orders.[437] However, if passed, the amendment Bill that is currently before the Western Australian Parliament will enable police to issue temporary orders, which would restrain the respondent in the same way as a court-imposed order.[438] The Bill provides that police may make a 'police order' if:

- they reasonably believe it would not be practical for an application to be made in person because the application is urgent or is required after-hours; and
- they reasonably believe a person has committed an act of domestic violence and is likely to do so again, or a child has been exposed to an act of domestic violence and is likely to be again; or
- they reasonably believe that another person fears a person will have an act of domestic violence committed against them, or that a child will be exposed to domestic violence.[439]

The Bill allows orders to be made for either 24 hours or 72 hours. The 72-hour order is intended to provide police with enough time to apply for a court-imposed order using the usual provisions of the Act, and lapses if it is not served on the respondent within 24 hours.[440] The police cannot impose a 72-hour order without the consent of the person in need of protection.[441] The 24-hour order simply remains in force for 24 hours, but lapses if it has not been served on the respondent within two hours.[442]

436 Consultation 12; see also Submission 5.

437 The *Domestic Violence Amendment Act 2001* (NT) inserted provisions into the *Domestic Violence Act 1992* (NT) that would allow police members ranked senior sergeant or above to make an interim order for no longer than 48 hours: see new pt 2A. However, the enabling regulations have not been promulgated and these provisions have not taken effect.

438 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new div 3A.

439 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new s 30A.

440 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new s 30F(3).

441 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new s 30G.

442 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new s 30F(2).

5.68 The NSWLRC has recommended that where 'an authorised justice' cannot be contacted, a police officer above the rank of Inspector may grant a telephone interim order, which shall be in force for 48 hours.[443]

? QUESTION(S)

16. Are any changes required to improve the process of obtaining interim intervention orders outside ordinary business hours?

17. Should others besides members of the police force be able to apply for interim intervention orders outside business hours? If so, who?

UNDERTAKINGS

5.69 Another issue raised in our consultations is that some people seeking protection are persuaded, either by the magistrate, the respondent's lawyer, their own support worker or a combination of all three, to accept an undertaking in place of an intervention order.[444] When respondents make an undertaking to the court, they agree to refrain from behaving in a certain way, such as assaulting, harassing, molesting 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, and an undertaking has no legal effect. 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.

5.70 Under the Magistrates' Court of Victoria *Family Violence and Stalking Protocols*, the giving of an undertaking results in the applicant withdrawing the application.[445] The applicant is given a 'right of reinstatement', which means that if the respondent breaches the undertaking, the applicant may write to the court and the application will be reinstated without the applicant having to complete another complaint, or application.

5.71 Although data on undertakings is now recorded by the Magistrates' Court, the recent Department of Justice intervention order statistics publication[446] does

443 NSW Law Reform Commission (2003), above n 350, 136–142.

444 Consultations 5, 11, 21, 26, 32, 36.

445 Magistrates' Court of Victoria (2003), above n 286, para 19.1.

446 Department of Justice Victoria (2004), above n 259.

not include information about the number of finalised applications for a family violence intervention order that result in an undertaking being made as an alternative to an intervention order.

5.72 In some situations, for example where people seeking protection are unlikely to obtain an order because there is minimal evidence to support their application, an undertaking from the respondent may be their best outcome.[447] Consultation participants indicated, however, that some people agree to an undertaking under pressure and without understanding that the undertaking is unenforceable and has no legal effect.[448] There is also concern that undertakings are being used inappropriately in situations in which an intervention order is required and warranted.[449]

5.73 The Magistrates' Court Protocols state that:

> Registrars should confirm with the parties upon delivery of the order at Court that Victoria Police will *not* enforce an undertaking made to the Court.[450]

5.74 The Protocols also provide that an undertaking document should not look like a court order, and that it should state '[t]his is not an intervention order'.[451] These provisions help to avoid confusion about the nature of the order after it has been made, but they do not ensure that a person seeking protection is fully aware of the consequences of accepting an undertaking from the respondent before they do so. Information obtained during one consultation suggests that despite the Magistrates' Court Protocols, some Magistrates' Court registries have provided written or verbal information stating that an undertaking has the same effect as an intervention order, although the practice has now been stopped.[452]

? QUESTION(S)

18. What changes are needed to ensure undertakings are only used when it is safe and appropriate to do so?

447 Consultations 11, 32.

448 Consultations 11, 36.

449 Consultation 2.

450 Magistrates' Court of Victoria (2003), above n 286, para 19.1.

451 Ibid.

452 Consultation 11.

? QUESTION(S)

19. What changes will ensure that people seeking protection from family violence fully understand the consequences of accepting an undertaking from the respondent to the court before agreeing to withdraw their application?

DURATION AND EXTENSIONS OF INTERVENTION ORDERS

THE COURTS' APPROACH TO DURATION OF ORDERS

5.75 The Act gives magistrates the discretion to decide whether to make an order for a specific period of time or for an 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.[453] Most other jurisdictions in Australia have similar provisions regarding the duration of intervention orders. However, the legislation in the ACT and Queensland provides that protection orders must be made for no longer than two years, unless special circumstances exist.[454] The NSW legislation is also slightly different, in that it provides that an order will last for six months if no time limit is specified.[455]

5.76 In Victoria in 2002–03, 57.3% of family violence intervention orders were made for a period of one year or less and 17.2% of orders were made for between one and two years.[456] Only 11.5% of family violence orders were made for longer than ten years or were of indefinite duration.[457] The published data does not provide separate information about how many intervention orders were made for an indefinite period, that is, to remain in place until revoked or until further court order. Since 1999–2000, when 16.3% of orders were made for ten years or longer, the proportion of family violence intervention orders that have been made for

453 *Crimes (Family Violence) Act 1987* (Vic) s 6.

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

455 *Crimes Act 1900* (NSW) s 562E(1)–(3). The NSWLRC has recommended that the default duration be extended to 12 months: see NSW Law Reform Commission (2003), above n 350, 153–162.

456 Department of Justice Victoria (2004), above n 259, 65.

457 Ibid.

periods of longer than ten years or for an indefinite period has decreased each year.[458]

5.77 The Act does not provide criteria to guide magistrates' decisions about whether they should make an intervention order that lasts indefinitely, or whether they should limit the operation of the order to one year or another specific period of time.[459]

GETTING AN EXTENSION OF AN INTERVENTION ORDER

5.78 When considering the best approach to the duration of intervention orders, it is important to consider the position that protected persons are in when their order expires. The Act enables a protected person to apply for an intervention order to be extended, provided the order is still in force and has not yet expired.[460] It does not guide magistrates' decisions about whether or not an extension should be made.[461]

5.79 In 2002–03 a total of 769 people had an application to extend an intervention order finalised.[462] This number includes stalking and family violence matters as the published statistics regarding extensions do not separate applications for stalking intervention orders from those for family violence.[463] Of all applications for an extension finalised in 2002–03, 97.6% were granted and the intervention order was extended.

5.80 A number of consultation participants said that from time to time extensions are refused on the basis that the respondent has not acted in a violent

458 Ibid. Prior to 1999–2000 very few orders were made for long periods—in 1998–99 only 0.6% of intervention orders made were for longer than ten years. This is related to the fact that until June 1997 the Act did not allow magistrates to make an order without specifying a period for its duration.

459 We do not have any recent information on magistrates' views about what they should take into account when deciding the duration of an order. In her 1992 interviews with magistrates, at which time the Act allowed for orders of no longer than 12 months to be made, Rosemary Wearing found that magistrates held a variety of views about whether it was preferable to make longer or shorter orders: see Wearing (1992), above n 3, 178–180.

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

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

462 Department of Justice Victoria (2004), above n 259, 106.

463 We can tell from the published data, however, that in 154 applications the parties were 'non-family members' and that of the 769 people who had an extension application finalised, 39.4% were a domestic partner or former domestic partner of the respondent: see ibid 106–107.

or threatening way for the period the order has been in force.[464] According to this reasoning, the lack of recent violence means there is no evidence on which to grant an extension of an order.

5.81 A related issue is that some protected persons are not aware their order is due to expire, and do not seek an extension before it expires. These people must then make a new application, repeat the initial process, and show they have grounds for an intervention order under section 4(1) of the Act. Consultation participants indicated that some people in this situation are refused an intervention order because there has been no violence against them since the original order was made.[465] 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.[466]

5.82 Whether protected people apply for an extension, or whether the order expires and they have to apply for a new order, they must return to court and confront the legal system again to maintain the protection offered by the intervention order. As we discuss in Chapters 6 and 7, most people who have experienced violence find contact with the court and the legal system intimidating and traumatic.[467] Returning to court to renew an order every year can be difficult and distressing for a protected person. On the other hand intervention orders are serious orders that, if enforced, carry significant consequences for a respondent. It is arguably inappropriate to restrict respondents' conduct for long or indefinite periods of time.

5.83 Various options to improve the safety provided by intervention orders and to minimise distress and risk faced by protected persons were suggested during our consultations. These included:

- amending the Act so that orders are made until further order except in special circumstances or where the magistrate has reason to believe that the risk to the protected person will only last for a specific period of time;

464 Consultations 9, 12, 33.

465 Consultations 12, 33.

466 Although the study is now dated, the majority of magistrates in Rosemary Wearing's 1992 research indicated that they would only grant an extension in certain circumstances, in particular if there was strong evidence to support an extension. See Wearing (1992), above n 3, 180–183.

467 Consultations 1, 9, 20.

- introducing administrative procedures so that if an order is made for a specific period, the protected person receives notice when the intervention order is due to expire; and
- amending the Act to set out the matters that a magistrate must take into account when considering an application for an extension of an intervention order.

? QUESTION(S)

20. Is the current approach to determining the duration of intervention orders appropriate?

21. What changes would improve the protection provided to protected persons at the time their intervention order expires?

VARIATIONS AND REVOCATIONS

5.84 Under the Act, the respondent, the protected person or the applicant (if the police or someone other than the protected person applied for the order) can apply to have an intervention order varied or revoked.[468] This means the police cannot apply for a variation to—or revocation of—an intervention order unless they applied for the initial order. There may be some situations where the terms of an order need to be changed, perhaps because of additional violence that occurs after the initial order has been made, and so it is appropriate for the police to seek a variation on behalf of the protected person.

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.

? QUESTION(S)

22. Should the police be able to apply for variations to an intervention order when they did not apply for the original order? Should the protected person's consent be required for this to occur?

468 *Crimes (Family Violence) Act 1987* (Vic) 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.

5.85 As is the case for applications for extensions of orders, the Act does not indicate when a revocation or variation should be made, or what matters a magistrate must take into account before granting a variation or revocation. Several consultation participants said the process that applicants and protected persons must go through to get a variation of the order should be simpler. A simpler process may reduce the number of breaches that occur because circumstances have changed, such as the protected person wanting to resume communication with the respondent.[469] It was suggested that an application for a variation could be made by affidavit and dealt with 'on the papers' and in chambers, with a provision for the magistrate to require the parties to attend a hearing if they are not satisfied that the variation sought would maintain adequate protection.[470]

5.86 Conflicting suggestions were made during the consultations about whether it should be made more or less difficult to have an order revoked. Some participants said it should be easier for protected people to get a revocation.[471] Others said provisions should be put into place to ensure magistrates only revoke an order when satisfied that circumstances have changed since the order was made, the revocation is not sought as a result of pressure placed on the protected person, and it is safe to revoke the order.[472]

5.87 It was also stated that some respondents repeatedly apply for variations to, or revocations of, an intervention order as a means of continuing to harass the protected person.[473] We discuss this issue, as well as other ways in which the Act can currently be misused, in Chapter 10.[474]

5.88 In 2002–03, there were 903 applications to revoke an intervention order finalised, of which 77.1% were granted.[475] In 21.2% of these applications, the order was not revoked but was varied.[476] In the same year, 835 applications to vary an intervention order were finalised and the majority of these (97.2%) were

469 Consultations 1, 5, 10, 21, 27.

470 Consultation 1.

471 Ibid.

472 Consultation 38.

473 Consultation 33.

474 See paras 10.60–10.71.

475 Department of Justice Victoria (2004), above n 259, 116.

476 Ibid 116.

granted.[477] These figures include applications to revoke both family violence and stalking intervention orders, as data specific to family violence orders has not been included in the published Department of Justice intervention order statistics. There is no published data to indicate what proportion of finalised applications to vary and revoke orders were made by protected persons and what proportion were made by respondents.

? QUESTION(S)

23. Should the process of seeking a variation or revocation be made easier for protected persons?

24. Should the *Crimes (Family Violence) Act 1987* require that the court is satisfied that:

    - when a protected person is seeking a variation or revocation, the application does not result from pressure on, or coercion of, the protected person; and
    - the revocation or variation, if granted, will not compromise the safety of any protected family member

before granting a variation or revocation?

25. Are any other changes required to improve the revocation and variation provisions in the *Crimes (Family Violence) Act 1987*?

5.89 The Office of the Public Advocate (OPA) raised a particular issue in relation to revocation of orders that have been obtained by guardians on behalf of people they represent.[478] They provided an example of a recent case where they had obtained an intervention order on behalf of a person for whom they 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, 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,

477 Ibid 110.

478 Submission 6.

so the issues were not raised before the court. However, OPA argue that only the guardian should be able to apply for any change to an order if the person's guardian obtained the order. OPA submit that this should be clarified in the Act.

? QUESTION(S)

26. If the guardian of a person in need of protection obtains an intervention order, should the *Crimes (Family Violence) Act 1987* stipulate that only the guardian has the authority to bring any application for variation, revocation or extension of the order?

Chapter 6
Barriers to Accessing Intervention Orders

INTRODUCTION

6.1 Any reform of the intervention order system must consider and address the barriers that prevent people who are subjected to violence from accessing the system. In this Chapter, we discuss some of these barriers and seek suggestions for how to address them.

6.2 There are many factors that can prevent a person who is experiencing violence from applying for an intervention order, or indeed from seeking any assistance. First, we examine general barriers that affect people throughout the community. We then look at issues that particularly affect certain people in the community, namely people from non-English speaking backgrounds, Indigenous people, people with disabilities and people in same-sex relationships.

SOCIETAL AND PRACTICAL BARRIERS TO INTERVENTION ORDERS

6.3 A threshold barrier to the intervention order system can exist if people do not identify the behaviour they are subjected to as family violence. Although community awareness about family violence has increased, many people still do

not recognise family violence as unacceptable or potentially criminal behaviour. In particular, people may not recognise non-physical abuse, such as financial abuse or psychological abuse, as a form of family violence.[479] Women may also be less likely to identify sexual abuse by an intimate partner as family violence.[480]

6.4 Alternatively, people may be aware they have experienced family violence, but may not know what options, including legal options, are available to them. Being in a family violence situation may mean that a person is isolated from such information, and from friends and family members who may otherwise provide it.[481] Even among people who know about the intervention order system, many people do not know how to apply for an order or where to get support to do so.[482]

6.5 A person may also be discouraged from accessing the intervention order system because of societal and institutional attitudes towards family violence. Family violence is still considered by many to be a private matter and there is some community reluctance to fully acknowledge and address it.[483] This means people may be afraid they will be disbelieved, judged or blamed if they speak out about their experience of violence.

> 'I hate this domestic shit' is what they said. I always used to feel so guilty about why I didn't go through with the restraining orders.[484]

In addition to fearing a judgemental or blaming response, people may be prevented from disclosing family violence because they feel shame and that they are responsible for the abuse.[485]

6.6 People may be especially reluctant to involve the justice system if they have previously received a negative response when they sought assistance. Our consultations found that some women who contact the police or go to court to get an order are deterred because they feel judged by the police officer or the court

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479 Consultations 9, 12.

480 Denise Lievore, *Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims Decisions to Seek Criminal Justice Solutions,* Australian Institute of Criminology <www.aifs.gov.au/institute/afrc8/lievore.pdf> at 18 August 2004, 5; Heenan (2004), above n 66, 16–17.

481 Consultations 5, 21, 29.

482 Consultations 1, 5.

483 Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (2001) 109, 102.

484 Keys Young (1998), above n 60, 55.

485 Partnerships Against Domestic Violence (2000) 'Attitudes to Domestic and Family Violence', above n 197, 21.

staff member they speak to.[486] Consultation participants said women who have repeatedly contacted police in relation to family violence, and have then returned to live with the person who has used violence against them, find it especially difficult to obtain assistance.[487]

6.7 One of the obvious factors that prevents people subjected to violence from a family member is fear of retaliation by that person. In addition, for many women, accessing the intervention order system means separating from their partner—if it is their partner who has used violence against them—or removing themselves from their family. There are, of course, many social, emotional and financial considerations that prevent women from doing this. Our consultation findings suggest that many women do not take any action about family violence because they know they will have to leave their homes.[488] These women are understandably reluctant to leave their community, disrupt their children's schooling, and leave their homes and belongings with the person who has used violence and who may vandalise or destroy them. The likelihood they will have to leave home is also a significant obstacle for people who cannot access appropriate refuge accommodation. Women with male children who are older than 12 years of age, for example, may not be eligible for refuge accommodation for their whole family.[489]

6.8 Another practical barrier is that many people do not want to become involved with the legal system. Participants in our consultations said that fear of having to appear in court to give evidence, to argue their case and to face the respondent are all factors that prevent some women from applying for an intervention order.[490] The prospect of having to discuss personal experiences of abuse in a public forum can be especially confronting for people in smaller communities or from some cultural backgrounds.[491] People with a criminal record,

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486 Consultations 5, 12, 14.

487 Consultations 14, 36, 37. We note that training and professional development of magistrates, court staff, police and various other professionals that people seeking help about family violence may come into contact with, is a planned component of the forthcoming Family Violence Courts at Heidelberg and Ballarat. The training and professional development will aim to 'increase awareness and understanding…of the special dynamics and needs of family violence cases': information provided to the Commission by Court Services, Department of Justice, October 2004.

488 Consultations 26, 28. This issue applies to women who know about the intervention order system as well as those who do not.

489 Consultations 18, 23.

490 Consultations 4, 12, 26.

491 Consultations 5, 33.

or who have outstanding warrants, are also likely to be hesitant to invoke the legal system for help.[492] In one example provided during our consultations, a woman was charged with an outstanding offence when she went to the police station for help to obtain a family violence intervention order.[493]

6.9 For women with children, fear of child protection services can be an additional factor that prevents them from seeking protection using the legal system. This issue potentially affects all women with children. However, because of the historical context of child removal policies and their devastating effects on Indigenous communities, fear of child protection intervention is especially strong among Indigenous women who are subjected to violence.[494] This was also raised as a major concern for women with disabilities, who fear if they leave their partner child protection authorities may decide they are not capable of caring for their children on their own due to their disability.[495]

6.10 Some people who have been subjected to family violence are reluctant to expose the person who has used violence to the criminal justice system.[496] Many workers we consulted told us that 'women do not want their partners to go to jail—they just want the violence to stop'.[497] People perceive, sometimes correctly, that using the intervention order system will result in the involvement of the police and the criminal justice system.[498]

6.11 Finally, the fact that people do not think the intervention order system works may compound their reluctance to use it. During our consultations, we were repeatedly told that 'women think an intervention order is not worth the paper it is written on'.[499] Similar views were expressed in consultations with Indigenous workers and Indigenous Family Violence Action Groups.[500] We discuss the effectiveness of intervention orders in more detail in Chapter 9.

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492 Consultation 5.

493 Consultation 28.

494 Consultations 8, 12, 14, 17, 22, 26, 28, 34.

495 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

496 Consultation 21.

497 Consultations 20, 33, 39.

498 As we discuss in Chapter 3, although the intervention order system is a civil system in the first instance, the enforcement of the system requires involvement of the police and a criminal justice response: see para 3.17.

499 Consultations 7, 10, 21, 23, 26, 28, 33, 34, 36, 38, 39.

500 Consultations 4, 6, 28.

ADDITIONAL BARRIERS FOR PARTICULAR GROUPS

6.12 During our consultations, additional barriers that affect particular groups of people within the community were raised. In addition to the issues discussed above, consultation participants said that Indigenous people, people from non-English speaking backgrounds, people with disabilities and people in same-sex relationships can face specific obstacles that stop them from seeking protection through the legal system. These barriers are aggravated by societal and institutional racism, homophobia, prejudice against people with disabilities or other discrimination, and an individual may be affected by several of these barriers.

6.13 Barriers that are related to police response to specific communities were raised throughout our consultations. We note that Victoria Police have included information and directions about responding to diverse communities in the new Victoria Police Code of Practice for the Investigation of Family Violence, in recognition that certain groups 'need additional consideration when faced with family violence'. [501]

PEOPLE FROM NON-ENGLISH SPEAKING BACKGROUNDS

6.14 There are significant barriers to the intervention order system for women from non-English speaking backgrounds, especially newly arrived migrant women and refugees. Women from non-English speaking backgrounds may have varied understandings of what behaviour constitutes family violence.[502] There is currently a lack of culturally specific and relevant community education about violence and about how to obtain assistance with family violence.[503] One issue raised with us was the need for community and culturally specific educational programs to raise

501 Victoria Police (2004), above n 134, para 2.5.6.

502 Partnerships Against Domestic Violence (2000), 'Attitudes to Domestic and Family Violence', above n 197, 36; Edna Erez, 'Immigration, Culture Conflict and Domestic Violence/Women Battering' (2000) 2 (1) *Crime Prevention and Community Safety: An International Journal* 27–29; Melba Marginson, 'Increasing Access for Filipina Survivors of Domestic Violence' in *Not the Same* (1996), above n 56, 19.

503 Partnerships Against Domestic Violence (2000), 'Attitudes to Domestic and Family Violence', above n 197, 40, 41.

awareness about family violence, the legal options available to people who experience family violence, and the intervention order process.[504]

6.15 Alternatively, a woman may be aware she is experiencing family violence but choose not to seek outside assistance to stop the abuse. The stigma of separation is severe in some communities, and some women from non-English speaking backgrounds risk 'losing everything' by being ostracised within their community if they take action against a violent family member.[505] Moreover, some community workers encourage women to reconcile with their husband or partner and dissuade them from accessing support to leave violent relationships or to stop the violence.[506] This may be motivated by either a concern about the image of the community in the broader Australian society or by community workers' own beliefs about cultural norms.[507] A woman's decision about disclosure may also be influenced by cultural beliefs about family and duty.[508]

6.16 Migrant women may be further discouraged by the practical implications of accessing the intervention order system. Women who are not confident speaking English have limited access to interpreters.[509] In smaller communities, women may also be concerned they will know their interpreters or that interpreters will not maintain confidentiality.[510]

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504 Consultations 5, 11, 13, 33, 37; VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

505 Erez (2000), above n 502, 30; Partnerships Against Domestic Violence (2000), 'Attitudes to Domestic and Family Violence', above n 197, 40.

506 Terry Kaufman and Anne Sietz, *Who Will Protect Her?: Ethnic Communities' Perceptions of Family Violence and Child Sexual Abuse: Phase 3: Arabic-Speaking and Turkish Communities* (1995) 164; VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

507 See Kaufman and Sietz (1995), above n 506, 164. By comparison, it has been raised with us that community workers who work in the area of family violence can face hostility within their communities, and also that most family violence work within non-English speaking background communities is conducted by community workers rather than mainstream family violence workers: VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

508 Erez (2000), above n 502, 30. It was noted, however, that it is important to avoid the assumption that violence against women is more acceptable in some cultures than in others: VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

509 Consultations 5, 18, 33, 40.

510 Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003) 67; see also Consultations 18, 33.

6.17 Migrant and refugee women may also be reluctant to seek help because they are uncertain about their residency status.

> He used to threaten me constantly that he would send me back to Poland without the children if I did not do what he wanted. The lawyer the refuge found for me has told me that he can't do that and that's made a big difference to me. I can now plan for a good future for me and the children.[511]

Migrant women on spouse or partner visas may fear deportation if they do not know, or are misinformed, about the domestic violence provisions in the Migration Regulations.[512] Migrant women, especially those on sponsored visas, may be particularly dependent on their partner financially and otherwise.[513]

6.18 Finally, it was raised in various consultations that the Australian legal system in general, and the intervention order system in particular, are alien and unfamiliar to many migrant and refugee women.[514] One worker commented that even finding the language to explain the system can be difficult.[515] Women who do not or cannot access culturally relevant support and information about the intervention order system and the protection it can offer are unlikely to see the legal system as a source of assistance. This issue is particularly relevant for refugee women who have experienced persecution or harassment by authorities in their country of origin.[516]

INDIGENOUS PEOPLE

6.19 Indigenous people face unique barriers to using the intervention order system. The intervention order system can be culturally inappropriate and inaccessible.[517] The intervention order system is not seen as providing what is needed or wanted to address family violence in Indigenous communities.[518]

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511 Vic Health (2004), above n 82, 14.

512 Erez (2000), above n 502, 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; Lievore (2003), above n 510, 66; Consultation 18.

513 Erez (2000), above n 502, 29.

514 Consultations 5, 18, 41.

515 VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

516 Consultations 5, 18.

517 Consultations 4, 20, 28, 36, 37.

518 Consultations 4, 6, 14, 15, 17, 26, 28, 37.

Moreover, there is a lack of culturally appropriate support and accommodation services for Indigenous women, men and children.[519] Indigenous people living in more remote communities may also have difficulty travelling to the court.[520]

> There is a lack of services in Victoria, with only one Indigenous Specific Statewide Women's Refuge. There are no services for men's support/rehabilitation. Lack of housing options keeps families in a domestic violence situation. We need family centres as healing places to heal families as a whole.[521]

6.20 Fear of institutional racism within the legal system prevents many Indigenous people from accessing the system for help. Many do not want to involve the police because they have experienced or have heard about police racism.[522] Indigenous women who experience violence perpetrated by a non-Indigenous partner think they will not be believed if they report the abuse.[523] Institutional racism can take many forms. In one form, racist stereotypes about Indigenous women can normalise abusive behaviour towards them leading law enforcement personnel to dismiss or disregard their calls for assistance.[524] In another form, it leads to Indigenous women being more likely to have charges laid against them because of their physical resistance to abuse.[525]

> It is a big step for an Aboriginal woman to go to the police or to the court, because of fear about the police and the legal system and because so many Aboriginal people have died in custody.[526]

6.21 As suggested in the above quote, Indigenous people may also be reluctant to use the intervention order system because they think justice system intervention is likely to result in the incarceration of a family member[527] or the involvement of

519 Consultations 6, 17, 22, 26, 28, 37.

520 Consultation 6.

521 Victorian Indigenous Family Violence Taskforce, (2003), above n 73, 203.

522 Consultations 4, 14. See also Elizabeth Hoffman House (2004), above n 114, 32.

523 Consultations 4, 6.

524 Partnerships Against Domestic Violence (2000), 'Crisis Intervention', above n 114, 24; Blagg (2002), above n 208, 197–198.

525 Partnerships Against Domestic Violence (2000), 'Crisis Intervention', above n 114, 9.

526 Consultation 4.

527 Consultations 4, 37. See also Loretta Kelly, 'Indigenous Women's Stories Speak for Themselves: The Policing of Apprehended Violence Orders' (1999) 4 (25) *Indigenous Law Bulletin* 4, 6.

child protection authorities.[528] Others may be prevented from taking formal action because of fear it will isolate them from their family and community.[529]

PEOPLE WITH DISABILITIES

6.22 People with disabilities encounter substantial barriers to accessing the intervention order system. At a basic level, people with disabilities cannot always obtain information in accessible formats about family violence, or about how to obtain assistance with family violence. One example provided during our consultations was that of a hearing-impaired woman who did not realise she was subjected to family violence until she saw a poster about it.[530]

6.23 This information barrier is exacerbated by the fact there is still, in general, a failure by family violence services to meet the needs of women with disabilities[531] and a limited understanding of family violence issues among disability service providers.[532] This makes it extremely difficult for people with disabilities who experience family violence to obtain appropriate support and advocacy in relation to their experiences of family violence.

6.24 Another layer of disadvantage is added for people with disabilities who are from non-English speaking backgrounds. The Commission's specialist advisory committee on disability issues expressed concern that problems with the use of interpreters and systemic discrimination make accessing the system much more difficult for these people. It was also noted that these people may suffer discrimination in their own community because of their disability, which may extend to being told they deserve 'what they get' because they have a disability.[533]

6.25 People with disabilities may experience family violence in different circumstances to other people. People with disabilities may be subjected to violence by an intimate partner or family member they live with, or they may be

528 See para 6.9.

529 Victorian Indigenous Family Violence Taskforce (2003), above n 73, 99; see also Consultations 4, 14, 15, 17.

530 Consultation 9.

531 Carolyn Frohmader, *Violence Against Women with Disabilities: A Report from the National Women With Disabilities and Violence Workshop, Melbourne, February 1998* (1999) 28; VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

532 Domestic Violence and Incest Resource Centre (2003), above n 55, 23; VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004; Consultation 33.

533 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

abused by live-in carers or staff in residential institutions.[534] Those who are subjected to violence by professional live-in carers or workers in residential institutions cannot access protection under the Crimes (Family Violence) Act. The Act specifically excludes people who provide domestic support and personal care to the person for fee or reward, or on behalf of another person or organisation, unless the court finds they have an 'intimate personal relationship' with the person.[535] Abuse of a person with a disability by someone in that position may therefore only be remedied through criminal law if an assault has occurred, through civil action against the organisation providing the service, or through that organisation's complaint mechanisms. These avenues all pose further barriers to a person with a disability who is being subjected to violence.

6.26 It is difficult, if not impossible, for people with disabilities to seek external assistance if they are being abused by someone they depend on for their day-to-day living needs. People with disabilities who wish to leave an intimate partner who is abusing them, or move out of a family home where abuse is occurring, may find it much more difficult than people without a disability. Women with disabilities may have difficulty in finding accommodation that is tailored to meet their needs or in obtaining help with personal care if they leave the abuser.[536] Women who experience violence when living in institutions, whether the violence is perpetrated by another resident or a worker, may find it difficult to get others in the institution to take any action, let alone to assist them to seek legal intervention.[537]

6.27 People with cognitive impairment face particular barriers when dealing with the justice system, which the Commission has previously reported in the context of sexual assault:[538]

- they may not tell anyone about abuse because they may not understand that what has happened to them is a crime;[539]

534 Domestic Violence and Incest Resource Centre (2003), above n 55, 23.

535 *Crimes (Family Violence) Act 1987* (Vic) s 3, definition of 'domestic partner' and 'family member'. See paras 5.32–5.35 for further discussion of these definitional issues.

536 Stephen Gilson, Elizabeth Cramer and Elizabeth DePoy, 'Redefining Abuse of Women With Disabilities: A Paradox of Limitation and Expansion' (2001) 16 (2) *AFFILIA* 220, 222; Women's Domestic Violence Crisis Service (2003), above n 41, 20; see also Frohmader (2002), above n 46, 22–23.

537 Lawrence and Robinson, above n 380.

538 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) paras 2.40–2.43, 6.4–6.5.

- they may face misconceptions about their credibility and their memory, as a result of which their complaints about assault may not be taken seriously by the police; [540]
- they may have difficulty in explaining what happened to them when they are interviewed by the police;[541]
- complex courtroom language makes it difficult for them to respond to questioning or to understand legal processes; and
- they are likely to find cross-examination particularly daunting and difficult.[542]

These issues of lack of information, difficulty understanding processes, and systemic discrimination apply equally in the context of family violence, whether or not it includes an element of sexual assault. People who have already experienced situations in which their reports of violence or mistreatment have not been believed, or where they have been treated as likely to fabricate reports, are even less likely to report abuse.[543] International research has found that women with disabilities are assaulted, raped, and abused at twice the rate of women who do not have a disability but are much less likely to receive assistance or services.[544]

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539 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); 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). In addition, it might be difficult for family or support people to know when to intervene or offer help. A 1996 study conducted by the National Council of Intellectual Disability found that family members and staff working with intellectually disabled people in residential services felt they lacked the skills and training required to recognise and report abuse: Robert Conway, Louise Bergin and Kathryn Thornton, *Abuse and Adults with Intellectual Disability Living in Residential Services: A Report to the Office of Disability* (1996). This is an important issue, which we believe should be included in a wider review of cognitive impairment and the criminal justice system.

540 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) paras 3.29–3.43.

541 Kelly Johnson, Ruth Andrew and Vivienne Topp, *Silent Victims, A Study of People with Intellectual Disabilities as Victims of Crime* (1988) 48.

542 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) 261.

543 Lawrence and Robinson, above n 380, 34; Consultation 33.

544 Frohmader (1999), above n 531, 5.

PEOPLE IN SAME-SEX RELATIONSHIPS

6.28 There are also numerous barriers that prevent people in same-sex relationships from accessing the intervention order system. People in same-sex relationships may fear an adverse reaction, such as scepticism or prejudice from police, court staff or others they report abuse to.[545] Men who are subjected to violence in a same-sex relationship, for example, may be exposed to a discriminatory belief that men should be able to protect themselves.[546]

6.29 People who have experienced family violence in a same-sex relationship may also fear that they, or the person who has abused them, will receive a homophobic response from the justice system.[547]

> I think their attitude is, that they're bashing each other up. It's one less—or two less. They can knock each other out.[548]

This fear may stem from the fact that their previous requests for help were met with discrimination, a generally unhelpful attitude[549] or disbelief that violence occurs in same-sex relationships.[550]

6.30 A person experiencing violence in a same-sex relationship may be prevented from accessing the intervention order system because of the practical implications of doing so. For example, if the person subjected to violence is not openly in a same-sex relationship, the decision to access public assistance may mean they have to reveal their sexuality.[551] Reporting family violence may also involve a risk of being isolated from the broader gay or lesbian community.[552] Furthermore, there may not be appropriate support and accommodation services

545 Consultation 33; Vickers (1996), above n 77, para 41.

546 Consultation 33.

547 Vickers (1996), above n 77, para 36; Irwin (1999), above n 77, 6. In 2002–2003, 84 Family Incident Reports submitted by police recorded the parties as being in a gay (50) or lesbian (34) relationship: see unpublished data extracted from LEAP on 30 August 2004 and provided to the Commission by the Statistical Services Division, Victoria Police.

548 Irwin (1999), above n 77, 6.

549 Vickers, above n 77, para 49.

550 Collins (1998), above n 56, 9.

551 Vickers (1996), above n 77, paras 36, 44.

552 Vickers (1996), above n 77, para 36.

for women and, especially, men who experience violence in same-sex relationships.[553]

? QUESTION(S)

27. Have we accurately described the barriers that prevent people who need protection from accessing the intervention order system?

28. Are there other groups of people within the community who face particular obstacles that prevent them from using the *Crimes (Family Violence) Act 1987*?

29. What strategies should be adopted to address these barriers?

553 Ibid paras 53–8; Collins (1998), above n 56, 8–9.

Chapter 7
Gateways to the Intervention Order System

INTRODUCTION

In Chapter 6, we examined the many factors that operate to prevent people who need protection from family violence from accessing the intervention order system. In this Chapter, we examine how people make an application for a family violence intervention order, what assistance they receive and what assistance they need. We also discuss whether most family violence intervention order applications should be made by police and, if so, how this might be achieved. Finally, we look at how courts can ensure that children are included in intervention orders whenever necessary, and whether the courts should be empowered to make orders on their own initiative. Based on the information we obtained during our consultations, some of the main problems that need attention in the intervention order system are those that face people when they go to court to make an application, or when they seek police assistance to obtain an order.

WHO MAY APPLY FOR AN INTERVENTION ORDER?

7.1 Where the person in need of protection is an adult, the Crimes (Family Violence) Act allows the intervention order application to be made by a member of the police force, the person seeking protection or any other person provided that person has the written consent of the person in need of protection.[554]

7.2 Where the person in need of protection is a child, however, the Act allows the following people to apply for an order:

- the police;
- one of the child's parents;
- any other person who has written consent from one of the child's parents;
- the children themselves, provided they are above the age of 14 years and the court gives them leave to apply;[555] or
- one of the child's parents if that parent is also applying for an order and the applications arise out of the same or similar circumstances.[556]

554 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(a),(b),(d).

555 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(iv). The court must not grant leave unless satisfied that the person understands the nature and consequences of an intervention order: see *Crimes (Family Violence) Act 1987* (Vic) s 7(3).

556 *Crimes (Family Violence) Act 1987* (Vic) s 7(4).

7.3 If a guardianship order under the *Guardianship and Administration Act 1986* is in place in respect of the person in need of protection—whether that person is an adult or a child—the appointed guardian may make an application on that person's behalf, or alternatively, any other person may do so with the court's permission.[557]

WHO CURRENTLY APPLIES FOR INTERVENTION ORDERS?

7.4 Data from the Children's and Magistrates' Courts indicates that most applications for a family violence intervention order are made by adults seeking protection in person, followed by the police, who apply for orders on behalf of people in need of protection.

7.5 In 2002–03, three-quarters of finalised intervention order applications were made by the person seeking protection.[558] Almost a quarter were made by the police (24%). A small number of finalised applications were made by parents who were not also seeking an intervention order for themselves (1.2% or 188 applications). Even fewer were made by people on behalf of others who had given their written consent (0.2% or 25 applications) or obtained the leave of the court (0.1% or 13 applications).[559]

APPLICATIONS BY PEOPLE IN NEED OF PROTECTION

7.6 Most people do not obtain advice or information about the Act or the processes and procedures used to administer it. Applications for a family violence intervention order are usually made at a time of significant personal crisis. People are likely to be apprehensive, distressed, scared, angry or otherwise suffering the effects of living with family violence.

7.7 The experiences of people in need of protection who attend court without personal or legal support are diverse. The outcomes for them depend on the skills, abilities and inclinations of registrars and magistrates, and on legal and other assistance that they receive when making an application.

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

558 Department of Justice Victoria (2004), above n 259, 61.

559 Ibid.

LEGAL ASSISTANCE

ACCESS TO LEGAL ASSISTANCE

7.8 Our consultations indicated that most people who seek a family violence intervention order do not obtain any legal advice or assistance before doing so.[560] Various reasons were suggested for this, but the most common reason raised was that appropriate, timely and affordable legal advice in relation to intervention orders is difficult to obtain.[561]

7.9 Another issue that was raised is that many legal practitioners, police and family violence workers do not encourage or refer people to seek legal advice before they apply for an intervention order. There is a common presumption that applying for an intervention order is a simple process and that there is no need for a person to obtain legal advice before they proceed.[562]

7.10 Free legal information and advice is available from community legal centres and from Victoria Legal Aid, but there are limitations to the availability of these services. Most community legal centres provide advice to prospective applicants, and some provide representation in court.[563] Victoria Legal Aid offers free, one-off general advice appointments, but will not fund legal assistance for an applicant unless the respondent intends to contest the application.[564] There are also duty lawyer services available in many courts that may be accessed by applicants and respondents. These services are provided by community legal centres through specific family violence intervention order programs, by Victoria Legal Aid or, in some regional areas, by private lawyers.

7.11 Some consultation participants noted that, despite these options, it is difficult to obtain detailed advice and assistance regarding an intervention order application.[565] Reasons given for this included:

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560 Consultations 7, 8, 21, 26, 27, 32, 40.

561 Consultations 2, 16, 36.

562 Consultations 1, 3, 19, 27, 39.

563 In Victoria, 29 community legal centres provide advice about family violence intervention orders to people seeking protection. Information about services provided by community legal centres in Victoria is based on a survey conducted by the Commission in September 2004. The Commission is grateful to all community legal centre staff who assisted us by completing the survey.

564 Victoria Legal Aid, *Victoria Legal Aid Handbook*, <www.legalaid.vic.gov.au/main1.cfm> at 6 August 2004, ch 2, para 6.1.

565 Consultation 24.

- intervention order support schemes usually operate at court on certain days and cannot assist people who need an urgent intervention order on other days;[566]
- generalist duty lawyers are usually not available to assist intervention order applicants because they prioritise criminal law cases, are too busy, have a conflict of interest[567] or do not assist applicants as a matter of policy;[568]
- people in small towns find it difficult to get assistance from Victoria Legal Aid or private lawyers, because the lawyers have often previously acted for the prospective respondent;[569] and
- people from culturally and linguistically diverse backgrounds who prefer to work with a lawyer from within their community find it difficult to find such a person, or to find one with an understanding of family violence.[570]

Is Legal Assistance Important?

7.12 Almost all consultation participants who expressed a view about legal assistance for intervention order applications said that obtaining legal advice is extremely important.[571] While one participant said that applying for an order without assistance can be empowering for people who have experienced family violence,[572] others noted that the provision of legal advice and assistance often makes the difference between a person proceeding with an application or withdrawing it.[573]

7.13 Applicants can receive inadequate—or no—orders as a result of not receiving legal advice before making an application. For example:

- applicants may not know what information to include in the application to maximise the likelihood of an order being made;[574]

566 Consultation 1.
567 Consultations 36, 38.
568 Consultation 23.
569 Consultations 2, 9, 23.
570 Consultation 31.
571 Consultations 1, 3, 7, 9, 12, 16, 18, 21, 32, 33.
572 Consultation 38.
573 Consultation 28.
574 Consultations 3, 12.

- applicants may not know they can include their children in the application, or may not know that they should provide separate and specific information to justify the making of an order for the protection of the children;[575]
- applicants may not know they can ask for particular terms and conditions to be imposed; and
- applicants may not consider some of the serious or complex issues, such as family law implications, that can arise in intervention order matters.[576]

7.14 It was generally agreed that informed, appropriate legal advice should be more readily and consistently available for people seeking protection both before and during an intervention order application.

THE ROLE OF COURT STAFF

7.15 Given that few people access legal assistance before they go to court to apply for an order, court staff, especially registrars, play a critical role in assisting people to make an application for a family violence order.

7.16 The Magistrates' Court Family Violence and Stalking Protocols provide guidelines to registrars about how to work with intervention order applicants. For example, the protocols provide that applicants should be served promptly and that, if the complaint involves imminent violence or property damage or the applicant is suffering a high level of distress, they should appear before a magistrate on the same day.[577]

7.17 These protocols also govern the way registrars interview the applicant and issue the 'complaint' or application. They require registrars to use interpreters, to take certain measures to ensure that the applicant's address is not disclosed, and to discuss the options before preparing the application.[578] The protocols also guide what information registrars should include in the applications, including 'the incident that brought the person to the court', a 'brief description of the past relationship', and 'what concerns the person has for future behaviour'.[579]

575 Consultation 29.

576 Consultation 3.

577 Magistrates' Court of Victoria (2003), above n 286, paras 2.1–3.

578 Ibid paras 4.2–4.

579 Ibid para 4.6.

7.18 Our consultations indicated that while some registrars fulfil their role professionally and skilfully, practices and approaches vary considerably, and the response that people in need of protection receive depends largely on which individual they encounter when they enter the court.[580] During our consultations, many concerns were raised about inconsistent practices and approaches by registrars across Victoria.

COURT STAFF AS GATEKEEPERS

7.19 One of the concerns raised is that registrars and other court staff often act as 'gatekeepers' to the intervention order system. A strong theme that emerged in our consultations with court personnel and family violence workers is that many court staff feel frustrated by large numbers of intervention order applications that they consider trivial, or constitute 'misuse' of the Act.[581] It was said that some registrars assess whether a person seeking protection is 'genuine' whenever they deal with one.[582] Whether an applicant is seen as 'genuine' will depend partly on a registrar's understanding of family violence and what kind of person constitutes a 'victim' of family violence.[583]

7.20 Various consequences can flow if an applicant is judged to be 'non-genuine' or lacking in credibility. One registrar told us that if an applicant is seen as genuine, it will completely change the way he talks to that person.[584] Alternatively, the registrar may dissuade people from proceeding with an application, or advise them that they may not proceed.[585] In one area, we were told that the registrars communicate their assessment of an applicant's credibility to the magistrate by placing a coloured marker on the applicant's court file.[586]

7.21 If, after interviewing the applicant, the registrar forms the view that an application should not be issued because there is insufficient evidence, the

580 Consultations 5, 6, 12, 16, 33.

581 As discussed in Chapter 4, the majority of court staff with whom we spoke tended not to differentiate between stalking intervention orders and family violence intervention orders, so that registrars' responses to applicants for family violence orders are influenced by their frustration with what they perceive to be a significant overuse of stalking intervention orders: see paras 4.36–4.39.

582 Consultations 8, 37.

583 If a registrar considers that only physical violence is 'real' violence, for example, they will be more likely to dismiss an applicant who is seeking protection from psychological abuse.

584 Consultation 8.

585 Consultations 5, 16, 37.

586 Consultation 40.

protocols allow him or her to place the case before the court before the application is served on the respondent. This enables a magistrate to determine whether the matter should proceed before the application is served.[587] From our consultations, it seems there is some confusion about what registrars are allowed to do when they do not consider that an intervention order should proceed. Different areas also follow different screening practices.[588] In one region, magistrates suggested that while registrars are not currently permitted to screen applicants, it might be useful if they were able to fulfil that function.[589]

COURT STAFF AS ADVISERS

7.22 Another concern about the role that registrars play is that, in the absence of a police applicant or detailed legal advice for the person in need of protection, the registrar assisting a person to make an application is often the sole source of information and advice. This means that the registrar influences the scope of the application, what information is included in it, what is provided to the magistrate, and what terms and conditions the person requests to have imposed.[590] While registrars are often required to fulfil the role of adviser, they are not—and should not be—advocates for either party. This means that most people seeking protection currently rely on a person whose role is to provide information and assistance, but not to act in the applicant's interests.

7.23 The level of assistance an applicant receives from a registrar and the quality of the application also depend on the registrar's approach and skill level. Some may be skilled in working with people who have been subjected to abuse and may be able to elicit all relevant information. Others, however, will not. Some consultation participants suggested that:

- applicants often have little time to provide the relevant information;[591]
- applicants are sometimes given no assistance to complete the necessary documents;[592]

587 Magistrates' Court of Victoria (2003), above n 286, para 4.7.

588 Consultations 8, 19, 33.

589 Consultation 38.

590 Consultations 3, 21, 22.

591 Consultation 33.

592 Consultation 37.

- applicants are not given time to read the information after registrars have completed the documents;[593] and
- it is common for registrars to give advice to people seeking protection, for example, to advise them that they do not have grounds for an order and should not apply.[594]

Another participant suggested that some registrars should be trained in working with Indigenous applicants, because 'if a person does not speak like a white person, the court staff…look at them like they're dumb'.[595] Even when registrars are skilled in eliciting relevant information from people affected by family violence, practical constraints on their time may make it difficult for them to work effectively with applicants.[596]

The Approach of Court Staff Generally

7.24 In addition to these issues, various concerns were raised about the way applicants are treated when they go to court. A number of consultation participants said that, in their experience, some registrars can be rude, appear judgmental or bored, or simply act in an unhelpful way towards people seeking help with family violence matters.[597] A number of Indigenous workers and community members with whom we spoke said that some registrars' responses seem to be affected by racist attitudes.[598]

7.25 Various participants said some registrars appear judgmental towards applicants, especially if the applicant has not separated from the violent family member or has returned to live with him or her in the past.[599] Others said some registrars do not understand that individual incidents may seem minor, but family violence may consist of a pattern of behaviours designed to control or intimidate the family member.[600]

593 Consultation 22.

594 Consultations 5, 16, 20, 37.

595 Consultation 28.

596 Consultation 3.

597 Consultations 7, 9, 12, 14, 21, 29.

598 Consultations 4, 6, 22, 37.

599 Consultations 21, 33.

600 Consultation 1.

7.26 One issue that affects some applicants in regional areas is that the response of court staff can vary depending on whether they know the prospective respondent.[601] Another issue raised is that, despite the protocols, some registrars do not always ensure an interpreter is provided when one is needed, or are impatient when using an interpreter.[602]

7.27 Many suggested that training for registrars and other court staff in the nature and dynamics of family violence should be introduced or increased.[603] As we have discussed in Chapter 6, it is intended that training in family violence for court staff, as well as other justice system personnel, will be conducted for the Family Violence Courts in Heidelberg and Ballarat.[604]

ACCESSING NON-LEGAL SUPPORT

7.28 Another important aspect of the intervention order system raised in our consultations is the role of non-legal support for people seeking protection. Many people said access to support is critical, that support workers can ensure people seeking protection understand the process and they are able to make informed decisions.[605] Consultation participants spoke positively of the type of support offered at court through Court Network, as well as the type of ongoing support that can be offered through family violence and other support services. In general, it was suggested that a combination of legal and non-legal assistance provides the most effective support for people who have been subjected to family violence.[606]

Court Network is an organisation of volunteers who help people navigate their way through the court system..

7.29 Several participants noted that the police practice of referring women directly to the court to apply for an intervention order is particularly problematic because it means women are not connected with support services.[607] Others

601 Consultation 21.

602 Consultation 5.

603 Consultations 2, 9, 31, 33, 36.

604 See para 6.6.

605 Consultations 12, 32, 36.

606 Consultations 10, 12.

607 Consultations 21, 23.

provided positive examples of areas where police routinely refer women to local support services.[608]

7.30 The limited availability of appropriate services for Indigenous people affected by violence was raised in many consultations with Indigenous workers and community members. Indigenous women may be reluctant to use Indigenous-specific services for family violence matters in case the workers know them or the family member who uses violence, but mainstream services may be seen as inappropriate.[609] Many consultation participants indicated that access to culturally appropriate family violence services for Indigenous people is a critical gap in the service system.[610]

7.31 Similar issues were raised in relation to the need for ethno-specific support workers, both in Court Network or other relevant services.[611] Various consultation participants also referred to the difficulty that some people who have experienced family violence experience in regional and rural areas, where access to family violence services is more limited.[612]

7.32 Workers in the disability sector note that making an application is particularly difficult for people with disabilities who experience violence in their place of residence.[613] Women with disabilities may find it difficult to obtain appropriate support and assistance through the system due to the lack of interaction between women's services and disability services. Disability services may refer women to domestic violence services so they can be assisted by workers who have expertise in that area, but domestic violence services may lack expertise in disability issues and refer women back to those services.[614]

7.33 Plans for the new Family Violence Courts in Ballarat and Heidelberg include the provision of a court-based applicant liaison worker. It has been proposed that this worker will be able to assist applicants by developing safety

608 Consultations 21, 29, 36.

609 Consultations 22, 28, 37.

610 See para 6.19.

611 Consultation 5.

612 Consultations 8, 9, 16, 21.

613 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

614 Department for Women, *Reclaiming Our Rights: Access to Existing police, Legal and Support Services for Women With Disabilities or who are Deaf or Hearing Impaired who are Subject to Violence* (2003) 28; Judith Cockram, *Silent Voices: Women with Disabilities and Family and Domestic Violence* (2003) 57–58; Domestic Violence and Incest Resource Centre (2003), above n 55, 29.

plans, providing information and referrals, and coordinating access to legal representation.[615]

? QUESTION(S)

30. What additional supports, services or other changes are required to make the process of applying for an intervention order accessible and effective for people who need protection, and who apply for an intervention order on their own behalf?

APPLICATIONS BY POLICE

7.34 In several regions, police officers play an active role in leading or participating in local intervention order programs that focus on improving the outcomes for people seeking protection from family violence. This includes developing creative ways to link people in need of protection with support services and programs that aim to coordinate services and improve service delivery for people in need of protection from family violence.[616]

7.35 However, one of the strongest themes that emerged during our consultations is that police should take a more active approach in relation to intervention orders, and that they should apply for more orders on behalf of people who need protection. Many people see this as an important element of an active police response to family violence.

WHEN POLICE SHOULD APPLY FOR AN ORDER—POLICE POLICY

PREVIOUS *POLICY*

7.36 Prior to the new Police Code of Practice for the Investigation of Family Violence (the police code of practice), the Victoria Police Manual stated that police *must* make an application for an intervention order wherever:

- the safety, welfare, or property of a family member appears to be endangered by another; or

615 Information provided to the Commission by Court Services, Department of Justice, October 2004.

616 Consultations 4, 6, 9, 10, 14, 16, 19, 20, 26, 29, 31, 36.

- a criminal offence is involved.[617]

THE NEW CODE OF PRACTICE

7.37 The new police code of practice has not altered the obligation on police to apply for an order wherever the safety, welfare or property of a family member appears to be endangered.[618] The code has added several provisions, including that:

- applying for an order in accordance with the policy may mean making an application without the agreement of the person in need of protection;[619]
- police must consider including any children on an application for the adult in need of protection when DHS is not involved;[620] and
- when police do not apply for an order, they must explain the civil options available and refer the person who has experienced violence to appropriate referral agencies or the court registrar.[621]

7.38 Another important addition in the code of practice is the requirement that police record their reasons for not making an application for an intervention order.[622] This is consistent with the approach taken in the code, which seeks to ensure that police 'respond to and take action on any family violence reported to them' and 'pursue criminal and/or civil options where there is sufficient evidence to do so and regardless of whether an arrest has been made'.[623]

617 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-4, para 4.

618 Victoria Police (2004), above n 134, para 5.3.2; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-4, para 4.

619 See paras 7.55–7.58.

620 Victoria Police (2004), above n 134, para 5.3.2.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-4, para 4.1.1.

621 Referrals to the court registrar are to be followed up by the police contacting the registrar to make an appointment for the person seeking protection: Victoria Police (2004), above n 134, para 5.3.3.

622 Ibid, para 5.3.3; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-4, para 4.2.

623 Victoria Police (2004), above n 134, para 2.1.

HOW OFTEN DO POLICE APPLY FOR AN ORDER?

THE DATA

7.39 As indicated at paragraph 7.5, almost a quarter of applications in the 2002–03 financial year were made by the police. The number of police applications has increased significantly over the past five years.

FINALISED POLICE APPLICATIONS FOR FAMILY VIOLENCE INTERVENTION ORDERS[624]

	1998–99	*1999–00*	*2000–01*	*2001–02*	*2002–03*
Number	2443	2256	2006	3291	3676
Percentage of all applications	15.9%	15.3%	13.2%	21.2%	24%

7.40 The most marked increase in police applications for a family violence intervention order occurred between 2000–2001, when the police made 13.2% of all finalised applications, and 2002–03, when police made 24%.[625]

7.41 While there has been a rise in police applications, however, police apply for intervention orders in only a small proportion of family violence incidents reported to them. Unpublished Victoria Police data indicates that in 2002–03, police members submitted 28 453 Family Incident Reports.[626] Of these, 11% (3117) recorded that the police had made an application for a complaint and warrant for an intervention order.[627] As noted at paragraph 7.36, during this

624 Department of Justice Victoria (2004), above n 259, 61.

625 The start of this increase coincides with the commencement in August 2001 of the Victoria Police review on matters relating to violence against women. Although it is impossible to be certain about what caused the rise in police applications, it is possible that the increased focus on responses to family violence and sexual assault within Victoria Police prompted members to comply with policy more frequently, even before the introduction of the code of practice: see para 1.11 for information about the background to the code of practice.

626 Family Incident Reports must be filed for any incident between family members attended by police or reported to police, including an incident involving any form of abuse such as homicide, verbal abuse, harassment, damage to property, verbal disputes and where police assistance is sought although no criminal offence is identified: see Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109–1, paras 9.1–2; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109–7 paras 4.1–4.2.

627 Unpublished data extracted from LEAP on 30 August 2004 and provided to the Commission by the Statistical Services Division, Victoria Police.

period police policy required that police apply for an order whenever a family member's safety, welfare or property was endangered. The figures suggest, therefore, that police members who attended family violence incidents in 2002–03 found that there was no danger to a family member's welfare, safety or property in approximately 89% of cases.

WHAT WE HEARD IN OUR CONSULTATIONS

7.42 Despite the recent increase in police applications, most people we consulted said that in their experience police rarely apply for an intervention order on behalf of people who need protection. While we heard from some workers that local police were very responsive to people needing protection from family violence,[628] we were told more often that whether people who need protection receive assistance with an intervention order depends on which police officer they speak with.[629] Many family violence workers said police usually refer people who need an intervention order directly to the court, even when they have experienced severe physical violence.[630] The same information was provided by court staff and magistrates, some of whom added that police often misrepresent the process to prospective applicants by telling them to 'just go down to the court and get an order'. This creates problems at court when people find that the process is far more difficult, and has a less certain outcome, than they have been led to believe.[631]

7.43 During consultations we heard that various factors affect the likelihood of a person in need of protection receiving police assistance to apply for an intervention order. It was suggested that police are less likely to make an application on behalf of a person if:

- police cannot see physical evidence of violence, or if the alleged violence is not severe;[632]
- the person has sought assistance regarding family violence in the past;[633]

628 See, eg, Consultations 7, 12, 19, 27, 36.

629 Consultations 2, 7, 13, 19, 33.

630 Consultations 2, 5, 7, 22. In one consultation, participants told of a woman whose partner had attempted to strangle her and who was advised by the attending officers to go to court the next day to get an intervention order: see Consultation 29.

631 Consultations 8, 38.

632 Consultations 2, 3, 6, 7, 8, 9, 14.

633 Consultations 21, 36, 37.

- police make an assessment that a person is not 'genuine' and that he or she is seeking an order for some ulterior motive, such as to use the order in Family Court proceedings;[634] or
- a woman does not present as the stereotypical 'victim' of family violence because, for example, she seems angry, frustrated or assertive.[635]

7.44 Participants in one consultation also suggested that some police are less likely to assist Indigenous women because of racism. Instead, they refer Indigenous women seeking protection to the court to apply for an order, even when the women are seeking help after hours and cannot obtain an urgent order without police assistance.[636]

7.45 Several consultation participants said they thought specialist operational units within Victoria Police, comprising members who have particular expertise in working with people who have been subjected to family violence, would improve police response to family violence incidents.[637] This is not the approach adopted by Victoria Police. Rather, there is a 'Family Violence Liaison Officer' located in each 24-hour police station and, in September 2004, Victoria Police established 10 full-time 'Family Violence Advisor' positions across Victoria.[638]

SHOULD POLICE APPLY FOR ORDERS MORE FREQUENTLY?

ARGUMENTS FOR A MORE CONSISTENT POLICE ROLE

7.46 The majority of consultation participants said that police should apply for intervention orders more frequently than they do. Reasons given included:

- Police action in response to family violence, whether or not there are grounds for criminal charges to be laid, sends a strong and important statement that family violence is unacceptable.
- Police action removes the responsibility for tackling violence from the person who has been subjected to it, potentially reducing guilt or

634 Consultation 21.

635 Consultation 12.

636 Consultation 37. In this consultation it was also suggested that police think Koori people in the region are well 'looked after' and that this affects their attitude towards Indigenous people who seek their assistance with family violence matters.

637 Consultation 28.

638 Victoria Police (2004), above n 134, xii.

responsibility felt by that person and minimising potential for the respondent to blame them. It also demonstrates that tackling family violence is the State's responsibility.[639]

- Police are better resourced and better equipped to pursue applications through the court system, and police involvement removes the onus on individuals who have experienced violence to navigate the legal system, which can be an intimidating and complex task.[640]
- When police do not apply for intervention orders, much of the work in assisting applicants to make an application is left to court staff.[641]

7.47 As well as the above reasons, police applications can reduce the need for the person who has experienced violence to participate in proceedings. This arises in two ways. First, where the police have initiated an application for an intervention order, the police prosecutor will usually 'prosecute' the application. This means that he or she will present the case in court, determine what evidence should be presented and how, and examine and cross-examine witnesses. This is required by police policy,[642] although there was some suggestion during consultations that it does not always occur.[643]

7.48 Secondly, police involvement should also be able to reduce reliance on the evidence of the person who has experienced violence. Police policy prior to the code of practice provided that:

- police *must* attend court when the person in need of protection is unable to attend or where the police can give 'substantial evidence that would not otherwise be available to the court regarding the incident or matter'; and

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639 Consultation 29. It was said in another consultation that, 'there are times when a woman can be extremely damaged by her experience of violence, and the law should be able to step in and say to the perpetrator, "You can't do this"': see Consultation 4.

640 Court personnel in one region noted that police understanding of court procedures and the laws of evidence makes it more appropriate for police to make applications, rather than people who have experienced violence: see Consultation 8. We discuss the process and procedure issues that confront people who seek intervention orders without assistance in Chapters 10 and 11.

641 From the perspective of court personnel, the work of court registrars and magistrates is made considerably more difficult when police do not apply for an order but refer someone directly to court: see Consultation 8.

642 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-4, para 8.1; Victoria Police (2004), above n 134, para 5.5.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-4 para 8.1.

643 See, eg, Consultation 19.

- police *should* attend when the respondent may assault or harass the person at court, when the person who has been subjected to violence needs support and it has not been possible to arrange support from other agencies, or police can provide evidence in relation to the matter.[644]

The code of practice and new police policy provide that the police member initiating the application 'need only attend [court] if required by the court or prosecutor'.[645] In some situations, police who attended the incident will be able to provide valuable evidence to the court regarding the facts alleged in the application. Several consultation participants said, in their experience, even where police apply for an order they do not attend the hearing to support the application by giving evidence.[646]

7.49 Several participants also said that police do not treat family violence incidents as a 'crime scene' and that the police do not consistently gather evidence that would support the intervention order application.[647] In some situations, a more active approach to gathering evidence in family violence situations would remove the need for the person who has been subjected to violence to give evidence in court. It was suggested that police should take a more active role not only in applying for intervention orders, but also in gathering and giving evidence to support the application. The new police policy provides that all family violence incidents are to be considered a crime until it is established that no criminal offences have occurred,[648] and that the police must record details of all persons present.[649] The policy in relation to pursuing civil options does not place any specific responsibility on officers to gather evidence when they attend the incident.

7.50 We are unable to comment on whether applications by police result in a higher proportion of intervention orders being made than applications made by the person seeking protection. Similarly, we cannot comment on whether fewer applications for an intervention order are withdrawn or struck out when the police make the application on behalf of the person in need of protection. This is

644 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-4, para 8.1.

645 See Victoria Police (2004), above n 134, para 5.5.1; ibid.

646 Consultations 8, 19.

647 Consultations 7, 8, 10, 20.

648 Victoria Police (2004), above n 134, para 2.4.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-1, para 8.1.

649 Victoria Police (2004), above n 134, paras 2.4.2, 2.5.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-1 paras 6.5, 8.3.

because the published Department of Justice intervention order statistics[650] do not provide separate information about the outcomes of police applications.

LEGISLATING A POLICE DUTY TO APPLY FOR AN ORDER

7.51 One option for increasing the police's role in relation to intervention order applications is to amend the Act to provide that police have a duty to apply for an intervention order in certain situations. Although Victoria Police policy requires police to apply for an order in certain situations, the Act gives police a wide discretion to decide whether or not they apply for an order.

7.52 By comparison, the legislation in NSW limits police discretion by stipulating that police must apply for an order in certain circumstances. For example, police must make an application for an order if they suspect or believe that a domestic violence offence, a stalking or intimidation offence, or a child abuse offence against a child who is under 16 years has recently been committed, is imminent or is likely to be committed against a family member.[651] If officers do not make an application because they believe that there is good reason not to do so, they must record that reason in writing.[652] Similar provisions apply in relation to the police's responsibility for making telephone applications for an interim order.[653] In its 2003 review, the NSWLRC recommends that the existing obligations on police officers be retained, because it considers that the process in general is more effective when police make the application.[654]

7.53 Similarly, the Western Australian Acts Amendment (Domestic Violence) Bill 2004 proposes that:

- police must investigate when they reasonably suspect that a person is committing or has committed an act of domestic violence which is a criminal offence or has put another's safety at risk;[655] and

650 Department of Justice Victoria (2004), above n 259.

651 *Crimes Act 1900 (NSW)* s 562C(3). A police officer need not make the application if the person in need of protection is over 16 years and intends to make an application, and if the officer believes there is good reason not to make the complaint.

652 *Crimes Act 1900 (NSW)* s 562C (3A).

653 *Crimes Act 1900 (NSW)* s 562H (2A), (2B).

654 NSW Law Reform Commission (2003), above n 350, 128.

655 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 42, inserting new s 62A.

- police who have conducted an investigation as described above must apply for a restraining order, make a police order[656] or record their reasons for failing to do so.[657]

7.54 The NSWLRC examined issues related to apprehended violence orders for people with an intellectual disability in its 1996 report on people with an intellectual disability in the criminal justice system.[658] It was noted that some people with an intellectual disability may have insufficient communication skills to successfully apply for an order on their own, and that they should be assisted by the police to do so. A blanket rule requiring police to *always* bring the application in those circumstances was considered but rejected, as the police may not believe the person seeking protection, or may have difficulty in obtaining instructions from that person.[659]

THE WISHES OF THE PERSON WHO HAS EXPERIENCED VIOLENCE

7.55 While most consultation participants called for police to play a greater role with intervention order applications, mixed views were expressed about whether the police should proceed with an intervention order application against the wishes of the person in need of protection.

7.56 The police code of practice notes that the obligation on police to make an application whenever the safety, welfare or property of a family member is endangered 'may mean making an application without the agreement of the aggrieved family member who may be fearful of the consequences of initiating such action'.[660] In its 2003 report, the NSWLRC recommends that a similar approach be enshrined in the NSW legislation. It recommends that the existing provisions be amended to state that reluctance by the person in need of protection to apply for an order is not, in itself, a good reason for the police not to make an application in situations where:

- violence has occurred;
- there is a significant threat of violence; or

656 See paras 5.67–5.68.

657 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 42, inserting new s 62C.

658 New South Wales Law Reform Commission (1996), above n 542, 306–308.

659 Ibid 307.

660 Victoria Police (2004), above n 134, para 5.3.2.

- the victim is a person with an intellectual disability who has no guardian.[661]

7.57 The main concerns raised during consultations were that when police apply for an intervention order, the person who has experienced violence loses control over the situation and becomes relegated to the role of police witness. In some situations, depending on how the police treat the person in need of protection, this can disempower the person who has been subjected to violence. One consultation participant was concerned that when police take out applications, the woman 'loses her power, is vulnerable, [and] has no say over anything'.[662]

7.58 Also, if the police initiate action where people in need of protection do not want any action taken, this may deter them from contacting the police or seeking help if they need it in the future. It is important that any changes to the current system do not add to the many existing barriers to reporting family violence.

? QUESTION(S)

31. Should most family violence intervention order applications be made by police? If so, are any further changes necessary to achieve this? What are the benefits and risks of this approach?

32. What should police do when the person in need of protection does not want an intervention order application to be made?

33. Are any changes needed to improve:
    - prosecution of applications by the police prosecutor;
    - provision of evidence by police witnesses in intervention order matters; and
    - gathering of evidence at family violence incidents?

APPLICATIONS BY THIRD PARTIES

7.59 Section 13 of the Act provides that if an application is made by a person other than the person seeking protection or by the police, the court must not hear

661 NSW Law Reform Commission (2003), above n 350, 132–133.

662 Consultation 39.

the matter if the person seeking protection objects.[663] The Office of the Public Advocate (OPA) submit that this section can cause difficulties for applications by a guardian on behalf of a person in need of protection.[664]

7.60 A guardian will only be appointed if people with a disability are found unable, by reason of the disability, to make reasonable judgments regarding their person and circumstances.[665] However, if guardians are considered a third party for the purposes of section 13, the court may refuse to allow them to apply for an order on behalf of the person in need of protection, if that person objects to the application.[666] This may be an anomaly in the legislation—it would seem contradictory for a person who has been found unable to make reasonable judgments on their own behalf to be able to veto their guardian's decision that they need protection. The OPA suggest that an exception to section 13 should be introduced in relation to people who have a guardian appointed under the Guardianship and Administration Act.[667]

? QUESTION(S)

34. Should section 13 of the *Crimes (Family Violence) Act 1987* contain an exception in relation to people in need of protection who have a guardian appointed under the *Guardianship and Administration Act 1986*?

WHERE APPLICATIONS MAY BE MADE

7.61 The *Magistrates Court Act 1989* stipulates that the 'proper venue' for civil proceedings is the court that is closest either to the defendant's place of residence or to the location at which the event giving rise to the complaint occurred.[668] This

663 *Crimes (Family Violence) Act 1987* (Vic) s 13.

664 Submission 6.

665 Ibid. Guardianship hearings are conducted at the Victorian Civil and Administrative Tribunal (VCAT), pursuant to the Guardianship and Administration Act 1986 (Vic).

666 Submission 6.

667 Ibid.

668 *Magistrates Court Act 1989* (Vic) s 3(1). This section should be read in conjunction with the *Magistrates' Court Civil Procedure Rules 1999* (Vic), which provide that a proceeding in the Magistrates' Court must be commenced by filing a complaint at the proper venue of the court: Order 4.04. The rules also clarify, however, that a court can hear or determine a matter despite the fact that the civil proceeding was not issued from the proper venue: order 29.01. Moreover, on a broader level,

provision applies to intervention order applications as they are a civil matter. In practice, however, the legislation is applied inconsistently. Our consultations suggested that some magistrates require people to apply for intervention orders at their local court.[669] In other cases, consultation participants said that people living in rural areas were allowed to go to Melbourne Magistrates' Court, rather than their local court, to apply for an intervention order.[670]

7.62 The Magistrates' Court Family Violence and Stalking Protocols do not specify whether a person should be required to make an intervention order application at their local court.

7.63 There are proposed amendments to the Magistrates Court Act in the Magistrates Court (Family Violence) Bill 2004. The Bill will, if passed, extend the definition of what constitutes a 'proper venue' for the purposes of the new Family Violence Court Division. It provides that the 'proper venue' for intervention order applications in the Family Violence Court Division, except interim intervention order applications, will include the court that is closest to the residence of the person seeking protection.[671]

7.64 People who have been subjected to violence may have sound reasons to apply for an order at a court that is not near their existing or previous residence, or to the respondent's residence. They may not want to go to the area in which the prospective respondent lives or, alternatively, may not want to disclose where they are living.[672] If people have relocated to a refuge or other safe accommodation, they often wish to maintain the confidentiality of their new residence.[673]

? QUESTION(S)

35. In your experience, what approach do court staff and magistrates apply when determining where intervention order applications can be made?

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the rules stipulate that any failure to comply with the Rules is only an irregularity, which does not void a proceeding, document or act: order 2.01.

669 Consultation 12.

670 Consultation 29.

671 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 3(2), amending s 3(1) of the *Magistrates' Court Act 1989* (Vic).

672 Consultation 29.

673 Consultation 12.

? QUESTION(S)

36. Is the current law regarding where an intervention order application can be made appropriate? If not, what amendments should be made?

ENSURING PROTECTION FOR CHILDREN OF PROTECTED PERSONS

CURRENT SITUATION

7.65 The Act enables a parent's intervention order application to include the parent's children, provided the reason for obtaining an intervention order for the parent and children arises out of the same or similar circumstances.[674] There is nothing in the Act or the Magistrates' Court Family Violence and Stalking Protocols that requires the court to give specific attention to any children living with the parties, unless the applicant includes the children in the application. Similarly, a magistrate cannot currently make an intervention order in relation to a child unless the applicant includes the child in the application, or if the police or some other person makes an application in relation to the child.

ISSUES RAISED IN CONSULTATIONS

7.66 Several consultation participants noted that some women do not know they are able to include their children in their application for an intervention order, or do not include their children because they fear the respondent's reaction.[675]

7.67 At present, the court may only make an intervention order in relation to a child if satisfied that the respondent has acted in one of the ways described in section 4(1) in relation to that child.[676] This means that a woman seeking an intervention order in relation to herself and her children must usually give detailed and specific evidence about why the order is required in relation to each child. Consultation participants said that some people seeking protection find this difficult, especially where they have a number of children, and that it can add to the distress and trauma associated with giving evidence.[677]

674 *Crimes (Family Violence) Act 1987* (Vic) s 7(4).

675 Consultations 8, 21, 24, 29.

676 *Crimes (Family Violence) Act 1987* (Vic) s 4(3).

677 Consultations 2, 8, 20.

OPTIONS FOR ENSURING CHILDREN ARE INCLUDED

7.68 There are a number of different ways to ensure that children of protected adults are given adequate protection. These include:

- amending the Act to provide that whenever the court makes a protection order, that order also applies to any child in the applicant's family;[678]
- amending the Act to require magistrates to enquire about whether any children are involved and to enable magistrates to make an intervention order in relation to a child on their own initiative; or
- amending court administrative procedures to require registrars who assist applicants with a family violence intervention order application to enquire about any children and to provide information about the possibility that affected children may be included in an intervention order application.

MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

7.69 Under the proposed amendments to the Act, magistrates will be required to consider whether there are any children who:

- are family members of the respondent or the person seeking protection; and
- have been subjected to, or have heard or witnessed, violence by the defendant of the kind described in section 4(1) of the Act.[679]

Magistrates will then be required to make an order in respect of any children, if satisfied there are grounds for making an order, even where a child has not been included in an application.[680]

678 This approach is applied in New Zealand, see *Domestic Violence Act 1995* (NZ) s 16.

679 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 10, inserting new s 4A(2) into the *Crimes (Family Violence) Act 1987* (Vic).

680 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 10, inserting new s 4A(3) into the *Crimes (Family Violence) Act 1987* (Vic). A protected person in respect of whom an order is made under these provisions and who is 14 years of age or over can appeal against the intervention order: see clause 26, inserting new s 21(1AA).

OTHER ISSUES RELEVANT TO THE PROTECTION OF CHILDREN

7.70 A number of other issues are relevant to our consideration of whether protected persons' children should be more frequently included in intervention orders. These issues are discussed later in this paper, and include:

- how the court should approach child contact issues when making an intervention order in relation to a child;[681]
- whether children should be provided with separate representation in intervention order proceedings;[682] and
- whether courts dealing with intervention order applications should have a process for inviting input or intervention from child protection agencies.[683]

? QUESTION(S)

37. The proposed amendments to the *Crimes (Family Violence) Act 1987* will, if passed, require magistrates who are dealing with an intervention order application to consider and make orders in relation to any children who are family members of the parties and who may be at risk of family violence. Will these changes to the Act be adequate to ensure protection for the children of protected adults?

COURT-INITIATED ORDERS

7.71 As we have discussed above, the Magistrates' Court (Family Violence) Bill 2004 proposes to empower the court to make an intervention order in relation to a child, even when no application in respect of that child has been made. This power will exist only when the court is dealing with an intervention order application relating to one or more of the child's family members. In some jurisdictions, the courts have the power to issue an intervention order in respect of adults, and in the context of proceedings other than intervention order proceedings.

681 See paras 8.29–8.44.

682 See paras 10.40–10.42.

683 See paras 10.46–10.49.

7.72 In Western Australia, for example, a court that is dealing with criminal charges against a person may make an order against that person or against any witnesses who give evidence in relation to the charge.[684] Similarly, a court hearing an application under the Western Australian child protection legislation may make a restraining order against a party to the proceedings or a witness in the proceedings.[685] A restraining order may be made during criminal or child protection proceedings:

- on the court's own initiative;
- at the request of a party to the proceedings;
- at the request of a witness who gives evidence in the proceeding; or
- at the request of various people on behalf of a child, including the child's parent or guardian, a child welfare officer during child protection proceedings, or the child.[686]

? QUESTION(S)

38. Should the *Crimes (Family Violence) Act 1987* allow courts to initiate an intervention order when hearing other proceedings, such as criminal proceedings or child welfare proceedings? If so, should this be made possible in respect of adults as well as children?

684 *Restraining Orders Act 1997* (WA) s 63(1). This provision also allows a judicial officer who is considering a bail application to make an order.

685 *Restraining Orders Act 1997* (WA) s 63(3).

686 *Restraining Orders Act 1997* (WA) s 63(3a).

Chapter 8
Making Effective Intervention Orders

INTRODUCTION

8.1 The effectiveness of intervention orders in protecting the rights and safety of family members depends largely on what orders are made, as well as how well they are enforced. In this Chapter we will discuss what types of restrictions and conditions are included in intervention orders, and what considerations should guide magistrates' decisions when they are dealing with intervention order applications.

CONTENT OF INTERVENTION ORDERS

WHAT THE ACT SAYS ABOUT RESTRICTIONS AND CONDITIONS

8.2 Under the Crimes (Family Violence) Act, a court making an intervention order may impose any restrictions or prohibitions that appear necessary or desirable in the circumstances, including provisions that:

- prohibit or restrict the respondent from approaching the protected person;
- prohibit or restrict the respondent from accessing premises in which the protected person lives, works or frequents, or 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;
- direct the respondent to participate in prescribed counselling; or
- revoke any firearm licence or other authority to possess, carry or use a firearm.[687]

8.3 Like Victoria, most other jurisdictions that have family violence protection order legislation provide magistrates with a broad discretion to determine what conditions should be imposed in any particular case. However, different jurisdictions name different specific conditions in the legislation. Examples of conditions and restrictions that are included in equivalent legislation in other jurisdictions, or in the Model Domestic Violence Laws, are the power to:

- prevent the respondent from harassing, contacting or intimidating a protected person's family member or coworker,[688] or any person at a place the protected person lives or works;[689]
- direct that the respondent dispose of weapons other than firearms or any other item that the respondent owns or possesses and that the court is

687 *Crimes (Family Violence) Act 1987* (Vic) ss 4(2), 5.

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

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

satisfied was used or may be used by the respondent to commit an act of family violence against the protected person;[690]

- direct the respondent to return certain personal property to the protected person or to 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;[691]
- suspend the respondent's driver's licence if satisfied that the respondent operated a motor vehicle when committing a family violence offence;[692]
- require that the respondent pay the protected person compensation for any monetary losses that he or she had suffered as a direct result of the respondent's use of violence; [693] and
- make a 'problem gambling order', which bars the respondent from gambling, if the court is satisfied that it is appropriate to do so.[694]

? QUESTION(S)

39. Are there other directions, restrictions or conditions that should be specifically provided for in the *Crimes (Family Violence) Act 1987*? What are they and why should they be added?

690 Domestic Violence Legislation Working Group (1999), above n 258, 74.

691 *Protection Orders Act 2001* (ACT) s 42(3); *Restraining Orders Act 1997* (WA) s 13(2)(e); *Justices Act 1959* (Tas) s 106B(5A); *Domestic Violence Act 1994* (SA) s 5(2)(g); Domestic Violence Legislation Working Group (1999), above n 258, 76. The *Domestic Violence Act 1995* (NZ), at 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.

692 *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, (Canada) CCSM (assented to June 29, 1998), c D93, s 15.

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

694 *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 to have such a scheme in place.

THE COURT'S APPROACH TO CHOOSING RESTRICTIONS AND CONDITIONS

8.4 Service providers in many of our consultations said magistrates tend to impose a standard set of conditions when making an intervention order.[695] Many magistrates do not appear to consider the facts before them in detail in order to craft more detailed conditions that suit the parties' particular circumstances. By comparison, some consultation participants provided examples of instances where magistrates had taken care to consider what types of provisions were most likely to make the order effective in the particular case, taking into account the protected person's knowledge about any patterns involved in the respondent's use of violence.[696]

8.5 Magistrates' approaches to making orders are influenced by the content of the applications they deal with. These applications are in turn influenced by the Magistrates' Court form which applicants must use to apply for an intervention order.[697] The form requires applicants to 'tick the box applicable to you' to indicate which restrictions they want to have included in the order. The list largely reflects the restrictions named in the Act, and includes a single line on which applicants can indicate whether they wish to ask the Court to make an 'other order'. It was noted during consultations that this format does not encourage applicants to seek orders that are tailored to suit their particular circumstances, or encourage magistrates to take responsibility for tailoring orders to suit the circumstances of individual applicants.[698] People seeking protection who do not have legal or other informed assistance before they make the application will not know that they can ask for specific orders that are most likely to prevent the respondent from acting in a violent way. In one regional area we were told that the local police have adopted a practice of seeking tailored orders with some success.[699] During the same consultation, however, it was noted that intervention orders containing detailed and tailored conditions can be more susceptible to different interpretation and can therefore be more difficult to enforce than standard orders.

8.6 Many consultation participants suggested that a more tailored approach to deciding the terms and conditions of intervention orders would increase their

695 Consultations 12, 28, 33, 36.

696 Consultations 1, 20.

697 Magistrates' Court of Victoria (2003), above n 286, Form 1, 25–6.

698 Consultations 12, 22, 28.

699 Consultation 20.

effectiveness.[700] Also, if orders are designed to suit the circumstances of the individuals involved, accidental or 'technical' breaches may be less likely to occur, which in turn will improve the enforcement of orders because police will be more likely to treat breaches seriously.

? QUESTION(S)

40. Should intervention orders be more detailed and tailored to the particular circumstances of the parties? If so, how should this be achieved?

8.7 Our research and consultations have indicated that several types of orders warrant particular attention. These are orders that require respondents to leave their home and allow protected persons to remain, directions to attend programs or counselling, and intervention order provisions that relate to children and child contact.

OUSTER/EXCLUSION ORDERS

8.8 The Act currently enables a court to prohibit the respondent from accessing premises in which the protected person lives, whether or not the respondent has a legal or equitable interest in the property. The Act also states that:

> Before making an order which restricts the defendant's access to any premises, the court must take into account-
>
> (a) the need to ensure that the aggrieved family member is protected from violence; and
>
> (b) the welfare of any children who may be affected by the order; and
>
> (c) the accommodation needs of all persons who may be affected by the order—
>
> and give paramount consideration to the matters in paragraph (a).[701]

8.9 The Act therefore makes it possible for someone who fears family violence to obtain an order that requires the respondent to leave the family home. This allows the person seeking protection and any children to remain in the home.

700 Consultations 12, 20, 36, 37, 40.

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

These kinds of orders are known as 'exclusion orders', 'sole occupancy orders' or 'ouster orders'. We will use the term 'ouster orders' to refer to orders that have the effect of requiring the respondent to move out of, and then stay away from, the family home.

8.10 Although the Act provides for ouster orders to be made, anecdotal evidence obtained through our consultations suggests they are rarely made in practice.[702] No Victorian quantitative data is available to confirm this. While court data shows that 83% of intervention orders made require the respondent to remain a certain distance from where the protected person lives or works, it does not tell us how many of these orders have actually required the respondent to leave the home.[703] Based on anecdotal information obtained through our consultations, it is likely the majority of these orders simply require the respondent to stay away from the place to which the protected person has relocated when escaping violence.

8.11 Australian research on this topic indicates that people who experience family violence must often leave their home in order to escape the violence.[704] The available research also demonstrates that there is a connection between women's and children's homelessness and their experience of family violence, and that as a result of leaving the home, women and their children experience 'considerable social and personal disruption and financial disadvantage'.[705] The issues are compounded for particular groups of women, such as some women with disabilities, for whom accessing appropriate crisis accommodation when they leave home is thwarted by a variety of additional barriers.[706]

8.12 The assumption that people affected by family violence must leave their homes to escape the violence is now being challenged, and ways to enable more

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702 Consultations 5, 14, 23, 24, 29, 31, 32, 33, 38, 40, 41.

703 Department of Justice Victoria (2004), above n 259, 67.

704 Partnerships Against Domestic Violence, *Home Safe Home: The Link Between Domestic and Family Violence and Women's Homelessness* (2000) 46.

705 Ibid.

706 For a discussion of some of the practical and policy issues that can prevent women with disabilities from accessing family violence services, see *'More than Just a Ramp'—A Guide for Women's Refuges to Develop Disability Discrimination Act Action Plans* Women With Disabilities Australia (WWDA) <www.wwda.org.au/cnts.htm> at 12 October 2004; Women with Disabilities Australia, *Response to the Domestic Violence Legislation Working Group Discussion Paper 'A Model Domestic Violence Law for Australia'* (1998) <www.wwda.org.au/dvlaws.htm> at 27 May 2004; Department of the Prime Minister and Cabinet, Office of the Status of Women, National Committee on Violence Against Women, *Access to Services for Women with Disabilities who are Subjected to Violence* (1993) 26–29.

people to safely remain in their homes are being examined.[707] The availability and use of ouster orders is an important part of this examination.

8.13 If it is true that few ouster orders are currently made in Victoria there may a range of contributing factors. Not all people who fear family violence want to remain in their own home, and it is not safe for everyone who experiences family violence to do so. The safety concerns associated with enabling protected persons to remain in their homes are particularly pertinent in light of the difficulties associated with enforcing intervention orders.[708] It is also possible that most people who have experienced family violence are not aware they may seek an order that would remove the violent family member from the home.[709] Those who do know that they can apply for an ouster order may be dissuaded from doing so by registrars, other court staff or legal advisers.[710] One submission stated that even when women who have been subjected to violence obtain legal advice before they apply for an intervention order, some lawyers advise them against applying for an ouster order because they are unlikely to be successful.[711] Some consultation participants said magistrates will not make ouster orders unless applicants had found alternative accommodation for their partner.[712]

8.14 It was stated during our consultations that many magistrates are reluctant to make ouster orders.[713] Although there is no recent Victorian research into magistrates' approaches to these orders, in a Queensland study in 2000 a significant proportion of magistrates surveyed said they were not comfortable ousting violent people from their homes.[714] The study also found key themes running throughout the responses of all surveyed magistrates. These included the

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707 See, eg, Commonwealth Office of the Status of Women, *Improving Women's Safety Project: Summary of First Forum Strategies* (2003); Rachael Field and Belinda Carpenter, 'Domestic Violence and Homeless Children: Are Ouster Orders the Answer?' (2003) *On Line Opinion* <www.onlineopinion.com.au/view.asp?article=587> at 17 March 2004.

708 See paras 9.1–9.29.

709 Submission 3.

710 Ibid.

711 Ibid.

712 Consultations 24, 33, 40.

713 This message was consistent with the information gathered during the research for Partnerships Against Domestic Violence (2000), 'Home Safe Home', above n 704, 54: see also consultations at above n 702.

714 Rachael Field, Belinda Carpenter and Susan Currie, '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, 9–13 July 2000, Brisbane) 7.

notion that ouster orders are only justified where there has been physical violence, that the respondent should be given the opportunity to be heard before an ouster order is made,[715] and that the respondent's property rights should be respected.[716]

8.15 The themes from the Queensland 2000 survey echo the views expressed by Victorian magistrates involved in Rosemary Wearing's 1992 research. In Wearing's study 21 of the 40 magistrates who were interviewed indicated they would *never* prohibit the respondent from attending the family home, and 15 magistrates expressed a definite reluctance to interfere with the respondent's property rights on an *ex parte* application.[717]

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

8.16 A NSW study of court transcripts of cases involving ouster orders also found that such orders are largely invisible in the justice system.[718] The research found that magistrates paid particular attention to the accommodation needs of the respondents, while none demonstrated an interest in the accommodation needs of the women seeking protection.[719]

8.17 A metropolitan family violence service, the Eastern Domestic Violence Outreach Service, runs a program that aims to enable women and children to remain in their own homes. The service has funded a worker to attend court two days per week to support women who are applying for intervention orders to seek orders that would remove the respondent from the home. In a submission to us, the service states that:

> Our experience at Court in working with women stands in contrast to the broadly

715 This means that ouster orders are less likely to be made as part of an interim order, which in practice means that people seeking protection are likely to have to leave the home while the respondent is served with the complaint and until the application is finally decided.

716 See Field et al (2000), above n 714, 8–10. These themes also reflect the concerns raised by the Law Reform Commission in its 1986 review of domestic violence laws, in which it stated that 'there is no doubt that the exclusion of the respondent from the home is a step which is fraught with high emotion and may have repercussions beyond the respondent's own feelings': The Law Reform Commission [Australia] (1986), above n 107, para 100.

717 Wearing (1992), above n 3, 167.

718 Violence Against Women Specialist Unit, NSW Attorney General's Department, *Violence Excluded: A Study into Exclusion Orders: South East Sydney* Final Report (2004) 15. The NSWLRC recommends that the non-statutory standard orders should be amended to refer specifically to 'exclusion orders': see NSW Law Reform Commission (2003), above n 350, 181.

719 Violence Against Women Specialist Unit (2004), above n 718, 8.

> held view that such [ouster] orders are not being granted by the courts or that they are unsafe and inappropriate.[720]

8.18 Results from this program suggest that access to information about applying for an ouster order, as well as support to seek an ouster order and to develop a safety plan, increase the likelihood that such orders will be made. During 2003, the service supported 58 women to apply for an ouster order. Of these, 42 were granted on an interim basis, and 46 were granted as part of the ongoing order. The applications were contested in 22 of the matters.[721]

8.19 In some consultations, people pointed out that the accommodation and service system is not tailored to support ouster orders. There is a lack of appropriate accommodation available for respondents who must leave their homes as a result of an intervention order.[722] We are interested in receiving views about what additional services, if any, are needed to maximise the availability and the effectiveness of ouster orders.

? QUESTION(S)

41. Should intervention orders that require the respondent to leave and stay away from the family home be made more frequently than they currently are? If so, what changes would best achieve this?

42. What other services and systems are needed in order to support the safe and effective use of ouster orders?

DIRECTIONS TO ATTEND A PROGRAM

8.20 Behaviour change programs for men who use violence are increasingly a part of coordinated responses to family violence in Australia and overseas.[723]

720 Submission 3.

721 Submission 4.

722 Mick Boyle, 'Family Violence Division of the Magistrates' Court Project' (Paper presented at the Initiatives for Justice Conference, 9 October 2003, Ballarat); Consultations 5, 23, 27, 40, 41. In addition, participants in consultations 16 and 20 said ouster orders are granted in their areas because there is accommodation for men who use violence.

723 Lesley Laing, *Responding to Men Who Perpetrate Domestic Violence: Controversies, Interventions and Challenges* (2002) 4, 23; Fernando Mederos, 'Batterer Intervention Programs: The Past, and Future

Programs are part of the legal response to family violence in many Australian and overseas jurisdictions.[724] Many referrals to behaviour change programs occur during a man's contact with the criminal justice system rather than the civil system. New Zealand is a notable exception, where a magistrate making a civil protection order under the Domestic Violence Act must direct the respondent to attend a program.[725]

8.21 In Victoria, behaviour change programs have been available since the mid 1980s[726] and there is now a developed network of such programs.[727] Referral to these programs is coordinated through a statewide organisation called No To Violence, which has 28 member programs.[728] Such programs aim to assist people using violence to take responsibility for their violence and to develop skills to stop using violence.[729] The programs are informed by an awareness of the power dynamics based on gender, and on culture, race and class, that underpin family violence.[730] At present, men's attendance at these programs is voluntary.

8.22 The Crimes (Family Violence) Act provides that a court may direct a respondent to undertake prescribed counselling as a condition of an intervention order.[731] In practice, however, no counselling has been prescribed by regulation and magistrates cannot actually direct a respondent to attend counselling. Our consultations suggest that a small number of magistrates recommend that respondents should undertake a program when making an order against them.[732]

Prospects' in Melanie Shepard and Ellen Pence (eds) *Coordinating Community Responses to Domestic Violence, Lessons from Duluth and Beyond* (1999) 145.

724 See paras 3.45–3.54.

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

726 Partnerships Against Domestic Violence, *A Comparative Assessment of Good Practice in Programs for Men who Use Violence Against Female Partners* (2003) 160.

727 It is thought that one-third of all Australian behaviour change programs are based in Victoria: see 'Towards Integrated Community Responses to Men who Use Violence Towards Family Members: NTV Response to "Ending Domestic Violence: Program for Perpetrators?" Report' *No to Violence—NTV Male Family Violence Prevention Association* <www.ntv.net.au/ntv_nine.htm> at 7 October 2004.

728 Ibid; Partnerships Against Domestic Violence (2003), above n 726, 161.

729 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 (2003), above n 726, 24–25.

730 Partnerships Against Domestic Violence (2003), above n 726, 25; No to Violence, above n 727.

731 *Crimes (Family Violence) Act 1987* (Vic) s 5(1)(g).

732 Consultations 6, 13, 32.

Such recommendations are not a formal condition of the intervention order and are not necessarily standard or common practice.[733]

8.23 The Magistrates' Court (Family Violence) Bill, currently before the Victorian Parliament, proposes a system whereby men are referred to counselling as part of the civil response to family violence.[734] The amendments will, if passed, require magistrates to order respondents to be assessed for counselling as a condition of an intervention order.[735] If it is appropriate for the respondent to attend counselling, the court is required to order that the respondent does so.[736] Failure to attend either the initial assessment for counselling or the counselling itself is an offence and can attract a fine.[737] The objective of these amendments is to increase the accountability of people who use violence against family members and to encourage them to change their behaviour.[738]

8.24 Under the proposed model, counselling would include attendance at a 20-week men's behaviour change group as well as individual counselling.[739] The proposed model includes formal outreach for respondents' partners/former partners and other family members, as well as concurrent support programs for partners/former partners and children.[740] This project, the Family Violence Court Intervention Project, will be trialed and evaluated in Ballarat and Heidelberg.

8.25 Many consultation participants supported the use of behaviour change programs. For some, behaviour change programs were seen as an appropriate response as they encourage men to take responsibility for their use of violence.[741] Others said the legal process itself cannot change a person's use of violence and

733 Consultation 13.

734 Currently, these amendments will be introduced for a two-year period, as the Magistrates' Court (Family Violence) Bill 2004 (Vic) also provides that the amendments will lapse on 31 October 2007: see clause 2(2) and pt 4.

735 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 14, inserting new s 8C into the *Crimes (Family Violence) Act 1987* (Vic).

736 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 14, inserting new s 8D into the *Crimes (Family Violence) Act 1987* (Vic).

737 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 14, inserting new ss 8C(5), 8D(4) into the *Crimes (Family Violence) Act 1987* (Vic).

738 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 14, inserting new s 8A into the *Crimes (Family Violence) Act 1987* (Vic).

739 Information provided to the Commission by Court Services, Department of Justice, October 2004.

740 Ibid.

741 Consultations 4, 5, 7, 9, 13, 14, 16, 20, 23, 24, 25, 27, 31, 32, 34, 36, 37, 39.

that programs are required to address the causes of family violence.[742] Behaviour change programs were seen to be most appropriate when imposed as an additional legal requirement for respondents, rather than a replacement for criminal sanctions.[743] Overall, our consultations found there is support for court-mandated attendance at programs.[744]

8.26 However, concerns were also raised about behaviour change programs. Some consultation participants noted that there is still debate about whether programs are effective in stopping men's use of violence,[745] and others felt that court-ordered programs may be ineffective if people using violence had not made a personal decision to change their behaviour.[746] There was also a concern that programs may teach men other, more subtle types of abusive behaviour.[747] Some research suggests that men using violence often agree to attend a program in order to persuade their partner to return to the relationship and then leave the program on their partner's return.[748]

8.27 Although most Victorian programs are informed by an awareness of gendered power dynamics, and focus on ensuring that men take responsibility for their use of violence, a recent Australian evaluation of behaviour change programs found there was a gap between the stated objectives and practice of some programs.[749] It was suggested that the proper monitoring and enforcement of

742 Consultations 36, 37.

743 Consultations 29, 36; see also Partnerships Against Domestic Violence (2001), 'Taking Responsibility', above n 729, 13; Community Law Reform Committee of the Australian Capital Territory (1995), above n 130, para 867.

744 Consultations 5, 9, 32, 36. Directing men to attend as part of an intervention order was seen as more appropriate than requiring them to attend after they had breached an intervention order: see Consultation 36.

745 Consultation 12.

746 Consultations 13, 21, 29. See also Buzawa and Buzawa (1996), 'Domestic Violence', above n 146, 214–215; Federal–Provincial-Territorial Ministers Responsible for Justice (2003), above n 153, 70.

747 Consultation 21. See also Community Law Reform Committee of the Australian Capital Territory (1995), above n 130, para 881.

748 Carann Feazell, Raymond Mayers and Jeanne Deschner, 'Services for Men Who Batter: Implications for Programs and Policies' (1984) 33 (2) *Family Relations* 217, 221; 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.

749 Partnerships Against Domestic Violence (2003), above n 726, 24–26.

program conditions in intervention orders is an important element of a court-mandated approach.[750]

8.28 The concerns about programs that were raised during our consultations reflect the debates in the broader literature on this subject. For example, relevant research and our consultations both suggest there is a need for programs that are appropriate for men from culturally and linguistically diverse communities and programs that are specifically tailored for Indigenous people.[751] This relates to a key theme in academic discussions about behaviour change programs, namely whether programs are effective and how they can be made more effective.[752] In our consultations, there was also a recognition of the fact that programs need sufficient funding to operate,[753] although not at the expense of funding for women's support programs.[754] Another issue raised in recent literature is that there is significant variation in the content and quality of existing programs, which may mean a uniform definition and minimum standards for these programs need to be implemented.[755]

? QUESTION(S)

43. Have we accurately identified the issues relevant to mandating men's attendance at behaviour change programs as part of an intervention order? Should other issues be taken into account during the development of the proposed Family Court Violence Intervention project?

750 Consultations 5, 12.

751 Consultations 4 , 5, 13, 22; Partnerships Against Domestic Violence (2001), 'Taking Responsibility', above n 729, 16; Mederos (1999), above n 723, 141–143; Domestic Violence Prevention Unit (2001), above n 197, 1; Laing (2002), above n 723, 20.

752 Some good summaries of the extensive debates on this issue are Laing (2002), above n 723, 9–23; Neville Robertson, 'Stopping Violence Programmes: Enhancing the Safety of Battered Women or Producing Better-Educated Batterers?' (1999) 28 (2) *New Zealand Journal of Psychology* 68; Buzawa and Buzawa (1996), 'Domestic Violence', above n 146, 218–222; see also Consultation 12.

753 Consultations 13, 16; Partnerships Against Domestic Violence, *Domestic Violence: Working with Men* Phase 1 Meta-Evaluation Report (2001) 70.

754 Consultation 29. See also Buzawa and Buzawa (1996), 'Domestic Violence', above n 146, 217; Laing (2002), above n 723, 1; Partnerships Against Domestic Violence (2001), 'Domestic Violence', above n 753, 89.

755 Partnerships Against Domestic Violence (2003), above n 726, 25–26.

ORDERS ABOUT CHILDREN AND CHILD CONTACT

8.29 In Chapter 7 we examined the issue of when children should be included in the court's consideration during family violence intervention order proceedings. In this section, we look at what kinds of terms are included when a court makes an intervention order in relation to a child, and what matters it must take into account when doing so.

INTERVENTION ORDERS AND CHILD CONTACT

8.30 Consultation participants raised two main criticisms of the courts' approaches to making intervention orders in situations when a child's contact with the respondent must be taken into account. First, they said magistrates too readily include the standard 'except for agreed child contact' exceptions when making an intervention order.[756] It was also suggested that magistrates rarely use their powers to vary or suspend Family Court contact orders when making an intervention order.[757] These tendencies, it was argued, result in intervention orders being made that put children at risk of violence during contact with the respondent. They may also put protected adults at risk of violence when children are handed over at the beginning and end of contact.

Use of Pro Forma Exceptions to Allow Child Contact

8.31 When magistrates make an intervention order involving a child, they have the option of including an exception to the 'no contact' restriction so that contact between the respondent and the relevant children may take place.[758] Magistrates can use these exceptions whether or not there are Family Court orders in place when the intervention order is made.

8.32 The pro forma Magistrates' Court exception stops the respondent from contacting the protected person or being within a certain distance of the protected person's residence or work except:

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756 Consultations 1, 10, 12, 16, 20, 21, 33, 40.

757 Consultations 1, 20, 23, 25, 29, 33, 38, 40.

758 Children may be involved in an intervention matter because they are included in the intervention order, or because the intervention order relates to adults who are the child's parents or carers. In the latter situation, an intervention order may prevent contact between the respondent and the child because it prevents the adult parties from communicating to arrange child contact or from being close enough to deliver or collect the child.

to exercise child contact by agreement with the victim or pursuant to a court order.[759]

8.33 Many of the participants in our consultations commented that magistrates tend to include these exceptions whenever adult parties to an intervention order application have children. Some suggested that magistrates rarely seem to question whether the exceptions allowing child contact are appropriate or safe in the circumstances of the case the magistrate is dealing with.[760]

8.34 Family violence workers and police officers who contributed to our consultations said the pro forma exceptions to non-contact and non-communication orders make intervention orders difficult to enforce.[761] This is because a respondent who breaches an intervention order containing the standard child contact exceptions can say that he and the protected person had agreed to communicate about child contact, or had agreed that he should attend the protected person's house to collect the child for contact.

Power to Vary Family Court Contact Orders

8.35 The second issue arises when there are Family Court contact orders in place before the intervention order is made, and the Family Court orders provide for contact between a child and the respondent to the intervention order application. If the magistrate makes an intervention order that is inconsistent with the Family Court order, the Family Court order prevails and the inconsistent part of the intervention order is invalid.[762]

8.36 If there are Family Court orders in place that would undermine the protection given by the intervention order, the Magistrates' Court has the power to vary, discharge or suspend the Family Court contact order.[763] This means it is open to a magistrate who is making an intervention order to suspend or vary existing Family Court orders so that the child's contact with the respondent stops, the arrangements for contact are changed, or the contact handover arrangements

759 Children's Court of Victoria, *Research Materials* Section 6. Family Division—Intervention Orders (2004), 6.10 Prohibitions in Intervention Orders.

760 Consultations 1, 10, 12, 16, 20, 21, 33, 40.

761 Consultations 1, 2, 5, 16, 20, 21, 31, 32.

762 *Family Law Act 1975* (Cth) s 68S. As discussed above, anecdotal evidence suggests that what is more likely to happen in practice is that the magistrate will make the restrictive terms of the intervention order subject to any Family Court contact orders.

763 *Family Law Act 1975* (Cth) s 68T.

are varied to reduce any risk to the child and/or the protected adult. The principle underlying this section is that contact orders should not expose people to violence.

8.37 In addition to varying or suspending existing contact orders, section 68T of the Family Law Act enables magistrates to make contact orders, even when there are no Family Court contact orders in place. This means that in certain cases, a magistrate may make an order for carefully prescribed contact with children that does not require the parents to have contact with each other.[764]

8.38 The Magistrates' Court may exercise its powers under section 68T, either in response to an application or on its own initiative. It was consistently stated during our consultations that magistrates rarely use these powers and that few people seeking protection are aware of this option.[765] Few people therefore apply to have their Family Court order varied or suspended, or to have the Magistrates' Court make specific contact provisions. The information obtained through consultations confirmed the findings of a 1998 study, which found that section 68T is not often used for various reasons, including that there is limited awareness of the provision, that magistrates are reluctant to become involved in family law, and that lawyers and police are reluctant to make an application under the section.[766]

8.39 Although the Children's Court is able to make intervention orders in relation to children under 17 years of age, the Children's Court does not have the power to vary, suspend or discharge a Family Court contact order. It is not possible to provide this power to the Children's Court by making changes to the Crimes (Family Violence) Act or any other Victorian legislation. Only amendments to federal legislation would achieve it.

8.40 The Magistrates' Court (Family Violence) Amendment Bill 2004 provides that if the court makes an intervention order in relation to a child, the court must

764 Miranda Kaye, 'Section 68T Family Law Act 1975: Magistrates' Powers to Alter Family Court Contact Orders when Making or Varying ADVOs' (2003) 15 (1) *Judicial Officers' Bulletin* 3, 4.

765 The Magistrates' Court does not collect data in relation to how many orders are made pursuant to s 68T of the *Family Law Act 1975* (Cth). Also above n 757.

766 Kearney McKenzie & 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) 17–20.

determine whether there are any Family Court orders in force regarding the child.[767] This provision will insert the following note:

> Note: If there is such an order in force, section 68T of that Act may allow the court to vary, discharge or suspend that order.

Intervention Orders and Child Contact – Why the Concern?

8.41 While court decisions about child residence and contact in the context of parental separation are generally made by the Family Court, intervention orders can provide children and their parents with protection from family violence until these arrangements are agreed between the adult parties or determined by the Family Court. It is important that Magistrates' and Children's Courts obtain the right balance between unnecessarily prohibiting contact between children and respondent parents and exposing children or adult family members to violence at contact or at contact handover.

8.42 In addition to the research that demonstrates a significant overlap between partner abuse and child abuse,[768] research shows that violence against children at contact and against women at contact handover is common.[769] Even when the respondent has not been violent towards the child or children prior to separation, some men subsequently use threatened or direct violence against children during contact as a means of continuing to abuse or control their partner.[770]

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767 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 10, inserting new s 4A(4) into the *Crimes (Family Violence) Act 1987* (Vic).

768 Thea Brown, Margarita Frederico, Lesley Hewitt et al, *Violence in Families: The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998) 23; Tomison (1995), above n 92; Tomison (2000), above n 97, 5–7; Edleson (1999), above n 92.

769 Thea Brown, 'Child Abuse in the Context of Parental Separation and Divorce: New Reality and New Intervention Model' (Paper presented at the 8th Australasian Conference on Child Abuse and Neglect, One Child's Reality—Everyone's Responsibility, 19–22 November 2001, Melbourne); Miranda Kaye, Julie Stubbs and Julia Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003) 37–38.

770 Lorraine Radford, Marianne Hester, Julie Humphries et al, 'For the Sake of the Children: The Law, Domestic Violence and Child Contact in England' (1997) 20 (4) *Women's Studies International Forum* 471, 477; Women's Legal Service, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (2002), 47–52; see also Martha McMahon and Ellen Pence, 'Doing More Harm Than Good?: Some Cautions on Visitation Centers' in Einat Peled, Peter Jaffe and Jeffrey Edleson (eds) *Ending the Cycle of Violence: Community Responses to Children of Battered Women* (1995) 187.

8.43 In some cases, therefore, when an intervention order is made for the protection of a parent it will be unsafe to enable the parent's child to have contact with the respondent until the full facts of the case can be thoroughly examined in the Family Court.[771] In other cases, given that family violence against women often continues or escalates following separation,[772] intervention orders that allow child contact may expose the protected adult to abuse by the respondent when arranging child contact or during contact handover. Contact handover can be a particularly dangerous time for women who have left a violent relationship.[773]

8.44 These factors suggest that it is appropriate for legal and support workers, registrars and magistrates to give active consideration to what specific provisions for child contact should be included in an intervention order. Failure to do so may expose children and adult family members to continued risk of violence.

? QUESTION(S)

44. Does the current approach to dealing with child contact issues in family violence intervention order cases ensure adequate protection for children and protected adults? If not, what changes to the legislation and/or procedure would lead to more consistent protection without unnecessarily restricting children's contact with respondent parents?

45. The proposed amendments to the *Crimes (Family Violence) Act 1987* will, if passed, require magistrates to determine whether any Family Court orders are in place before making an intervention order in relation to a child. They also insert a note regarding magistrates' powers to vary or suspend Family Court contact orders. Will these amendments lead to more consistent protection for children and protected adults or are further changes needed?

771 Concerns were raised in consultations that the Family Court at times fails to protect children and their mothers from post-separation abuse when making child contact orders: Consultations 1, 21, 27, 29, 31.

772 Ruth Fleury, Chris Sullivan and Deborah Bybee, 'When Ending the Relationship Does Not End the Violence: Women's Experience of Violence by Former Partners' (2000) 6 (12) *Violence Against Women* 1363; Women's Legal Service (2002), above n 770, 46–47; Mouzos and Rushforth (2003), above n 33, 2.

773 Women's Legal Service, above n 770, 47; Radford et al, above n 770, 477.

REFERRALS TO THE CHILDREN'S COURT

8.45 Under the Act, if the defendant or the person in need of protection is under 17 years of age 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.[774]

8.46 The Magistrates' Court Family Violence and Stalking Protocols provide registrars and magistrates with guidance about how to decide where proceedings should be instituted. The protocols state that:

- 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.[775]

8.47 In relation to the decision about where proceedings should be heard, the protocols state:

> With the assistance of the Protocols above, suburban Magistrates and Registrars may consider whether the particular case is one more suited to listing in the Family Division of the Melbourne Children's Court. This may be particularly relevant where there are child protection issues arising in the evidence before the Court.[776]

8.48 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 DHS 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 and proceed without regard to legal form; and

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

775 Magistrates' Court of Victoria (2003), above n 286, para 21.2.3.

776 Ibid para 21.3.

- a guarantee that children will be separately represented.

8.49 If an application involves an adult and a child, however, 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 power to make orders in respect of an adult who is seeking protection against an adult respondent.

8.50 In several consultations, participants stated that some magistrates at their local court referred all intervention orders relating to children to the Children's Court.[777] Participants said that when hearing an application involving an adult and a child, these magistrates make a decision in relation to the parent's intervention order, but will only make an interim order in relation to the child. They then refer the application as it relates to the child to the Children's Court in Melbourne. This means that in order to obtain a final intervention order protecting their children, parents must go to the Children's Court and repeat the process there.

8.51 Consultation participants suggested that many parents who are required to repeat the intervention order process at the Children's Court do not pursue the application in relation to their children.[778] Some live in outer metropolitan or regional areas, and find it too difficult or costly to travel to Melbourne to attend the Children's Court, if this is what they are required to do. Others have simply found the process in the Magistrates' Court too difficult or demanding, and are reluctant to face another set of court proceedings. The result of this practice, therefore, is that some children do not obtain protection under the Act.

8.52 If an applicant parent pursues the application regarding the child in the Children's Court, the Magistrates' and Children's Courts will be considering the same set of allegations, any witnesses will have to testify twice, and a degree of unnecessary and potentially harmful duplication will be involved.

8.53 The protocols note that 'splitting' an application involving both an adult and a child 'may not always be desirable given the two courts could then be considering the same set of circumstances'.[779] The routine transferral of proceedings relating to children to the Children's Court does not therefore appear to be consistent with the protocols.

777 Consultations 2, 3, 25.

778 Consultation 2.

779 Magistrates' Court of Victoria (2003), above n 286, para 21.6.

? QUESTION(S)

46. When an application for an intervention order seeks protection for an adult and children, should the application be heard in:
    - the Magistrates' Court;
    - the Children's Court; or
    - separated so that the application relating to children is heard in the Children's Court while the application relating to the adult is heard in the Magistrates' Court?

MATTERS TO BE TAKEN INTO ACCOUNT WHEN MAKING AN ORDER

8.54 Unlike most other family violence legislation, the Act does not indicate what matters the court must consider when making an order, except for the provision about orders that restrict the respondent's access to premises.[780] The decision-making process is therefore left to the discretion of the individual magistrate in most cases.

8.55 Many consultation participants believe that the lack of guidance in the Act is problematic, and that it contributes to subjective decision making by magistrates. In consultations, we often heard that whether or not an order was obtained could depend on which magistrate was in court on the day.[781] Consistency of approach and decision making may encourage more women who need protection to use the intervention order process.

MAGISTRATES' APPROACHES TO FAMILY VIOLENCE MATTERS

8.56 Many participants also believed that differences in decision making reflected differing levels of understanding about family violence throughout the magistracy.[782] Lack of understanding about the nature and dynamics of family violence may lead to magistrates refusing to make orders, or making inappropriate orders.

8.57 Magistrates in Victoria have not been recently surveyed to ascertain their approach and attitude towards family violence and the use of intervention

780 See paras 8.8–8.19.

781 Consultations 1, 5, 11, 20, 21, 23, 30, 33, 41.

782 Consultations 2, 5, 7, 9, 12, 19, 21, 26, 28, 29, 34, 38, 39, 40.

orders.[783] However, two such studies have been undertaken in Australia, one in NSW and one in Queensland.[784] In these surveys, magistrates were asked to comment about the system, and to indicate their views about the nature and causes of family violence.[785]

8.58 The NSW study found that most magistrates saw family violence as different from other forms of violence for a range of reasons.[786] However, only a relatively small number of magistrates recognised that issues of control, assertion of power and gender imbalance were causes of family violence. Many more identified the defendant's characteristics, and external factors such as poverty and unemployment as causes.[787] Almost one-fifth of magistrates (19%) who responded thought that domestic violence matters are best resolved privately between the parties and over one-third thought that they are sometimes best worked out privately.[788] Magistrates were evenly divided about whether it 'takes two to tango' and that both parties can be to blame for the violence.[789] A substantial majority of magistrates said their main priority was concern for the safety of women and children involved in the application. The majority disagreed with the proposition that they should be sensitive toward the person seeking protection, stating that they should be sensitive to the needs of all parties, not just the applicant.[790]

8.59 The responses of magistrates involved in the Queensland survey were very similar to those in NSW, except the response to the statement about sensitivity to the person seeking protection. In Queensland the majority of magistrates agreed that a magistrate needs to be sensitive towards the person seeking protection,

783 The most recent research of which the Commission is aware is that conducted by Dr Rosemary Wearing in 1992. As part of her evaluation of the impact of the *Crimes (Family Violence) Act 1987* (Vic), Dr Wearing interviewed 40 magistrates regarding their application of the Act and elicited considerable information about magistrates' attitudes to family violence cases: see Wearing (1992), above n 3, ch 4.

784 The Queensland study replicated the NSW study in order to provide accurately comparable data.

785 Jennifer Hickey and Stephen Cumines, *Apprehended Violence Order: A Survey of Magistrates* (1999) 13.

786 Ibid 49.

787 Ibid 53–56.

788 Ibid 56–57.

789 Ibid 59–61. Many magistrates qualified their response that both parties could be to blame by stating that there was no excuse for violence.

790 Ibid 61–65.

although many qualified this by saying it was important to be fair to both parties.[791]

8.60 Many participants in our consultations believed magistrates' attitudes to family violence affect the decisions they make. Problems in obtaining orders for or about children were common, as discussed above.[792] Other examples of situations in which a lack of understanding of family violence was seen to have affected magistrates' decisions included:

- refusal to grant intervention orders where there has been no physical violence but constant harassing behaviour or psychological abuse;[793]
- refusal to grant an order because the applicant was in a refuge and was therefore considered safe and not in need of an order;[794] and
- 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 the woman on the street.[795]

8.61 It was suggested by many consultation participants that magistrates should receive training about the nature, dynamics, effects and underlying issues involved in family violence.[796] We note that training is planned for magistrates and other justice system personnel who will be involved in the Family Violence Courts at Heidelberg and Ballarat.[797]

? QUESTION(S)

47. What is the best way to ensure that magistrates are familiar with the nature and dynamics of family violence, and to ensure consistent decision making?

791 Belinda Carpenter, Sue Currie and Rachael Field, 'Domestic Violence: Views of Queensland Magistrates' (Paper presented at the Australian and New Zealand Society of Criminology Annual Conference, 21–23 February 2001) 28. In the Queensland survey, 40% of magistrates responded—75% of female magistrates and 33% of male magistrates.

792 See paras 5.14–5.17, 8.29–8.38.

793 This matter is discussed in detail at paras 5.4–5.13,.

794 Consultation 5.

795 Consultation 5.

796 Consultations 2, 5, 9, 12, 21, 26, 28, 29, 34, 38, 39, 40.

797 See above n 487.

LEGISLATIVE GUIDANCE ABOUT MATTERS TO BE TAKEN INTO CONSIDERATION

8.62 Unlike the Victorian Act, most equivalent Australian legislation provides that when considering whether to make an intervention order and the terms of the order, the court must take into account, as being of paramount importance:

- the need to ensure that the person seeking protection is protected from family violence; and
- the welfare of children who are likely to be affected by the respondent's behaviour.[798]

8.63 It has been suggested that the legislation should be amended to encourage magistrates who are making, varying, extending or revoking an order for the protection of both a parent and a child to separately consider the interests of the child. It is possible that a provision requiring the court to consider the welfare of any children affected by the respondent's behaviour, or involved in the application, would serve such a purpose.

8.64 Other matters that equivalent legislation state must be taken into account are:

- hardship caused to the respondent, or any other person;[799]
- how the order would be likely to affect contact between any children and either the protected person or the respondent;[800]
- the respondent's criminal record or any previous similar behaviour of the respondent, whether towards the protected person or towards someone else;[801] and
- that the order made must be the least restrictive of the respondent's personal rights and liberties that still achieves the objects of the legislation and ensures protection for the protected person.[802]

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798 See, for example: *Restraining Orders Act 1997* (WA) s 12, *Domestic Violence Act 1994* (SA) s 6, *Domestic and Family Violence Protection Act 1989* (Qld) s 25(5). Similar provisions related to the need to protect persons seeking protection are in the *Justices Act 1959* (Tas) s 106B(4AAB) and the *Protection Orders Act 2001* (ACT) s 6(1).

799 For example *Restraining Orders Act 1997* (WA) s 12(1)(e) and *Domestic Violence Act 1994* (SA) s 6(1)(d).

800 For example *Domestic Violence Act 1994* (SA) s 6(1)(cb) and *Justices Act 1959* (Tas) s 160(4AAB)(b).

801 *Restraining Orders Act* 1997 (WA) s 12(1)(h), (i).

802 *Protection Orders Act 2001* (ACT) s 6(2).

8.65 In its 2003 report on apprehended violence orders, the NSWLRC recommends that the legislation in that jurisdiction be amended to provide that the paramount consideration in deciding whether to make an order should be the safety and protection of the applicant and any child directly or indirectly affected. The NSWLRC further recommends that in making its determination about safety, the court should consider:

> (a) the effects and consequences on the safety of the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made;
>
> (b) any hardship that may be caused by making or not making the order, particularly on the person for whose protection the order would be made and any children;
>
> (c) the accommodation needs of all parties and particularly the applicant and any children; and
>
> (d) any other relevant matter.[803]

? QUESTION(S)

48. Should the *Crimes (Family Violence) Act 1987* provide additional guidance to magistrates about what matters must be taken into account when making an intervention order and when deciding which provisions to include in an intervention order?

Legislative Guidance About the Act's Objects

8.66 The Crimes (Family Violence) Act does not articulate its objects.[804] By comparison, a number of other equivalent statutes in Australia and internationally articulate their underlying philosophy or their objectives using an 'objects clause'. Objects clauses, when included in legislation, operate to clarify legislative policy and intent and to guide judicial and legal interpretation of the legislation. Most refer to the aim of:

803 NSW Law Reform Commission (2003), above n 350, 175.

804 The Act does provide that its purposes are '[t]o provide for intervention orders in cases of family violence and to amend the Crimes Act 1958': see *Crimes (Family Violence) Act 1987* (Vic) s 1.

- ensuring the safety of people who fear or experience violence;[805] and
- reducing and preventing violence between family members.[806]

8.67 The NSW legislation also lists, among its objects, the aim of enacting 'provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence Against Women'.[807] In its 2003 report, the NSWLRC recommends that, in light of the negative impact of family violence on children who experience and witness it, the objects be amended to:

- 'ensure the safety and protection of all persons (especially children) who witness or experience domestic violence'; and
- refer also to the United Nations Convention on the Rights of the Child.[808]

8.68 Statutes may also articulate how they aim to achieve their objectives. Examples include the New Zealand and NSW legislation. These statutes state that the legislation will achieve its objects by 'ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice'.[809] The New Zealand Act also states that its objects will be achieved through the provision of appropriate programs for people who have experienced family violence and the requirement that respondents attend programmes to stop or prevent their use of violence.[810] Another example can be found in the proposed amendments to the ACT *Protection Orders Act 2001* which, if passed, will state that the object of facilitating safety and protection of people who experience violence will be achieved by:

- providing a legally enforceable mechanism to prevent violent conduct; and

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805 See, for example, *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1); *Crimes Act 1900* (NSW) s 562AC(1)(a). The *Protection Orders Act 2001* (ACT) provides that one of the objects is to 'provide a mechanism to facilitate the safety and protection of people who experience' violence; see s 5(b).

806 *Crimes Act 1900* (NSW) s562AC(1)(b); *Protection Orders Act 2001* (ACT) s 5(a) and *Domestic Violence Act 1995* (NZ) s 5(1). Section 5(1) of the New Zealand Act provides that the object of reducing and preventing violence is to be achieved by 'recognising that domestic violence, in all its forms, is unacceptable behaviour' and ' ensuring that, where domestic violence occurs, there is effective legal protection for victims'.

807 *Crimes Act 1900* (NSW) s 562AC(1)(c).

808 NSW Law Reform Commission (2003), above n 350, 46–47, 49.

809 *Crimes Act 1900* (NSW) s 562AC(2)(b); *Domestic Violence Act 1995* (NZ) s 5(2)(b).

810 *Domestic Violence Act 1995* (NZ) s 5(2)(c), (d).

- allowing for the resolution of conflict without the need to resort to arbitration.[811]

8.69 Participants in one consultation suggested that the Act should articulate its purpose and objectives, and that all decisions made under the Act should be consistent with, and measured against, these objectives.[812]

? QUESTION(S)

49. Would the inclusion of an 'objects clause' improve interpretation and application of the *Crimes (Family Violence) Act 1987*?

COSTS ORDERS

8.70 The Crimes (Family Violence) Act states that:

> Each party to any proceedings under the Act must bear his or her own costs of those proceedings, unless the court decides that exceptional circumstances warrant otherwise in a particular case.[813]

The exception to the rule that each party must bear their own costs is when a court is satisfied in a particular case that the making of the application was 'vexatious, frivolous or in bad faith'.[814] In that situation, the court may award costs against the applicant.

8.71 Several consultation participants said that despite the above rule, a number of lawyers use the threat of costs to pressure an applicant to withdraw an application, to agree to an undertaking or to agree to a consent order in particular terms.[815]

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811 Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 6, amending s 5(b). The second 'object' refers to the new proposal, contained in the Domestic Violence and Protection Orders Amendment Bill 2004 (ACT), to require that parties to a protection order application must be referred to mediation when a registrar considers that the application will be more effectively resolved through mediation than by a hearing: see Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 11, inserting new s 18A.

812 Consultation 1. See para 3.76 for a discussion and question about the aims of the *Crimes (Family Violence) Act 1987* (Vic).

813 *Crimes (Family Violence) Act 1987* (Vic) s 14A(1).

814 *Crimes (Family Violence) Act 1987* (Vic) s 14A(2).

815 Consultations 3, 12, 40.

? QUESTION(S)

50. Are there any problems with the use or threatened use of costs orders under the *Crimes (Family Violence) Act 1987* against either applicants or respondents. If so, what changes would address this?

Chapter 9
Enforcement of Intervention Orders

INTRODUCTION

9.1 The intervention order system is unable to protect individuals from continuing violence and harassment if intervention orders are not enforced. Concerns about inadequate enforcement of intervention orders and inconsistent responses to breaches of intervention orders were raised in almost every consultation we held. Many people think the failure by police and the courts to ensure that some consequences follow when a respondent breaches a family

violence intervention order gives respondents a free rein to continue to abuse and harass protected family members.[816]

BREACH OF AN INTERVENTION ORDER—A CRIMINAL OFFENCE

9.2 Under the Crimes (Family Violence) Act, the only mechanism for enforcing an intervention order involves the police charging and prosecuting a respondent after the respondent has breached a condition of an order.

9.3 Section 22 of the Act creates the criminal offence of breach of an intervention order. Under that section, a person against whom an order has been made can only be charged with breach of the order if he or she has been served with a copy of the order, or was in court when the order was made and explained by the magistrate.

9.4 The Act does not create different types or levels of breach, apart from providing different maximum penalties for first and subsequent breaches. Section 22 simply says that if the order is contravened 'in any respect' the person who contravened it is guilty of an offence.

9.5 Because breach of an intervention order is a criminal offence, action on a breach can only be taken by the police. In order for that to occur, the person protected by the order must report the breach to the police or the police must be made aware of the breach in some other way. At present, for the police to take action over a breach, the protected person must usually be willing to provide evidence of the breach in court. The police must then make a decision as to whether or not to charge and prosecute the alleged offender for the breach.

9.6 Breach of an intervention order is a summary offence and therefore prosecuted in the Magistrates' Court. The offence must be proven beyond reasonable doubt, which is the standard of proof that applies in criminal cases. Consultation participants said that workers and people using the intervention order system are confused by the different standard of proof for breach of an order, as opposed to the standard of proof for obtaining the order.[817]

816 Consultations 1, 4, 8, 9, 11, 24, 26, 29, 31, 39.

817 Consultations 20, 24, 29, 33.

POLICE RESPONSE TO BREACHES—CONSULTATIONS

9.7 The operation of intervention orders was criticised in consultations, with some participants saying that intervention orders are only really effective against those who have a respect for the law and a fear of the consequences of breaching an order.[818] Issues were also raised in consultations about the lack of police response to breaches, and lack of appropriate penalties being imposed by courts when breaches are prosecuted. Considerable frustration was expressed that this lack of response to breaches creates a major impediment to the effectiveness of intervention orders. A frequent criticism made in consultations was that an intervention order is 'just a piece of paper', which can give persons seeking protection a false sense of security, as orders are often not adequately enforced.[819]

9.8 Arbitrary practices have developed which indicate the reluctance on the part of police to treat breaches of intervention orders seriously, and also demonstrate the issue of inconsistent responses across Victoria. Consultation participants in two separate regional areas said police will not take any action until there have been at least three breaches, and even then they may not act depending on the nature or severity of the breach.[820] This is inconsistent with the current law and police policy. Participants also said police responses within regions varied—police in one part of the region responded to breaches very well, but the response was not as good in other parts of the region.[821]

9.9 The issue of variation in police responses to breaches was a common problem identified in consultations. Participants noted that if a woman had been physically assaulted, was articulate, not affected by alcohol or other substances, was not a repeat complainant, and showed 'appropriate' emotions such as fear and distress as opposed to anger, she would be more likely to receive a positive response from police. If, however, she was known to the police and had made repeat complaints, and particularly if she had withdrawn complaints in the past, police were less likely to respond, provide any assistance, or charge the alleged defendant.[822]

818 Consultations 1, 9, 14, 20, 26, 32, 39, 40.

819 Consultations 1, 2, 5, 9, 12, 15, 24, 26, 32, 36, 40.

820 Consultations 6, 15. However, in Consultation 15, participants suggested that this 'rule' came from the local Magistrates' Court as well.

821 Consultation 16.

822 Consultations 1, 5, 6, 11, 12, 14, 15, 16, 17, 28, 29, 39, 40.

9.10 This was referred to in one consultation as 'intervention fatigue'.[823] In consultations where this was raised, participants also noted the problem that these complaints are not recorded by police. Therefore, not only is no action taken, but when a matter does finally come before the court there is no evidence to prove that a number of complaints of breach have previously been made and that the defendant's action is not a one-off incident.

9.11 These issues were emphasised in consultations with Indigenous community members and service providers. Most said police did not respond or act on breaches, particularly if they have had a lot of contact with the family or even the area where they live.[824] On some occasions this has led to women suffering serious injuries.[825] In one consultation, participants said police are less likely to act on a complaint of breach if the order is obtained by a Koori person against a non-Koori person. Some said the lack of response by police results in intervention orders not being considered as an appropriate means of protection by Indigenous women.[826] Another concern raised was the issue of who police choose to speak to at incidents. In one consultation participants said that when police attend incidents in 'Koori villages' they identify key people to deal with, but that 'those people are sometimes the perpetrators of abuse'.[827]

9.12 As discussed in Chapters 3 and 6, some Indigenous people are reluctant to contact police for assistance with family violence incidents, including breaches of an intervention order.[828] However, concerns were also raised about police non-attendance or failure to act, which leaves children and women in danger.[829] One suggestion to improve police response was for Victoria Police to establish a unit of specialist family violence officers in each area.[830] Another suggestion was that a domestic violence worker or Aboriginal Liaison Officer should attend incidents with police.[831]

823 Consultation 29.

824 Consultations 4, 6,14, 15, 17, 20, 26, 28.

825 Consultation 28.

826 Consultations 26, 20.

827 Consultation 14.

828 See paras 3.15, 6.21.

829 Consultations 26, 28.

830 Consultation 28.

831 Consultations 6, 26.

9.13 A common complaint across consultations with service-providers who work with Indigenous and non-English speaking communities was that police do not recognise that violence in particular communities should be addressed:

> They say 'those communities are violent, that's the way they do things, we don't have to intervene'.[832]

There is clearly a need for education of police about this issue. Lack of police response perpetuates problems in these communities, as women who experience violence will be less likely to seek assistance from police if they have had a negative experience with them. Consultation participants also said that word of these negative experiences soon spreads throughout communities, so that women who have not previously contacted police will also be less likely to seek their assistance.[833]

POLICE RESPONSE TO BREACHES—POLICE POLICY

PREVIOUS POLICY

9.14 Before Victoria Police introduced a new Code of Practice for the Investigation of Family Violence, the police response to family violence incidents, including breaches, was set out in the Victoria Police Manual. Prior to the code, the Manual contained short paragraphs covering the issue of arrest or summons of the offender, what should be contained in a brief of evidence, and the issue of defence of 'breach with consent'.[834] It contained limited guidance about how police should respond to breaches, thereby allowing the use of broad discretion.

THE NEW CODE OF PRACTICE

9.15 The new code of practice contains considerably more detail and direction to police who respond to a reported breach of an intervention order. The code states, for example:

> An intervention order is an order of a Magistrate and a breach is any behaviour that

832 Consultation 24.

833 Consultations 5, 14, 26, 28.

834 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109–3 para 6. The issue of breach with consent is discussed further at paras 9.32–9.38.

> contravenes the Magistrate's order…Intervention orders must be strictly interpreted and enforced.[835]

This section of the code also provides that regardless of what other action is taken police must provide the parties with appropriate referral.[836] This new policy reflects a recognition by Victoria Police that helping the parties to access support and assistance will not only benefit the parties, but also the community, as it aims to reduce the need for police intervention in the future.

9.16 The code also stipulates that police must pursue action on the breach:

> Regardless of the seriousness of the alleged breach, police must conduct a thorough investigation to identify and locate the offender [if the alleged offender is not at the scene]…Police must then pursue one of the criminal options.[837]

9.17 The clear directions in the code of practice to treat each breach seriously are intended to overcome individual interpretations of the law, such as those we learned about during our consultations.[838] The new code makes it clear that the officers who respond to an alleged breach do not have authority to make judgments about what action should be taken:

> Decisions to prosecute are based on the evidence gathered and not a subjective assessment by the responding police as to the seriousness of the breach…A police supervisor will decide if there is sufficient evidence to warrant prosecution and recommend which of the criminal options should be followed based on the individual circumstances of the incident…The decision regarding the outcome of an investigation of an alleged breach must not be pre-empted. In all cases the matter must be investigated and a brief of evidence submitted.[839]

'MINOR' OR 'TECHNICAL' BREACHES

9.18 Although the Act does not differentiate between more or less serious breaches, many consultation participants said breaches that do not involve

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835 Victoria Police (2004), above n 134, para 4.6.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-3 para 8.1.

836 Victoria Police (2004), above n 134, para 4.6.2.1.

837 Ibid, para 4.6.2.2. The 'criminal options', set out at para 4.1.1, are: charge and remand, charge and bail, charge and summons, intent to summons and no further police action.

838 See para 9.8.

839 Victoria Police (2004), above n 134, paras 4.6.3.1, 4.6.3.2, 4.6.3.3.

physical violence are often not acted on, and are sometimes referred to by the police as 'minor' or 'technical' breaches.[840]

9.19 It would appear that this may have become an entrenched practice as it has been specifically addressed in the new code of practice:

> There is no such lawful term as a 'technical' or 'minor' breach and any breach will be treated the same. Ignoring the breach conveys to the defendant and the aggrieved family member that the order is not taken seriously. An outcome of this could be continued abuse, further police involvement in subsequent breaches and possible harm to victims and/or their children.[841]

EVIDENCE OF BREACHES

STANDARD OF PROOF

9.20 One issue that was commonly raised in consultations was the difficulty for women in understanding the different standard of proof required for obtaining an order and proving breach of an order.[842] It was noted that women find it difficult to understand that they can obtain an order based on one standard of proof, but if they want it enforced a higher level of proof must be satisfied—'the bar has been raised'.[843] Some participants also thought that police often focus on obtaining orders as though obtaining an order is in itself a means of protection, and are less focused on enforcing the orders.[844]

EVIDENCE GATHERING

9.21 The section on breaches in the police code of practice refers to gathering of evidence by police but does not specifically refer to what evidence should be gathered, apart from taking a statement from the alleged offender. However, evidence gathering is discussed earlier in the section of the code that deals with 'criminal options'. As breach of an order is a criminal offence it could be assumed that the policy regarding criminal options applies to breaches. This section contains directions about interviewing the offender, taking forensic evidence from

840 Consultations 1, 12, 20, 21.

841 Victoria Police (2004), above n 134, para 4.6.1.

842 Consultations 7, 11, 20, 29, 33, 40.

843 Consultation 29.

844 Consultation 12.

the offender, including clothing and photographs, forensic and clinical evidence from the victim and a statement from the victim.[845]

9.22 Several concerns about the failure of police to gather evidence of intervention order breaches emerged through consultations. The first was about current police policy and police attitudes to gathering evidence at the scene of family violence incidents. Police suggested that under current police policy family violence incidents are not treated as crime scenes, and therefore evidence is not gathered.[846] However, many consultation participants advised that even where evidence is obvious at the scene, police do not collect it and instead rely on the protected person to give evidence. Therefore if the protected person does not want to testify because of fear of the perpetrator, charges are not laid. Our consultations were held prior to the introduction of the new police code, and it would appear clear from the code that police must now conduct investigations at the scene of a breach.

CORROBORATION

9.23 The second related issue raised by consultation participants is that police are not willing to pursue matters where there are no independent witnesses or physical evidence, though this is the case for many breaches.[847] Workers noted that police often say they cannot take action because there is no evidence on which to act, particularly in the situation of breaches that do not involve physical violence.[848] Police themselves said they could not 'take one person's word against another'.[849] However, there is still reliance on the complainant giving evidence, rather than other evidence being gathered.

9.24 Many cases which go before the courts involve one person's word against another, and the decision as to whose evidence to accept rightly rests with the fact finder at court—the magistrate in the Magistrates' Court or the jury in upper courts. Police should not be acting as 'gatekeepers' by making their own decision about whether or not a witness is to be believed. As a general principle of evidence, if witnesses say a fact occurred and the fact finder believes them, the testimony is sufficient to prove the fact, even if the fact is disputed and there is no

845 Victoria Police (2004), above n 134, paras 4.2.2–4.2.3, 4.3.1.1–4.3.1.2.

846 Consultation 10. See also para 7.49.

847 Consultations 12, 20, 21, 29.

848 Consultations 1, 5, 9, 11,12, 20, 21, 29, 31.

849 Consultation 20.

other evidence to prove it. Corroboration of a complainant's evidence is not generally required by the law, though in the past the uncorroborated testimony of some witnesses was considered unreliable, including complainants in sexual offence cases. Legislation has since been passed to abolish this bias against complainants in sexual offence cases.[850]

9.25 Despite the fact that the law does not require corroboration, many consultation participants, including police, said breaches are not prosecuted because there is no independent evidence.[851] Lack of physical evidence, or statements from independent witnesses, were commonly raised as causing problems for prosecuting breaches. Harassing phone calls and 'drive bys' were said to be difficult to act on because there is insufficient evidence to prove the offence. Decisions are clearly being made by police that the testimony of the complainant is not sufficient. It is possible that this occurs because police have prosecuted such cases in the past and the court has held that there is insufficient evidence to satisfy the criminal standard of proof of the breach having occurred 'beyond reasonable doubt'. In such cases the police may be open to an action against them for costs by the defendant, which would create a further disincentive for the police to prosecute.[852]

9.26 It was also suggested that where there are children of the relationship it can be especially difficult to establish whether the respondent has acted in breach of the order, or whether his or her conduct comes within the standard child contact exception.[853] If, for example, the respondent repeatedly telephones the protected person, it can be argued that the telephone calls are for the purpose of arranging child contact.

9.27 Many consultation participants said that even where evidence is obvious, or where incidents take place in public with many witnesses, police do not act to collect evidence.[854] Some police in consultations said that women often exaggerate about violence.[855] Several police officers also said that a lot of people use the

850 In Victoria, the *Crimes (Sexual Offences) Act 1980* (Vic) inserted s 62(3) into the *Crimes Act 1958* (Vic). In 1991, s 62(3) was repealed and replaced with s 61 of the *Crimes Act 1958* (Vic).

851 Consultations 5, 7, 9, 10, 11, 12, 14, 16, 20, 21, 24, 29, 31, 36, 40.

852 The issue of costs in criminal proceedings is discussed at 9.28–9.29.

853 See paras 8.34.

854 Consultations 1, 7, 12, 21.

855 Consultation 20.

system to gain some advantage in family law cases.[856] If police hold misconceptions about women's tendency to exaggerate their experiences of abuse or perceive that many people misuse the system, it is likely to affect the way they respond to those who allege family violence.

COSTS

9.28 In civil proceedings to obtain an intervention order the Act specifies that each party bears their own costs.[857] However, breach proceedings are criminal proceedings, to which the Act does not apply. If the police charge a defendant with breach of an intervention order and the defendant successfully defends the charge and it is dismissed, the court has the power to order the police to pay the defendant's costs.[858] In that case, the defendant is generally entitled to costs unless he or she has unreasonably induced the prosecution to believe that the offence could be proved or has unjustifiably prolonged the case.[859]

9.29 Some consultation participants thought the threat of costs was a significant factor in police decisions about prosecution of breaches.[860] It is likely that police also consider the possibility of a costs order when considering whether or not to prosecute a reported breach where there is no independent or forensic evidence, as discussed above. As the breach must be proved 'beyond reasonable doubt', police may be concerned the court will not convict the defendant on the testimony of the complainant alone, and may not want to risk the possibility of costs by bringing charges in those circumstances.

856 Consultations 10, 16, 20.

857 See para 8.70.

858 *Magistrates Court Act 1989* (Vic) s 131 gives the court 'full power to determine by whom, to whom and to what extent the costs are to be paid'.

859 *Latoudis v Casey* (1990) 170 CLR 534, 544 (Mason CJ), 565 (Toohey J), 569 (McHugh J). The defendant might be refused all or part costs where the prosecution was instigated because of conduct by the defendant after the offence, the defendant unreasonably prolonged the proceedings or the defendant refused to give the police an explanation for his or her conduct.

860 Consultations 16, 25, 31, 36.

? QUESTION(S)

51. The Victoria Police Code of Practice for the Investigation of Family Violence articulates police members' obligations in dealing with breaches of intervention orders. Are other changes needed to improve police responses to breaches, including decisions about whether to lay charges and gathering of evidence to support prosecution of breaches?

THE PROTECTED PERSON'S WISHES

9.30 Many consultation participants criticised the lack of understanding by police of the complex dynamics of family violence. This lack of understanding can make it difficult for police to understand why complainants may not wish to pursue criminal action against the person who uses violence, to respond to complainants appropriately, and to provide adequate support. In one consultation service providers gave the example of a client making a complaint to police that led to her partner being charged with a breach, then signing a statement of no complaint, and later changing her mind and asking the police to pursue the charge.[861] The police initially refused to reinstate the charge, though they eventually did so.

9.31 Issues of whether the person in need of protection or the police should control the application process are discussed earlier.[862] Similar issues arise in relation to criminal charges related to intervention orders. In the case of a reported criminal offence of a breach of an intervention order, the difficulty for police is that they may not have sufficient evidence to continue with a charge if the complainant is not willing to give evidence.

? QUESTION(S)

52. What should the police response be where sufficient evidence exists to charge and prosecute a respondent for breach of an intervention order but the protected person wants no further action to be taken?

861 Consultation 29.

862 See paras 7.34–7.58.

DEALING WITH A PROTECTED PERSON'S INVOLVEMENT IN BREACHES

9.32 Different views were raised during consultations about what should happen when a protected person in some way encourages or consents to a respondent's breach of an intervention order.

9.33 Many participants were concerned that police threaten to, or lay, aiding and abetting charges against protected persons in these circumstances.[863] The view put by these participants is that an intervention order is made against the respondent, that only the respondent is bound by the order and that only the respondent should be held responsible if the order is breached. Several participants suggested that this area of the law should be clarified, though there were divergent views about how it should be clarified. Some participants thought it should be clear that breach proceedings can only relate to the person against whom the order was made. Others suggested that legislation should clarify whether complicity of the protected person is a formal defence or should be taken into account in some other way.[864]

9.34 Many participants also raised concerns that respondents caught breaching an order can easily raise the excuse that 'she invited me' or 'she agreed', thereby seeking to avoid any police action. Consultation participants suggested that such a tactic is often effective because police seem unlikely to press charges for breach if there is a chance the protected person consented to the respondent's presence. This was noted to be a particular problem when the respondent speaks English but the protected person does not and cannot effectively dispute what the respondent tells the police.[865] Participants in that consultation said in such cases, especially when the police fail to use an interpreter, the police tend to act on what they are told by the respondent.

9.35 The new code of practice addresses this issue:

> 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

863 Consultations 1, 3, 6, 8, 12, 19, 21, 23, 26, 33.

864 Consultations 1, 3, 12, 21.

865 Consultation 5.

> 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.[866]

9.36 The code raises the issue, which was also raised in consultations, of the need to educate protected persons about the need to vary or revoke orders if they are no longer appropriate or needed. It was noted that while a protected person may agree to have contact with a respondent, this does not equate to consenting to abuse or assault. Several consultation participants suggested that an easier and more accessible process should be implemented for protected persons to obtain a variation of an order when they wish to resume communication or cohabitation with the respondent.[867]

9.37 A smaller number of consultation participants said it is unfair that protected persons can seek to have the respondent's actions restricted but can themselves act without any restriction. There was some concern that it was unfair to the respondent and an abuse of process for the protected person to be permitted to invite the respondent to have contact in breach of an intervention order.[868] Some suggested that a respondent who is charged with breaching a restraining order should be able to rely on a defence when the protected person has agreed to the breach. Several others suggested that orders should be made binding on protected persons as well as respondents.

9.38 The information presented to the Commission so far suggests that police do not respond consistently to breaches of intervention orders where the protected person has played some role in enabling the breach to occur. In some instances they do not press any charges, while in other cases they press charges against both the respondent and the protected person. It appears there is a need for greater clarity about this issue. The new code contains some guidance on this issue:

> 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.[869]

866 Victoria Police (2004), above n 134, para 4.6.3.4.

867 Consultations 9, 21, 23, 26.

868 Consultations 6, 8, 13.

869 Victoria Police (2004), above n 134, para 4.6.3.4.

While this policy should prevent inconsistent charging practices, it may not prevent the more common scenario, heard through consultations, of protected persons being threatened with such charges.

? QUESTION(S)

53. Are any further changes needed to clarify and improve the police response to breaches where the protected person has consented to the breach, or to a previous breach of the intervention order?

CONSEQUENCES OF BREACHING AN INTERVENTION ORDER

9.39 The maximum penalty for a first offence of breach of an intervention order is a fine not exceeding 240 penalty units—currently $24 540—or imprisonment for no more than two years.[870] For a subsequent offence the maximum penalty is imprisonment for no more than five years. Throughout our consultations we were told that the penalties imposed by courts for a breach of an intervention order are often seen as inappropriate, and lead to the perception that defendants can 'get away with it'.

9.40 Four main issues were raised in consultations about the consequences of breaching orders:

- the penalties that are actually imposed by courts are insufficient to deter those who refuse to comply with orders, particularly those who engage in serial harassment;
- the possibility of jail may deter some women from seeking a criminal justice response, particularly Indigenous women;
- the need for men to take responsibility for their behaviour through behaviour change programs; and
- the problems caused by the delay between the breach and the imposition of a court sanction.

9.41 The first two points are difficult to reconcile. On one hand, some participants thought that harsher penalties were appropriate to impress upon the

870 *Crimes (Family Violence) Act 1987* (Vic) s 22. For the financial year commencing July 2004, the value of a penalty unit is $102.25: see *Victoria Government Gazette*, No. G 25 Thursday 17 June 2004 1683; *Sentencing Act 1991* (Vic) s 110(1); *Monetary Units Act 2004* (Vic) s 11(1)(b).

community that intervention orders should not be taken lightly and that breach of an order is a serious offence.[871] In one consultation a service provider who had worked in the area for nine years said a 'slap on the wrist' was the most common penalty, and she had only ever known one perpetrator to be jailed for breach of an order. She reported that when he received a six-month custodial sentence, news of this quickly travelled through the area and 'everyone stayed quiet for six months'. However, when he was released, and breached the order again but did not receive a custodial sentence 'it all started again'.[872] This also highlights the issue of inconsistency of decision making which can occur in regional areas where there is a turnover of magistrates.

9.42 One possible approach to this issue could be to distinguish between different types of breach, such as a distinction between breaches which involve physical violence and those that do not, and attach different maximum penalties to them to reflect their seriousness. An approach that has recently been proposed in Western Australia is to introduce increased penalties for breaches that are witnessed by children. The Bill specifies that if a child with whom the offender is in a domestic relationship is 'exposed' to an act of violence, it is taken to be an aggravating factor for the purposes of the *Sentencing Act 1995* (WA).[873] 'Exposed' is defined in section 5 of the Bill to mean seeing or hearing the act of abuse, or witnessing physical injuries resulting from the act of abuse. The Bill also specifies that the court still has discretion to decide whether or not it is an aggravating factor.

9.43 On the other hand, in our consultations some participants thought that not all women wanted the full criminal justice response, and that it may actually deter them from contacting police when they need protection. Those participants noted that what some women want from the system is a police response which provides safety and perhaps removes the offender to provide short-term respite, but they do not want the risk of their partner going to jail.[874] In one consultation it was stated that some women use intervention orders because they are the only protection available. They are then locked in to a system of having to call the police whenever there is a breach, even though they may not always want the

871 Consultations 1, 4, 9, 11, 26, 29, 39, 40.

872 Consultation 26.

873 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 40(4), inserting new s 61(4).

874 Consultations 22, 33.

police involved and may not find them effective.[875] This raises the issue of alternative options for enforcement of orders, discussed below.

9.44 Some participants wanted the system to require people who use violence to acknowledge and take responsibility for their actions through behaviour change programs, rather than focusing only on punishment.[876] Participants who focused on this thought that defendants who breach orders should be required to attend behaviour change programs and this should be a key element of sentencing. At the moment, participation in such programs is only considered at the time of making an intervention order.

9.45 Another option raised in consultations was for defendants who breach intervention orders to have greater access to diversion.[877] Diversion is available for criminal offences that can be dealt with in the Magistrates' Court if:

- the defendant admits responsibility;
- both the prosecution and defendant consent; and
- it appears appropriate to the court, which may inform itself in any way it thinks fit, that the defendant should participate in a diversion program.[878]

9.46 As the prosecution must consent, the person who has experienced violence will be informed about the diversion. Victoria Police policy states:

> The victim must be advised that a diversion is being recommended and that their details will be given to the diversion coordinator who may subsequently contact them to ascertain their views. The victim's details will not be given to the defendant.[879]

9.47 Diversion must also be appropriate in the circumstances, so it is up to the discretion of the magistrate to decide whether to allow diversion for a breach offence.

9.48 The focus of diversion is on restitution and an apology to the victim. It also focuses on rehabilitation of offenders by requiring them to attend appropriate counselling or treatment. If the defendant does not comply with the diversion

875 Consultation 22.

876 Consultations 31, 32.

877 Consultation 3.

878 *Magistrates Court Act 1989* (Vic) s 128A. Section 128A sets out the entire procedure for the processing of a matter through a diversion program in the Magistrates' Court.

879 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 113-10 para 6.2.3; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 113-10 para 6.2.3.

conditions set by the court, the matter is returned to court and the defendant is sentenced in the usual way.[880] Diversion therefore involves a level of monitoring by the court.

9.49 The final point raised was the delay between the breach and the defendant being dealt with by the court. In one area, consultation participants said that breaches could take up to nine months to be dealt with by the court if the defendant pleads not guilty. By that time, they said, there have often been several breaches and protected persons, trying to move on with their lives, have to give evidence and go through their experience of violence all over again.[881]

? QUESTION(S)

54. Should the *Crimes (Family Violence) Act 1987* specify different types/levels of breaches, with different maximum penalties? Would other changes to the penalty provisions in the Act make intervention orders more effective?

55. Should referral to a behaviour change program be a mandatory part of a sentence for breach of an intervention order?

56. Is diversion ever an appropriate way for the court to deal with breaches of an intervention order?

ALTERNATIVE OPTIONS FOR ENFORCING INTERVENTION ORDERS

9.50 Under the current Act, an intervention order can only be made in negative terms—the court prohibits the defendant from doing certain things—except for the direction to attend counselling.[882] There is no monitoring of an intervention order by the court or the police. Intervention by these agencies will only occur if the order is breached and the breach is brought to the attention of the police.

9.51 There may be other ways to ensure that orders are complied with rather than waiting until the order has been breached and taking criminal action. One

880 *Magistrates Court Act 1989* (Vic) s 128A(5). The court is, however, required to take into account the extent to which the defendant complied with the program.

881 Consultation 14.

882 *Crimes (Family Violence) Act 1987* (Vic) s 5(1). The current position of counselling orders is discussed at para 8.20.

possibility is greater police involvement in monitoring a respondent's compliance with an intervention order. For example, an initiative by one local area command of the New South Wales Police involves a monthly operation targeting family violence offenders against whom orders have been made. During this operation, officers attend the offenders' homes uninvited to check whether they are abiding by the conditions of the order.[883]

9.52 Another possibility is monitoring of the order by the court. Some 'court monitoring' will occur in the new Family Violence Courts through the imposition of a condition in the order that the defendant attend a mandated men's behaviour program. This is a pilot program confined to those courts and will be available to limited numbers of defendants. Another possibility is for the court to direct the defendant to attend other counselling or programs that are readily available and would assist the defendant to manage behaviour which may trigger violence. This could include such things as alcohol or drug counselling. The defendant's participation would be monitored through progress reports made to the court. These kinds of orders cannot currently be made under the Act. The court currently only has the power to order a defendant to participate in 'prescribed' counselling—the mandated men's program—so a legislative amendment would be required for other orders to be made.

? QUESTION(S)

57. Are there any other options for monitoring a respondent's compliance with an intervention order, and should they be implemented?

883 Information regarding the Domestic Assault Response Team (DART), presented by Sue Prosser, Maree Sykes and Chelsea Wheele (Home Truths Conference, 15–17 September 2004, Melbourne).

Chapter 10
Improving Process and Procedure

INTRODUCTION

10.1 The processes that are used to access and implement the Crimes (Family Violence) Act can be as important as the legislation itself. A person's experience of the process—such as whether the respondent is served with the documents promptly, whether the court registrar is encouraging or discouraging, and how long it takes between the initial application and a final hearing—can directly influence that person's decision about whether to continue to seek protection from family violence.[884] Similarly, a respondent's experience of the process can influence his or her compliance with an order, if one is made.[885] In this Chapter, we will discuss procedural issues that affect the way the legislation works in practice and that have been raised with us during consultations.

BEFORE THE HEARING DATE

10.2 In this section we examine aspects of the process that occur before an intervention order application is heard. Service of intervention orders is a critical aspect of the system, because intervention orders have no effect until they have been served on the respondent. We will discuss some of the concerns regarding service that have been raised with us, in particular:

- many protected people are not aware when an order has been served and has taken effect;
- it can take a long time for police to serve the documents on a respondent, and in some cases the police are unable to do so; and
- although the Act provides for the court to make orders for 'substituted service', it has been suggested that this is rarely done and the effect of such orders is not well understood.

10.3 As well as issues regarding service, we will discuss problems that arise because people seeking protection do not usually receive any warning that the respondent will defend an application before they attend the court hearing.

884 For an analysis about procedural factors that lead women to withdraw their applications for a family violence intervention order, see Wearing (1996), above n 3, 232–127.

885 Consultation 13.

SERVICE OF INTERVENTION ORDERS

10.4 Under the Act, an intervention order made when the respondent is not in court provides no protection, in that no consequences can arise from a breach of the order, until it has been personally served on the respondent.[886]

10.5 The importance of service arises in two situations. The first is where an application for an interim order is heard without the respondent knowing about the application or being present in court.[887] If an interim order is granted, the police must serve a copy of the order personally on the respondent and the interim order is not effective until that is done.[888]

10.6 The second situation occurs where a respondent has been notified about an application and given a date on which to attend court to contest or agree to the order.[889] If the respondent does not attend court, the court may proceed to hear and determine the matter in the respondent's absence.[890] If an order is made after such a hearing, the order is not effective until the police serve a copy of the order on the respondent.[891]

10.7 Throughout our consultations various participants, including members of Victoria Police and family violence workers, expressed frustration at the length of time it can take for the police to serve an interim or final order.[892]

LETTING THE PROTECTED PERSON KNOW ABOUT SERVICE

10.8 A number of family violence workers said a common problem for women who have obtained an interim intervention order is that they do not know when the order has been served.[893] Many women think the order has been served before it has been. We heard that some do not find out that the order is not yet

886 *Crimes (Family Violence) Act 1987* (Vic) s 22(1). Under section 22(1), if a person is present in court when the intervention order is made, and the court gives an explanation to the respondent as required under s 15 of the Act, the intervention order will be effective immediately.

887 *Crimes (Family Violence) Act 1987* (Vic) s 8(1).

888 *Crimes (Family Violence) Act 1987* (Vic) s 17(1)(b).

889 The application, or complaint, must be served personally on the respondent or must be left at the respondent's last or most usual residence or workplace with someone who appears to be 16 years of age or over; see *Crimes (Family Violence) Act 1987* (Vic) s 11(2).

890 *Crimes (Family Violence) Act 1987* (Vic) s 12(c).

891 *Crimes (Family Violence) Act 1987* (Vic) s 22(1).

892 Consultations 1, 12, 13, 29, 39, 40.

893 Consultations 12, 32.

enforceable until they attend court on the return date, and are told the hearing will have to be adjourned to give the police more time to find the respondent and serve the documents.[894]

10.9 The onus is on people seeking protection to contact the police to find out whether the interim or final intervention order has been served. Family violence workers said it is often difficult for women who contact their local police station to find out who is responsible for serving the order and whether the order has been served.[895]

10.10 It was strongly suggested that steps should be taken to ensure protected persons know that their orders cannot be enforced until they have been served, and that police should notify protected persons as soon as their intervention orders have been served.[896]

DEALING WITH DIFFICULTIES IN EFFECTING SERVICE

10.11 Police members who participated in our consultations said it can be difficult to serve the respondent in a number of situations. The respondent may have moved from the last known residence and is difficult to locate, or the respondent may deliberately abscond and avoid service.[897] Several suggestions were made to overcome these difficulties.

10.12 One suggestion was that the police should be empowered to detain or remove a person until a telephone interim order has been obtained or to serve an existing order.[898] Other jurisdictions, such as Western Australia, NSW and Queensland, currently enable a person to be detained for a limited period while a telephone application is made for an intervention order against that person.[899]

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894 Consultation 12.

895 Consultations 12, 29.

896 Consultations 1, 12.

897 Consultation 16.

898 Consultation 20. The NSWLRC, in its report on apprehended violence orders, recommends that the *Crimes Act 1900* (NSW) be amended to grant police a limited power to arrest and detain a respondent for the purpose of serving a copy of an interim or final order, or variation of an order, personally on the respondent: see NSW Law Reform Commission (2003), above n 350, 232.

899 See *Restraining Orders Act 1997* (WA) s 22, which enables police to detain a person for up to two hours; *Crimes Act 1900* (NSW) s 562H(12), which enables the police to detain the person until the interim order is made and served; *Domestic and Family Violence Protection Act 1989* (Qld) s 69, which allows the police to detain a person in custody in certain circumstances for no more than four hours

10.13 As discussed previously,[900] the amendment Bill under consideration by the Western Australian Parliament proposes to empower police to issue temporary orders, and would enable police to detain persons for up to two hours until a police order is made.[901]

10.14 Another suggestion was that where a respondent is avoiding service, or the police have been unable to locate the respondent to effect service, the court should be empowered to issue a warrant for the respondent's arrest specifically to effect service. The officer who made this suggestion said that upon the respondent's arrest, the respondent should be required to appear before the court to be served with the order, and that this process would deter the respondent from breaching the order.[902]

ORDERS FOR SUBSTITUTED SERVICE

10.15 If it appears to the court that it is not reasonable or practicable to serve an order personally, the court may order that a copy of the order be served by some other means or it may make an order for substituted service.[903] During our consultations, a number of people suggested that orders for substituted service are not sought or made as frequently as they are needed.[904] Some police participants said police officers find it difficult to convince magistrates they have made all possible attempts to locate and serve the documents on the respondent.[905]

An order for substituted service is one which has a definition coming but it's not quite here yet so these words have to stand in for the final definition.

10.16 It was also clear from our consultations that stakeholders have different views about what consequences flow after an order for substituted service has been made. Some people, including police officers, appeared to think that when an order for substituted service has been made in relation to an intervention order, that order is still not enforceable against the respondent until it is personally

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until a temporary order is made, or an application for a protection order completed and arrangements made with the watch-house manager.

900 See para 5.67.

901 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 18, inserting new div 3A and clause 42, inserting new s 62F.

902 Submission 5; Consultation 20.

903 *Crimes (Family Violence) Act 1987* (Vic) s 17(2).

904 Consultations 11, 31.

905 Consultation 40.

served.[906] This interpretation of the effect of an order for substituted service undermines the purpose of section 11(3) of the Act.

? QUESTION(S)

58. What changes are required to ensure that protected persons are informed about whether and when the intervention order made for their protection has been served and is enforceable?

59. Should the police be given greater powers to detain a person against whom a telephone intervention order is being sought, or against whom an order has been made but not served?

60. Is there a need to clarify the effect of an order for substituted service?

NOTICE OF THE RESPONDENT'S INTENTION TO DEFEND AN APPLICATION

10.17 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. The respondent is also advised about this date, 'the return date', when served with the application. The respondent is also given information stating that he or she may go to court and may oppose the order or contest the terms of the order. The information sheet that is given to respondents[907] advises them that they should tell the court if they oppose the orders sought in the application as soon as possible. The respondent is also given a 'Notice of Intention to Defend', which can be completed and returned to the court immediately if the respondent intends to defend the application.[908]

10.18 However, respondents are not *required* to advise the court if they intend to defend an application for an intervention order. As a result, when people seeking protection attend court for the return date, they do not know whether the respondent will be at court, whether he or she will have legal representation or will

906 Consultations 20, 34.

907 Magistrates' Court of Victoria Form 6; see Magistrates' Court of Victoria (2003), above n 286, 33–34.

908 Magistrates' Court of Victoria Form 8: ibid 37. When faxing complaint and summons or complaint and warrant and other documents to the police for service of the documents, the notice of intention to defend must be included: see ibid para 7.

be planning to contest the application. In addition, where the applicants are applying for an order in person, they cannot access representation from Victoria Legal Aid until they can establish that the application will be defended.[909] Most applicants attend court on the return date without legal representation.

10.19 Not knowing what will happen at court, or whether the person from whom they are seeking protection will be present, adds to applicants' distress. The information given to applicants states that they must be ready to proceed with their application and must bring witnesses and evidence with them on the return date.[910] We were told during consultations that respondents' lawyers often threaten applicants that they will seek costs because the applicant is not ready to proceed on the return date, and that magistrates also occasionally raise the issue of costs when an applicant is not prepared to proceed with the hearing.[911] If these practices occur, they are inconsistent with the Magistrates' Court protocols, which provide that:

> If the Court is in a position to proceed to a contest on the first return date, the case should only be heard on that day if the Magistrate determines the matter should proceed and all parties are ready to proceed.[912]

10.20 Participants raised these issues in almost every consultation we conducted. Various suggestions were made about how this might be addressed. These included:

- requiring the respondent to notify the court before the return date about whether or not he or she intends to contest the order and whether he or she will attend court on the return date;[913]
- listing the matter only for mention on the return date—this would involve an extra court attendance for many applicants but would enable the court and the applicant to be informed about the respondent's intentions on the return date without there being any expectation that the final hearing would be held on that date;[914] or

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909 Victoria Legal Aid, above n 564, ch 2, para 6.1.

910 Magistrates' Court of Victoria Form 4; see Magistrates' Court of Victoria (2003), above n 286, 30–31.

911 Consultations 1, 2, 3, 4, 12.

912 Magistrates' Court of Victoria (2003), above n 286, para 17.8.

913 Consultations 1, 33, 34.

914 Consultations 1, 33.

- making provision in the Act or in the Magistrates' Court Protocols that, in situations where the applicant has no legal representation and the respondent is represented and intends to contest the order, the court should adjourn the matter to another date.[915]

10.21 The New Zealand approach to protection orders provides another model to resolve these issues. There, the majority of protection orders are made as temporary protection orders, which are usually made on the basis of affidavit evidence without the applicant having to attend a hearing. Under the New Zealand Domestic Violence Act, temporary protection orders automatically become final orders unless the respondent notifies the court that he or she wishes to contest the final order.[916] If the respondent notifies the court that he or she intends to contest the order, the registrar of the court must then set a hearing date and advise the applicant.[917] As noted at paragraph 5.54, this approach was not supported by several consultation participants.

? QUESTION(S)

61. Should respondents be required to provide notice about whether they intend to contest an application for an intervention order? If so, what changes will reduce distress experienced by persons seeking protection, while ensuring that the process is fair for all parties?

COURT ENVIRONMENT

SAFETY AT COURT

10.22 A large proportion of consultation participants said many women who attend court to seek an intervention order fear for their safety in the court building.[918] Fear for their physical safety can affect women when they:

915 Consultations 1, 27, 36.

916 *Domestic Violence Act 1995* (NZ) ss 76–7.

917 *Domestic Violence Act 1995* (NZ) s 76(3).

918 Some of the issues raised relate to women's concerns about safety when they are in the court room giving evidence against a respondent. In Chapter 11 we discuss various options for protecting witnesses from being subjected to intimidation by a respondent while the witness is giving evidence; see paras 11.11–11.30.

- enter and leave the court building, particularly in courts that do not have, or do not make people aware of, a separate entrance;
- are waiting for their matter to be heard, especially if there are no separate waiting rooms and they must wait in a common waiting area with the respondent; and
- are in the courtroom during the proceeding.[919]

10.23 Participants said that some courts provide excellent security and have facilities that maximise the sense of safety of people seeking protection, but other courts do not. Consultation participants cited various regional courts as being particularly poor. The most frequently raised concern was that a lack of separate waiting space in some courts exposes people seeking protection to abuse by the respondent, or by the respondent's family or friends, while the parties are waiting for their matter to be called.[920]

10.24 The Magistrates' Court protocols provide for registrars to implement security measures if they become aware that a party to a family violence matter has been involved in an incident at court involving violence, or has numerous prior orders for violence.[921] These measures include:

- contacting the local police and (if in metropolitan Melbourne) the Protective Security Group; and
- communicating the concern, and immediately communicating any threat or act of violence occurring within the court building, to the chief executive officer and the registrar in charge of the relevant court region.

? QUESTION(S)

62. What can be done to improve the safety of people when they attend court to obtain an intervention order, or when they attend court as witnesses in intervention order proceedings?

919 Consultations 5, 7, 12, 14, 33.

920 Consultations 7, 19, 27, 32.

921 Magistrates' Court of Victoria (2003), above n 286, para 8.

OTHER ASPECTS OF THE COURT ENVIRONMENT

10.25 Various other issues about the court environment and court facilities were raised during our consultations. These issues included concerns that:

- the court is not child friendly and that not all women are able to access child care—some people said there should be childcare facilities at court and/or that the court environment should be made more child friendly;[922]
- not all courts have adequate disability access;[923]
- the court is too formal, and people seeking protection find the physical environment intimidating; and
- the lack of Indigenous staff working at courts makes the environment seem more intimidating and hostile to Indigenous people.[924]

? QUESTION(S)

63. Are there other aspects of the court environment or the facilities available at court that stop people from pursuing intervention orders? What should be done to address these matters?

REPRESENTATION AND SUPPORT IN COURT

REPRESENTATION FOR PEOPLE SEEKING PROTECTION

10.26 If the police apply for an intervention order on someone's behalf, the police prosecutor usually attends court to present the evidence and argue why an intervention order should be made. The person in need of protection also has to attend court, but does not have to present the case.

10.27 However, most adults who seek protection apply for an intervention orders themselves.[925] Anecdotal information obtained through our consultations

922 One consultation participant also stated that court staff and magistrates are hostile towards women who have brought their children to court, and that this demonstrates a lack of understanding that some women have limited options for arranging child care, especially in emergency situations; Consultation 4; see also Consultations 7, 40.

923 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

924 Consultations 4, 14.

925 See paras 7.4–7.5.

indicated that very few women who apply for an intervention order on their own behalf have legal representation in court. Most women go through the whole process of seeking an intervention order without accessing professional legal advice and assistance.[926]

10.28 Various reasons for the low use of lawyers in intervention orders were suggested. The intervention order system has been designed so that it is accessible, and this may have created a culture where service providers and people in need of protection assume that lawyers are not needed.

10.29 Other participants stated that legal representation was difficult to obtain for those who cannot afford a private lawyer.[927] Victoria Legal Aid does not fund representation for people who have applied for an intervention order unless the respondent is defending the application.[928] Even when a respondent does not appear at court to contest the application, the applicant must still present evidence to show that there are grounds for making an order, and must argue what types of restrictions and terms should be included in the order. Duty lawyer services are provided for intervention order matters at some courts on some days, but these are not consistent across Victoria. Even where an intervention order court support scheme exists at a court, whether an applicant can make use of that program usually depends on whether assistance is available on the right day. [929]

10.30 In cases where the respondent defends an application for an intervention order, applicants who meet the Victoria Legal Aid means test will be eligible for legal aid.[930] There are, however, many applicants who cannot afford a private lawyer but earn slightly too much to be eligible for legal aid funding. The only option for people in this category is assistance from a community legal centre. While many community legal centres offer assistance with intervention order matters, the level of assistance varies considerably and the majority do not provide representation in contested matters.[931] Some applicants with a cognitive

926 Consultations 1, 3, 7, 16, 21, 23, 26, 27.

927 Consultation 21.

928 Victoria Legal Aid, above n 564, ch 2, para 6.1.

929 Most intervention order court support schemes are provided by community legal centres, although we were told of several regional courts at which members of the private legal profession provide pro bono assistance through a duty lawyer scheme. Support provided usually consists of advice and assistance on the day rather than representation, although some representation is also provided.

930 Victoria Legal Aid, above n 564, ch 2, para 6.1.

931 While 29 community legal centres provide legal advice to people seeking protection and 25 provide assistance with documentation, only 17 provide a duty lawyer service and 12 provide representation

impairment may find the process extremely difficult to negotiate on their own, but will not necessarily be granted legal aid to assist them. Although there is provision for Victoria Legal Aid to consider 'special circumstances', which includes the applicant having an intellectual or psychiatric disability, a grant of assistance is discretionary.[932]

10.31 Many consultation participants said it is important for people seeking protection to have access to legal advice and/or legal representation.[933] Legal representation may assist people seeking protection in a number of ways. A lawyer will be more confident in presenting the person's case and may be more familiar with legal rules regarding what evidence is relevant to a case and how best to present the evidence. A lawyer will prevent some of the trauma and distress experienced by self-representing applicants by limiting particular kinds of questions or behaviour by the respondent in court. All the magistrates and court staff consulted expressed the view that the involvement of lawyers is preferable because it leads to more efficient proceedings.[934] By comparison, some people argue that the involvement of lawyers in intervention order matters makes the process more formal and more adversarial than necessary in many instances.[935] Workers think that legal representation is important for women in culturally and linguistically diverse communities because these women may have greater difficulties in understanding proceedings and their consequences, including any potential consequences for visas.[936]

? QUESTION(S)

64. Is legal representation readily available for people who have applied for a family violence intervention order?

for contested applications: information provided by community legal centres in response to a survey conducted by the Commission in September 2004.

932 Victoria Legal Aid, above n 564, ch 2, para 2.3.1.

933 Consultations 1, 3, 4, 7, 9, 11, 12, 21, 24, 25, 29, 32, 36, 37, 39.

934 Consultations 8, 25, 38.

935 Consultations 8, 18, 40. This view was noted and criticised in Consultation 3.

936 Consultations 18, 26, 36, 41.

? QUESTION(S)

65. Is it desirable that people seeking an intervention order have access to legal representation:
    - If the respondent does not contest the application; and/or
    - If the respondent contests the application?

If so, why?

REPRESENTATION FOR RESPONDENTS

10.32 Respondents in intervention order matters are entitled to be legally represented, but unless they can afford a private lawyer they have limited access to legal representation. Victoria Legal Aid will only grant assistance to an adult respondent to oppose an intervention order, or to apply for a variation of an intervention order, if:

- the respondent was arrested and is still in custody; or
- the order sought would curtail an important right of the respondent (eg excluding the respondent from his or her home) and a court might be persuaded to make a less restrictive order, or no order at all.[937]

The same guidelines regarding legal aid and cognitive impairment apply to respondents and applicants. Therefore, a respondent with cognitive impairment will not necessarily receive assistance.

10.33 Other than the provision about the defendant being in custody, these provisions leave room for interpretation and discretion so it is possible that different grants officers within Victoria Legal Aid interpret these provisions in different ways. It may therefore be unclear to respondents whether they will be able to get legal aid funding to defend an order on the basis of the guidelines.

10.34 Of 30 community legal centres that we surveyed, 25 provide legal advice to respondents in intervention order proceedings, 20 assist respondents with documents and nine provide duty lawyer services and representation for respondents in contested hearings.[938]

937 Victoria Legal Aid, above n 564, ch 2, para 6.2.

938 Information provided by community legal centres in response to a survey conducted by the Commission in September 2004.

10.35 The Magistrates' Court (Family Violence) Bill 2004 will, if passed, allow magistrates in the Family Violence Division to adjourn proceedings to give one or more parties a reasonable opportunity to obtain legal advice.[939]

10.36 During our consultations, various arguments were given in favour of providing representation for respondents who attend court for intervention order matters.[940] These include:

- The lack of advice and representation for men who appear as respondents in intervention order matters can contribute to a respondent's frustration and antagonism towards the system. This in turn can make it less likely the respondent will become engaged in a process of taking responsibility for, and trying to change, his behaviour.
- Self-representing respondents can be extremely difficult and abusive during proceedings, which can increase the distress and intimidation experienced by the person seeking protection.
- Access to representation assists respondents to better understand orders and the consequences of breaching orders. This in turn may improve compliance. This may be particularly relevant for respondents with cognitive impairment or from non-English speaking backgrounds.

? QUESTION(S)

66. Is legal representation readily available for respondents in family violence intervention order proceedings?

67. Is it desirable that respondents in intervention order proceedings should have access to legal representation. If so, why?

REPRESENTATION FOR CHILDREN

10.37 A child or young person may be involved in intervention order proceedings as:

939 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 4, inserting new s 4J into the *Magistrates' Court Act 1989* (Vic).

940 Consultations 18, 21, 26, 29, 32, 34, 36, 38, 39, 41.

- the respondent to an intervention order application, in which case the matter will be heard in the Children's Court;
- the sole person for whom an intervention order is sought; or
- one of several people for whom an intervention order is sought, when an application includes the child's parent, the child and perhaps the child's siblings.

10.38 In the first two situations, where a child is the respondent in an intervention proceeding, or where an intervention order is sought by or on behalf of a child and no adults are included in the application, the matter will usually be dealt with in the Children's Court.

10.39 The *Children and Young Persons Act 1989* gives the Children's Court the power to adjourn proceedings to enable a child to obtain legal representation.[941] Unlike some other types of proceedings in the Children's Court, it is not mandatory for children in intervention proceedings to be represented. However, children who are involved in intervention order matters in the Children's Court, whether as a respondent or a person for whom an intervention order is sought, will usually receive separate legal representation by a duty solicitor from Victoria Legal Aid. The aim of this is to ensure that children have their own voice in the proceeding.[942] Lawyers who represent children in the Children's Court must act in accordance with the child's instructions or wishes 'so far as it is practicable to do so having regard to the maturity of the child'.[943] This is different from the model of representation provided for children in the Family Court, where children's representatives must act on the child's best interests, rather than the child's wishes or instructions.

Representation of Children's Interests in Magistrates' Courts

10.40 In Chapter 6 we asked where intervention order applications should be heard if the application seeks protection for both a child and an adult (usually the child's parent). At present, some applications of this kind are heard in the

941 *Children and Young Persons Act 1989* (Vic) s 20(1).

942 Children's Court of Victoria (2004), above n 759, para 6.7. Notwithstanding the restriction on grants of assistance to adult respondents, Victoria Legal Aid may grant assistance to child defendants in intervention orders; see Victoria Legal Aid, above n 564, ch 2, para 6.2(i).

943 *Children and Young Persons Act 1989* (Vic) s 20(9).For more detail about the way that lawyers are supposed to act when representing children in Children's Court proceedings, see Louise Akenson, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (1999).

Magistrates' Court. Anecdotal information provided to us during our consultations suggested that although some magistrates 'split' these applications and refer the application regarding any children to the Children's Court, most applications involving adults and children are still dealt with in the Magistrates' Court.[944]

10.41 Unlike the Children's Court, there is no practice in place in the Magistrates' Court to ensure that children involved in intervention order proceedings are legally represented. Some consultation participants have stated that this is a problem, arguing that children's access to separate representation in intervention order proceedings should not depend on which court is hearing the application.[945]

10.42 The legislation, or the subordinate legislation, in some jurisdictions makes specific reference to the courts' powers in respect of arranging representation for children in family violence proceedings. The *Domestic Violence Act 1995* (NZ), for example, provides that the court may appoint a lawyer to represent a child.[946] The *Protection Orders Regulations 2002* (ACT) enable the court to ask that legal representation be arranged for child applicants or for children who are included in a parent's application.[947]

? QUESTION(S)

68. Is adequate and appropriate representation provided for children who attend the Children's Court as:

    - persons in need of protection; and
    - respondents

    in family violence intervention order matters?

944 Consultations 2, 8, 21, 25.

945 Consultations 3, 8.

946 The provision also enables a lawyer to be appointed to assist the court or to represent a person who lacks capacity to understand the nature of the proceedings; see *Domestic Violence Act 1995* (NZ) s 81(1)(a), (c).

947 *Protection Orders Regulations 2002* (ACT) reg 55.

? QUESTION(S)

69. When the Magistrates' Court is considering an application for an intervention order in relation to a child, should separate representation be provided for the child? What practical and other issues need to be taken into account?

70. If you consider that children involved in Magistrates' Court proceedings should be provided with separate legal representation, should this representation be provided using the same model of representation as that provided in the Children's Court?

NON-LEGAL SUPPORT

10.43 In Chapter 7 we discussed the value of complementary, non-legal support for people seeking protection at the time they are applying for an intervention order.[948] Accessing non-legal information, support and assistance can also improve the experience of parties during intervention order proceedings.

10.44 The demonstration Family Violence Courts at Heidelberg and Ballarat will provide separate on-site court liaison workers for applicants and respondents. At the time of writing, it was envisaged that the 'court applicant liaison worker' will provide information and referrals, assist with safety planning and arrange legal representation. Other envisaged functions for the worker include:

- coordination of witness assistance or other applicant support needs; and
- contact with the applicant between different court dates, for example between the interim order being made and the return date for the final hearing.[949]

10.45 The envisaged role of the 'court defendant liaison worker' is similar and includes:

- the provision of information about the legal process and the implications of intervention order proceedings, including the criminal consequences that flow from breach of a civil order;
- the provision of referrals;
- arrangement of legal representation;

948 See paras 7.28–7.33.

949 Information provided to the Commission by Court Services, Department of Justice, October 2004.

- provision of 'specialist assistance' to defendants; and
- undertaking eligibility assessments in relation to court-directed behaviour change counselling for men.[950]

? QUESTION(S)

71. What additional supports, services or other changes are required to assist:
    - people seeking protection; and
    - respondents

    during intervention order proceedings?

INVOLVEMENT OF CHILD PROTECTION AGENCIES

10.46 In some situations of family violence, the Department of Human Services (DHS) Child Protection Service, as the lead agency for the protection of children, may have been notified that a child involved is in need of protection. If police have been involved with the family, for example, the police may have made a notification to DHS Child Protection Service. Police are required to notify DHS if:

- a child has suffered or is likely to suffer significant harm as a result of physical or sexual abuse and the parents have not or are unlikely to protect the child from harm of that type;[951] or
- the police believe that a child's emotional or intellectual development is likely to suffer significant harm as a result of the family violence.[952]

10.47 In other cases, the DHS Child Protection Service will not be notified and will have had no involvement by the time the Magistrates' or Children's Court is hearing an intervention order application involving a child. An issue for

950 Ibid.

951 *Children and Young Persons Act 1989* (Vic) ss 63–4; Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-2 para 6.3; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-2 para 7.4.

952 Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-2 para 6.4.1; Victoria Police (Quarter 2, 2004–2005), above n 44, VPM Instruction 109-2 para 7.5.1. Previous police policy also required police to notify DHS if they were applying for an intervention order and a child was present during the family violence incident: see Victoria Police (Quarter 1, 2004–2005), above n 44, VPM Instruction 109-2 para 6.4.1.

consideration is whether courts dealing with intervention order applications should be given a power to notify the DHS Child Protection Service in certain circumstances. The Children's Court has such a power when it is hearing criminal proceedings and the court considers there is evidence that grounds exist for a protection application to be made in relation to the child.[953] The amendment Bill under consideration by the Western Australian Parliament proposes a requirement that child welfare be notified before a court makes an order against a respondent who is under 16 years, where the person seeking protection is the child's parent, guardian or the person with whom the child 'habitually resides'.[954]

10.48 Another related issue is whether the court should have a power, similar to that held by the Family Court, to invite the DHS Child Protection Service to intervene when dealing with matters that affect a child's welfare.[955] If this occurred, an officer from DHS Child Protection Service would have the status of a party in the proceedings, and the court would be able to use the officer as an additional source of information to assist its decision-making. The proposed amendments to the Western Australian Act will, if passed, enable the court to ask child welfare to intervene in any proceedings under the *Restraining Orders Act 1997* (WA) that may affect the welfare of a child.[956] This issue is related to whether the court should be given the power to make an intervention order for the protection of a child on its own initiative, even when no application in relation to the child has been made, which we discuss in Chapter 5.[957]

10.49 Each of these suggestions would increase the involvement of Child Protection services in family violence intervention order matters. In light of the importance of ensuring maximum protection for children, as well as the concerns that Child Protection involvement may deter some women from seeking protection through the justice system,[958] we are interested in receiving your views about the benefits and risks associated with these options.

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953 *Children and Young Persons Act 1989* (Vic) s 132.

954 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 35, inserting new s 50C.

955 *See Family Law Act 1975* (Cth) s 91B.

956 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 35, inserting new s 50D(1). The amendments will also enable child welfare to intervene on its own initiative in certain circumstances: see clause 35, inserting new s 50D(2).

957 See paras 7.65–7.69.

958 See para 6.9.

? QUESTION(S)

72. What would be the advantages and disadvantages of giving the Children's and Magistrates' Courts the power to:

- notify the Department of Human Services Child Protection Service when hearing an intervention order matter that raises protective concerns regarding a child; and
- invite the Department of Human Services Child Protection Service to intervene as a party in particular intervention order matters affecting a child's welfare?

PARTIES' UNDERSTANDING OF INTERVENTION ORDER PROCEEDINGS

DO PARTIES UNDERSTAND WHAT IS HAPPENING?

10.50 Many consultation participants said that the parties who attend court for intervention order proceedings frequently do not understand what happens in court or the outcome of the court hearing.[959] This problem is exacerbated for people from non-English speaking backgrounds and people with certain cognitive impairments.

10.51 Participants who work with men who use violence said many men who attend court as respondents leave the court unclear about what the order means. This, of course, makes it less likely they will comply with the order.[960] During the proceedings, many respondents are intimidated and overwhelmed by the environment, so that even when magistrates take care to explain the order, the respondents do not absorb the information. For some respondents from a non-English speaking background, even when the intervention order is translated it can be difficult to understand. This is a particular problem for respondents who are unfamiliar with this type of legal order.[961]

959 Consultations 1, 10, 26, 27, 39.

960 Consultations 13, 23. However, it was suggested in Consultation 5 that some men from non-English speaking backgrounds state that their English is poor and that they have not understood the meaning of the order as an excuse for breaching it.

961 VLRC Specialist Advisory Committee—Culturally and Linguistically Diverse Communities, meeting 22 June 2004.

10.52 Members of our Specialist Advisory Committee on disability issues noted that intervention orders can create problems for some respondents with a cognitive impairment, who may not be able to understand the criminal consequences of breaching orders.[962] These issues were also raised by staff we consulted from Victoria Legal Aid.[963]

10.53 Participants who work with women who have experienced violence also said many women who go to court are so distressed or frightened that they find it difficult to understand the proceedings.[964] Some workers said that they frequently leave court with a client, only to have her ask whether or not the order was granted.[965]

10.54 The parties who have a legal or non-legal support person with them during court proceedings also have a greater likelihood of understanding what happens in court. Lawyers or experienced support workers can explain any aspects of the process that the party has not fully understood, either during the proceeding or after. During our consultations, a number of family violence workers explained that they try to take clients to court to show them the environment and explain the process before the hearing date, and that this can help people seeking protection when they have to attend court.[966]

10.55 A number of consultation participants said that, although magistrates are under pressure to deal with matters expeditiously, it would be helpful if magistrates made more effort to communicate with parties in an accessible way. Several people commented that even when magistrates seem to be trying to make themselves understood, the language they use is not accessible for people who are unfamiliar with the legal system.[967]

Magistrates' Explanations When Making an Order

10.56 The legislation in various jurisdictions, including Victoria, requires magistrates who make an intervention order to explain that order to the respondent. The Victorian Act provides that if the court is making an order and

962 VLRC Specialist Advisory Committee—People with Disabilities, meeting 9 September 2004.

963 Consultation 3.

964 Consultations 8, 35.

965 Consultation 1.

966 Consultation 4.

967 Consultations 8, 12, 34.

the respondent is before the court, the court must explain the purpose, terms and effect of the order, the consequences of failing to comply with the order and how the order may be varied or revoked.[968]

10.57 Other jurisdictions, such as NSW, the ACT and Queensland require a similar explanation to be given to the person seeking protection.[969] In NSW, the court must give a similar explanation when varying an order.[970] The NSW legislation also requires the court to provide the parties with a written explanation of the terms, effect and consequences of an order when it is made or varied. The explanation must be given in a language that is, as far as practicable, likely to be readily understood by the person receiving it.[971]

10.58 The Queensland legislation requires the court to 'ensure that the respondent understands' and 'ensure that the aggrieved understands' various aspects of the order. Provision is made for the court to use the services of, or help from, other people to ensure the parties understand the order. The Act gives examples of help the court may use, including the use of:

- a clerk or public service employee to explain the order;
- explanatory notes prepared, including in languages other than English; or
- an arrangement with an Aboriginal local government, community justice group or group of elders for someone to explain the order.[972]

10.59 We are interested in receiving your views about whether the inclusion of broader legislative provisions that require magistrates to explain the outcome of intervention order proceedings to both parties would improve communication. Alternatively, we welcome your suggestions about other mechanisms that may increase parties' understanding of what occurs during intervention order proceedings.

968 *Crimes (Family Violence) Act 1987* (Vic) s 15.

969 *Crimes Act 1900* (NSW) s 562GC(1), *Protection Orders Act 2001* (ACT) ss 24–25; *Domestic and Family Violence Protection Act 1989* (Qld) s 50. The Model Domestic Violence Laws also provide that the explanation must be given to both the protected person and the respondent, see Domestic Violence Legislation Working Group (1999), above n 258, 96–97.

970 *Crimes Act 1900* (NSW) s 562GC(2).

971 *Crimes Act 1900* (NSW) s 562GC(3), (4).

972 *Domestic and Family Violence Protection Act 1989* (Qld) s 50(1)–(3).

? QUESTION(S)

73. What would improve the parties' understanding of the terms, effects and consequences of an intervention order when one is made or varied?

74. What would improve the parties' understanding of what happens during intervention order proceedings and the outcome of these proceedings generally?

MISUSE OF THE INTERVENTION ORDER SYSTEM

VARIOUS FORMS OF MISUSE OF THE ACT

10.60 During our consultations, concerns were raised about various ways in which people misuse the Act. Particular groups of people who are seen as misusing the Act were discussed, including:

- vexatious litigants who, for some malicious or mischievous purpose, make repeated applications based on the same or similar allegations;[973]
- respondents who, after an order has been made against them, repeatedly apply for an order to be varied or revoked;[974]
- respondents who make a cross application for an order when they learn that an application has been made against them, in order to achieve some perceived tactical advantage;[975] or
- people who apply for family violence intervention orders because they think an intervention order will give them some advantage in the Family Court.[976]

10.61 We referred to the last issue, along with the perception expressed by some consultation participants that intervention orders are too easy to obtain and are too frequently made, in Chapters 7 and 9.[977] In this section we will first examine whether the existing powers available to the courts to deal with vexatious litigants

973 Consultations 6, 12, 16.

974 Consultations 32, 33.

975 Consultation 28.

976 Consultations 20, 36.

977 See paras 7.19–7.20, 9.27.

in general are utilised and are adequate in this area. We will then look specifically at the potential misuse of the Act by respondents and issues that arise for the court and the other party when people misuse the provisions of the Act in some way.

VEXATIOUS LITIGANTS IN THE INTERVENTION ORDER SYSTEM

10.62 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.

10.63 The Magistrates' Court has no power to declare a person a vexatious litigant, although the Supreme Court may do so on the basis that a person has instituted vexatious legal proceedings in the Magistrates' Court.[978] An order declaring a person to be a vexatious litigant prevents that person from commencing future legal proceedings without permission from the court.

10.64 At one consultation, we heard about one Magistrates' Court that has developed an informal system for dealing with vexatious litigants. We were told that at that court, when the magistrate identifies a vexatious litigant, the magistrate advises the registrars not to accept any further applications from that person. Instead, the person is required to appear before the magistrate to seek leave to proceed with the application.[979]

10.65 The ACT *Protection Orders Regulations 2002* empower the Magistrates' Court to order that a proceeding be stayed or dismissed if it appears to the court that no reasonable cause of action is disclosed or the proceeding is frivolous, vexatious or an abuse of the process of the court.[980]

978 Such a declaration can only be made on the application of the Attorney-General, see *Supreme Court Act 1986* (Vic) s 21.

979 Consultation 32.

980 *Protection Orders Regulations 2002* (ACT) reg 66. The *Crimes Act 1900* (NSW) contains a similar provision, but only in relation to apprehended personal violence orders, not family violence orders: see s 562AK.

? QUESTION(S)

75. Should the *Crimes (Family Violence) Act 1987* be amended to empower magistrates to stay or dismiss an application if satisfied that the proceeding is vexatious, or on any other grounds? What are the risks and benefits of such a provision?

VEXATIOUS RESPONDENTS

CROSS APPLICATIONS AND MUTUAL ORDERS

10.66 A number of consultation participants said there is an ongoing problem with respondents cross-applying for an intervention order. These respondents perceive they will gain some strategic advantage if they also obtain an intervention order, for example in any concurrent or future Family Court proceedings.[981] The person who sought protection under the original application must then either defend the cross application or consent to an intervention order being made against them.

10.67 It was said during our consultations that at times some people advise or pressure the first applicant to consent to a 'mutual order' on the basis it will end the proceedings quickly and with minimal distress. It was suggested that this pressure comes from magistrates and respondents' advocates, as well as occasionally from advocates for the applicant who first sought protection.[982] If a person consents to an intervention order, the court may grant the order even if it is not satisfied that the grounds for making an order at section 4(1) have been proven.[983]

10.68 It is not possible to determine how frequently this actually occurs because the Magistrates' and Children's Courts do not collect data about the number of complaints for an intervention order that result in a mutual order being made.

10.69 The New Zealand *Domestic Violence Act 1995* allows the court to make orders by consent of all parties except when the order is sought by a cross application.[984] The Act states that:

981 Consultations 20, 36.

982 Consultations 1, 9.

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

984 *Domestic Violence Act 1995* (NZ) s 86.

> 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.[985]

10.70 In its 2003 report on apprehended violence orders, the NSWLRC considers the best approach to dealing with cross applications.[986] The NSWLRC noted that 'cross applications do present problems when they are made to retaliate or intimidate the other party' but that it is also 'mindful of the desirability of limiting general access to the AVO system'. The NSWLRC did not recommend the approach taken in New Zealand of imposing a presumption against the making of a mutual order as an outcome of a cross application. Instead, it suggests there is a need to 'keep courts and the police informed of all applications made by all parties' and recommends:

> Court forms should be drafted to include relevant questions to determine if the applicant is, or has been, a defendant [respondent] to AVO proceedings between the same parties.[987]

? QUESTION(S)

76. Should the *Crimes (Family Violence) Act 1987* be amended to require that, before granting an intervention order following a cross application, the Court must be satisfied that the criteria for granting an intervention order at section 4(1) have been met?

77. Are there other changes to the legislation, or to court processes, that would improve the current approach to cross applications and mutual orders?

Applications for Variations and Revocations

10.71 Several consultation participants said some vexatious respondents make repeated applications for variations to, or revocations of, an intervention order as a way of forcing the protected person to return repeatedly to court and continue a

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

986 NSW Law Reform Commission (2003), above n 350, 214–219.

987 Ibid 218–219.

pattern of harassment. Suggested options for preventing this misuse of the revocation and variation provisions included:

- allowing only protected persons to apply for a variation or revocation of an order, particularly when the order was imposed on the respondent after a hearing;[988]
- requiring respondents to seek leave from the court before applying for a variation or revocation of an intervention order; [989]or
- limiting the number of times a respondent may apply for the variation or revocation of an order.

10.72 The Magistrates' Court (Family Violence) Bill 2004 will, if passed, amend section 16 of the Crimes (Family Violence) Act. Under the amendment, a court may only revoke or vary an order in response to a respondent's application if 'there has been a change in the circumstances in which the order was made'.[990]

? QUESTION(S)

78. The proposed amendments to the *Crimes (Family Violence) Act 1987* will allow a magistrate to order that an order be varied or revoked on application by a respondent only if there has been a change in circumstances. Are other changes needed to prevent the revocation and variation provisions of the Act being misused by vexatious respondents?

988 The *Protection Orders Act 2001* (ACT) allows both parties to apply for a variation of an order, but only allows an order to be revoked if the court is satisfied that the order is no longer necessary for the protection of the protected person or if the applicant applies for the revocation: see s 31(3).

989 This is the approach taken in the South Australian legislation; see *Domestic Violence Act 1994* (SA) s 12(1a). Amendments to the ACT Act will also, if passed, provide that respondents cannot apply for an order to be varied or revoked without leave of the court. Leave to apply must only be granted if the court is satisfied there has been a substantial change in circumstances surrounding the making of the original order: see Domestic Violence and Protection Orders Amendment Bill 2004 (ACT) clause 15, inserting new s 30A.

990 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 21, amending s 16(2) of the *Crimes (Family Violence) Act 1987* (Vic).

Chapter 11
Evidence in Intervention Order Proceedings

INTRODUCTION

11.1 The outcome of an application for an intervention order, or of criminal proceedings for breach of an intervention order, will depend largely on what evidence is presented to the court. The main source of evidence in intervention order proceedings is usually the testimony of the person who has experienced violence. Giving evidence in court can be one of the most intimidating and distressing aspects of the intervention order system for people who have been subjected to family violence.[991]

991 Consultations 4, 5, 9, 16, 18, 20, 21, 26, 28, 29, 40.

11.2 A number of consultation participants said many women decide not to use the intervention order system because of fear of giving evidence in court.[992] Various issues regarding evidence were raised with us, including:

- ways to reduce the stress of giving evidence;
- what evidence is relied on in intervention order matters; and
- what types of evidence can and should be admitted during intervention order proceedings.

REDUCING THE STRESS OF GIVING EVIDENCE

11.3 As we discussed in Chapter 7, the person or people in need of protection from family violence are usually required to appear in court to give evidence in most applications for an intervention order. This is the case:

- in proceedings for an intervention order application, whether or not the intervention order is contested; and
- in criminal proceedings for breach of an intervention order.

11.4 If the respondent contests an application for an order, the person seeking protection will usually be cross-examined by the respondent's lawyer or by the respondent in person. Similarly, in criminal proceedings for breach of an intervention order, if the respondent denies the breach and the matter goes to trial, the defendant or the defendant's barrister has the right to cross-examine the protected person.

11.5 Giving evidence in court is intimidating for most people, regardless of what legal matter they are involved in. The nature of family violence makes the process of giving evidence in intervention order cases especially difficult.

11.6 To obtain an intervention order, or to support charges for breach of an order, people seeking protection must talk about matters that are very personal and private. Their evidence may include testimony about their experiences of sexual abuse, physical assault or other ways in which they have been humiliated, verbally abused, or controlled. The dynamics of family violence, and the way it is seen by many parts of the community, mean that many women who have been

992 Consultations 5, 29.

subjected to family violence feel ashamed about, and responsible for, the abuse they have endured.[993]

11.7 When respondents attend court for an intervention order application, or contest a charge of breach of an intervention order, the person who has been subjected to their violence has to face them and give evidence in front of them. In some cases, where respondents do not have a lawyer, people seeking protection will be questioned directly by the very person they fear.

11.8 These factors exacerbate the already daunting process of testifying, and prevent some women from giving their evidence in full.[994] This can affect the quality of the evidence obtained by the court, as well as the wellbeing of the witness.

11.9 Many of our consultation participants highlighted how traumatic it is for women who have experienced family violence to give evidence in court about their experiences.[995] Some consultation participants noted that the experience is compounded for women from non-English speaking backgrounds, who may be unfamiliar with the system and understand less of what is occurring in court. It was also suggested that women from certain communities find it especially difficult to give evidence in open court about sexual violence or other personal issues, because these matters are rarely discussed within their own communities.[996]

11.10 Witnesses other than the person seeking protection may also have some reason to fear the respondent. This may arise, for example, when the witness is a friend or family member of the person seeking protection.

Alternative Arrangements for Giving Oral Evidence

11.11 In this section we will examine the laws that regulate how witnesses give evidence in intervention order cases. In most legal proceedings, witnesses are required to appear in open court to give evidence and be questioned by the other side. However, judicial officers currently have an inherent power to conduct proceedings in the manner they consider appropriate, which may include directing

993 See paras 2.1–2.20, 2.24–2.26 regarding the dynamics and effects of family violence, and para 6.5.

994 We have already discussed that a number of women do not access the intervention order system because they know that they will have to give evidence in court: see para 6.8.

995 See above n 991.

996 Consultation 5.

that alternative arrangements be put in place when witnesses are giving evidence. The Magistrates' Court Family Violence Protocols reflect this:

> If there is a security concern, police or other court security should be advised. Where available, the remote witness facility may be utilised when the matter is listed before Court.[997]

11.12 We have not heard, during our consultations, of any instances in which a witness gave evidence in an intervention order case using a remote witness facility or other alternative arrangements. We are interested in how often such arrangements are used under the current legislation.

Alternative Arrangements for Complainants in Sexual Offence Cases

11.13 For criminal proceedings, legislation has been enacted that specifically empowers courts to direct certain witnesses to use other means of giving evidence. For example, most Australian jurisdictions now provide that complainants in sexual offence cases may be allowed to give their evidence using alternative arrangements.[998]

11.14 In Victoria, section 37C of the *Evidence Act 1958* allows a court, either on its own motion or on application of a party to the proceeding, to direct that a witness give evidence using alternative arrangements. This can occur in criminal proceedings for sexual offences, and for certain violent indictable offences where the witness is under 18 or is a person with impaired mental functioning. Alternative arrangements that may be put in place include:

- permitting evidence to be given from another room via closed circuit television (CCTV);
- putting a screen in place to remove the defendant from the witness' line of vision;
- allowing a support person to be beside the witness while the witness is giving evidence;
- requiring legal practitioners not to robe or to remain seated while examining or cross-examining the witness; and

CCTV Closed circuit television allows witnesses to give their evidence in a room separate from the court. Their testimony is then transmitted to/shown on a TV monitor in the courtroom.

997 Magistrates' Court of Victoria (2003), above n 286, para 18.2.

998 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 43; *Evidence Act 1939* (NT) s 21A; *Evidence Act 1977* (Qld) ss 21AP, 21AR; *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.

- allowing only certain persons to remain in the court while the witness is giving evidence.[999]

11.15 In our review of the law relating to sexual offences, we found that despite section 37C of the Evidence Act, which allows the use of CCTV and screens for certain vulnerable witnesses, these measures are rarely used for adult witnesses.[1000] We recommended that the Evidence Act be changed to provide for routine use of CCTV for all complainants in sexual offence cases unless:

- the court is satisfied that the complainant is aware of his or her right to give evidence by CCTV and is willing and able to give evidence in the courtroom; or
- 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.[1001]

11.16 We further recommended that:

- complainants in sexual offence cases should be entitled to have a person of their choice beside them for the purpose of providing emotional support while giving evidence (whether or not they give evidence by CCTV), except where the presiding judge or magistrate has satisfied him or herself that the complainant does not wish to have a support person present;[1002] and
- where the presiding judicial officer is of the opinion that it is not in the interests of justice for a particular person to provide support to the complainant, that person shall not act as a support person, but the complainant is entitled to have another support person.[1003]

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999 *Evidence Act 1958* (Vic) s 37C(3). We discuss issues about closing the court during family violence intervention order proceedings as a separate matter: see paras 11.22–11.25.

1000 Victorian Law Reform Commission (2003), above n 540, paras 5.5–5.7; Victorian Law Reform Commission (2004), above n 538, paras 4.8–4.14.

1001 Recommendation 64: Victorian Law Reform Commission (2004), above n 538, 196. The Commission recommended the routine use of CCTV only for the complainant in sexual offence cases. 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.

1002 Ibid 197, recommendation 66.

1003 Ibid 198, recommendation 67.

OTHER AUSTRALIAN JURISDICTIONS

11.17 No Australian states or territories have extended the routine use of alternative arrangements to adult complainants in family violence proceedings. The only state that legislates a specific alternative arrangement for adults in family violence proceedings is NSW. The NSW *Crimes Act 1900* states that respondents and protected persons are entitled to choose a person to be present or near them when they are giving evidence.[1004]

11.18 However, some other Australian jurisdictions have legislated routine use of alternative evidence arrangements for children involved in family violence proceedings. The Queensland *Domestic and Family Violence (Protection) Act 1989* provides that if the court orders that a child may give evidence it must consider whether the evidence should be given by video or other electronic means.[1005] The Western Australian Bill provides that where the court orders that a child may give oral evidence, the evidence should be given from outside the courtroom by means of video link.[1006]

11.19 In NSW, all children called to give evidence in complaints for an apprehended violence order have the right to give evidence via CCTV unless the court orders otherwise.[1007] The court may order that a child give evidence from the courtroom if satisfied that use of CCTV is not in the interests of justice or that the urgency of the matter makes the use of CCTV inappropriate. In its 2003 report on apprehended violence orders, the NSWLRC recommends that the same provisions should also apply to children giving evidence in any apprehended violence order proceedings, including proceedings for the variation or revocation of an order.[1008]

1004 *Crimes Act 1900* (NSW) s 562ND(2). The legislation also empowers a court to permit more than one person to be present where the court thinks that it is in the interests of justice to do so: s 562ND(5).

1005 *Domestic and Family Violence Protection Act* 1989 (Qld) s 81A(3). The legislation states that children other than respondents or aggrieved persons are not to be called as witnesses unless the court orders otherwise: s 81A(2)(a).

1006 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 36, inserting new s 53B(3).

1007 *Evidence (Children) Act 1997* (NSW) ss 17, 18.

1008 NSW Law Reform Commission (2003), above n 350, 225.

MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

11.20 The changes proposed in the Magistrates' Court (Family Violence) Bill will enable some witnesses in family violence proceedings to give evidence using alternative measures. Under the amendments:

- where the witness is a child, a magistrate sitting in the Family Violence Division must direct that the witness give evidence using some form of alternative measures unless the magistrate considers that it is not appropriate to do so;[1009] and
- where the witness is an adult, a magistrate sitting in the Family Violence Division may make a direction for alternative arrangements for giving evidence, either on his or her own initiative or on application by one of the parties.[1010]

11.21 Under the proposed amendments, these provisions will only apply to proceedings heard in the Family Violence Court Division, which will sit at Ballarat and Heidelberg. They will not, at this stage, apply to people whose matters are dealt with in other Magistrates' Courts around Victoria. Further, they will not guarantee that adult witnesses in intervention order proceedings will have access to measures that reduce the stress of giving evidence.

? QUESTION(S)

79. Do magistrates currently direct that evidence be given using alternative arrangements in intervention order cases? If so, how often?

1009 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 4, inserting new s4 K(1),(3) into the *Magistrates' Court Act 1989* (Vic). The provision does not specify what type of arrangement the magistrate should make, merely that some direction should be made. The Bill will also, if passed, amend the *Crimes (Family Violence) Act 1987* (Vic) to provide that children in need of protection and children who are family members of a respondent or person seeking protection must not be called as a witness in intervention order proceedings without leave of the court: see clause 27, inserting new s 21B(2), discussed at para 11.39.

1010 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 4, inserting new s 4K(1), (2) into the *Magistrates' Court Act 1989* (Vic).

? QUESTION(S)

80. Should the *Crimes (Family Violence) Act 1987* provide for the routine use of CCTV or other alternative arrangements in intervention order proceedings for:

- all children, whether or not the application is being heard in the Family Violence Division of the Magistrates' Court; and
- adults

on whose behalf an intervention order is sought?

ENABLING WITNESSES TO GIVE EVIDENCE IN CLOSED COURT

CURRENT SITUATION

11.22 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 present in the courtroom, as may people who have attended court to support one of the parties to the proceeding. Throughout our consultations, participants described the extra stress and fear that the presence of respondents' friends and family members can create for women giving evidence in an intervention order case.[1011]

11.23 Magistrates are entitled to order that certain people leave the court during a hearing. However, our consultations indicated that there is no consistent practice across all Magistrates' Courts, or by all magistrates, and we did not hear any instances of the court being closed during intervention order matters.

MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

11.24 The Magistrates' Court (Family Violence) Bill 2004 will, if passed, allow magistrates in the Family Violence Division of the Magistrates' Court to close the court as part of a direction that alternative arrangements be used for witnesses to

1011 Consultations 2, 4, 9, 18, 26, 28.

give evidence.[1012] Under this approach, there is no *requirement* that the court be closed, even when children are giving evidence.[1013]

OTHER AUSTRALIAN JURISDICTIONS

11.25 Other Australian jurisdictions adopt a variety of approaches to whether the court should be closed during family violence proceedings. Some provide that court hearings are not to be open to the public,[1014] or that the court may, if it thinks fit, order that all or any persons except the parties shall leave the court.[1015] By comparison, the Tasmanian legislation states that all hearings for restraint orders must be heard in open court, except as otherwise ordered by the court.[1016] The NSW legislation provides that, unless the magistrate otherwise directs, the court is to be closed during proceedings that relate to an order for the protection of a child under 16 years of age.[1017]

? QUESTION(S)

81. Should the *Crimes (Family Violence) Act 1987* provide for the court to be routinely closed during:

    - hearing of applications to make, vary, revoke or extend an intervention order; and

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1012 The power to permit only specified persons to be present while a witness is giving evidence is one of the available alternative measures listed at new s 4K(1): see Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 4, inserting new s 4K into the *Magistrates' Court Act 1989* (Vic).

1013 As we discuss at para 11.39, the amendments limit the capacity to call children as witnesses.

1014 *Domestic and Family Violence (Protection) Act 1989* (Qld) s 81(1). The New Zealand legislation also states that only persons involved in the proceedings may be present during the hearing of any proceedings under the Act: *Domestic Violence Act 1995* (NZ) s 83.

1015 *Domestic Violence Act 1992* (NT) s 13. The *Protection Orders Regulations 2002* (ACT) provide that hearings must be in public, unless the hearing relates to a consent order, an ex parte application for an interim order or the respondent has been served but has not appeared for the return date. The magistrate may order that a hearing be conducted in private if satisfied that it is in the public interest or the interests of justice to do so: regs 10–12.

1016 *Justices Act 1959* (Tas) s 106E(1)(a)(i).

1017 *Crimes Act 1900* (NSW) s 562NA(1). The NSWLRC has recommended that the court should have the power to close the court for all apprehended violence order proceedings involving children, either in the capacity of witnesses or as protected persons: see NSW Law Reform Commission (2003), above n 350, 224–5.

? QUESTION(S)

- proceedings for breach of an intervention order?

Why or why not?

CROSS-EXAMINATION BY UNREPRESENTED RESPONDENTS

11.26 In proceedings for an intervention order, or in criminal proceedings for breach of an intervention order, the respondent has the right to be represented by a lawyer. However, if a respondent wants to represent himself or herself, he or she may do so. The Magistrates' Court does not collect data about whether parties in intervention order proceedings are represented, but anecdotal information provided to the Commission during our consultations indicates that a large proportion of applicants and respondents in intervention order proceedings represent themselves.[1018]

11.27 If respondents represent themselves, this means they have a right to cross-examine any witnesses in person. The witnesses will include:

- the person seeking protection;
- the protected person in criminal proceedings for breach of an intervention order; or
- other family members or friends of the protected person, who may also have been subjected to violence or abuse by the respondent and who may also find it distressing and traumatic to be questioned by the respondent personally.

OTHER AUSTRALIAN JURISDICTIONS

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

1018 It is likely that part of the reason for this is that it is difficult to obtain funding from Victoria Legal Aid to defend an intervention order: see para 10.32 for a discussion of respondents' access to Victoria Legal Aid funding; Consultations 7, 8, 21, 26, 27, 32, 40.

> 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.[1019]

11.29 Most other Australian jurisdictions do not address this issue. However, the amendment Bill that is currently before the Western Australian Parliament will, if passed, require the court to prevent an unrepresented respondent from directly cross-examining a person with whom he or she is in a domestic relationship. Instead, the court must order the respondent to put any questions to the witness through a judicial officer or a person approved by the court.[1020] This provision applies to both applications for, and breaches of, restraining orders. The Western Australian amendment Bill also proposes that unrepresented parties be prohibited from directly cross-examining child witnesses.[1021]

Cross-examination of Complainants in Sexual Offence Cases

11.30 Similar issues arise regarding cross-examination by unrepresented accused persons in the context of criminal proceedings for sexual offences. In our report on sexual offences, we noted that other jurisdictions have enacted legislation restricting the right of an accused person who is not represented by a lawyer to cross-examine certain types of witnesses.[1022] We recommended that the accused in criminal proceedings for a sexual offence be prevented from personally cross-examining the complainant or a protected witness.[1023] We further recommended that:

1019 *Domestic Violence Act 1992* (NT) s 20AD.

1020 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 25, inserting new s 44C(1). The proposed rule is subject to certain exceptions: see clause 25, inserting new s 44C(2).

1021 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 36, inserting new s 53D.

1022 Victorian Law Reform Commission (2004), above n 538, 234–236. Jurisdictions that impose restrictions include: *Evidence Act 1977* (Qld) ss 21M–21S (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).

1023 The report recommends that protected witnesses include children under 18, a person who is a complainant in other sexual offence charges brought against the accused and persons with impaired

- 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 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.[1024]

? QUESTION(S)

82. Should the *Crimes (Family Violence) Act 1987* be changed to prevent an unrepresented respondent or defendant from personally cross-examining protected persons or persons who are seeking protection:
    - in intervention order application proceedings; and
    - in criminal proceedings for breach of an intervention order?

    If so, what mechanisms should be put in place to protect the rights of the respondent or defendant?

83. Should the same provisions be put in place for other witnesses in intervention order proceedings? If so, which witnesses should receive this protection?

ACCESS TO INTERPRETERS

11.31 The Magistrates' Court Family Violence Protocols contain specific provisions regarding the court's responsibility to ensure interpreters are provided for people who require them. The relevant provisions state:

mental functioning: see recommendations 94–102 in Victorian Law Reform Commission (2004), above n 538, 245–248.

1024 Ibid 245, recommendation 97.

- when completing an interview with an applicant, the registrar must tell the applicant to contact the court before the hearing date to confirm whether any interpreters are required;[1025] and
- the registrar is responsible for arranging an interpreter in all applications or hearings where an interpreter is required, and the police should be informed that the respondent requires an interpreter so that they can organise an interpreter for the purpose of service.[1026]

11.32 All consultation participants who work with clients from non-English speaking backgrounds said the courts' inability to consistently provide accredited, impartial interpreters was an ongoing problem.[1027] Some of the specific problems cited were:

- some interpreters breach client confidentiality, with occasionally disastrous results;[1028]
- some interpreters act unprofessionally, for example by advising women they should return to their husbands or communicating inappropriate views or messages from the respondent to the applicant; [1029]
- some interpreters work without being accredited to the required level; [1030]
- some applicants find it extremely difficult and intimidating when only one interpreter is provided to interpret for both the applicant and the respondent[1031]—it also increases the potential for interpreters to inappropriately influence the applicant's decision-making, especially where the parties are involved in any negotiations outside the courtroom; and

1025 Magistrates' Court of Victoria (2003), above n 286, para 5.2(f).

1026 Ibid para 16.1.1.

1027 Consultations 5, 11, 18, 19, 27, 29, 31, 32, 33, 35, 39, 40.

1028 Consultation 39. One example was given where an interpreter advised the respondent of the applicant's whereabouts, resulting in a violent attack on the applicant.

1029 Consultations 5, 18, 29, 32, 39.

1030 Consultation 5. The Magistrates' Court Family Violence Protocols state that any person interpreting in court should be accredited to minimum NATI Level 3 whenever available: Magistrates' Court of Victoria (2003), above n 286, para 16.1.3.

1031 Consultations 5, 8, 29, 33, 35. The Magistrates' Court Family Violence Protocols state that if both parties require an interpreter it is usually preferable that two are provided, and that where only one interpreter is available, it must be explained to all parties and to the interpreter that the interpreter is an independent person responsible to the court, not the parties: Magistrates' Court of Victoria (2003), above n 286, paras 16.1.1–2.

- interpreters are not always provided when an applicant (or other party) can speak English but is not confident in speaking and understanding English in the context of stressful legal proceedings.[1032]

11.33 One of the elements of the demonstration Family Violence Courts, to be established early in 2005 in Ballarat and Heidelberg, is the development of a strategy for culturally and linguistically diverse and Indigenous communities. It is intended that this strategy will address discrimination in the operation of the court and will include efforts to ensure the provision of suitably qualified interpreters, as well as translated publications.[1033]

? QUESTION(S)

84. What is your experience of obtaining appropriate access to interpreters for intervention order proceedings?

85. Where both parties to an intervention order matter require an interpreter, should the provision of separate interpreters for each party be mandatory?

86. What mechanisms would improve access to independent, professional interpreters for people involved in intervention order proceedings?

CHILDREN AND YOUNG PEOPLE AS WITNESSES

11.34 In addition to the various alternative arrangements that can be put in place to improve the experience of children and young people who are witnesses in intervention order cases, it is also possible to limit the participation of child witnesses. Some children will have experienced psychological, physical, sexual or other abuse within the family. Attending court to give evidence in intervention orders is likely to cause them further stress, particularly because their evidence will often relate to matters involving one or more parent.

OTHER AUSTRALIAN JURISDICTIONS

11.35 In Queensland, the legislation provides that subject to a court order, a child must not be called as a witness in protection order proceedings unless the

1032 Consultation 5.

1033 Information provided to the Commission by Court Services, Department of Justice, October 2004.

child is the respondent or the protected person.[1034] The Western Australian Bill will, if passed, prevent children from giving oral evidence in proceedings under the *Restraining Orders Act 1997* (WA) unless the court orders otherwise or the evidence is given in the Children's Court.[1035]

11.36 The legislation in NSW provides that in proceedings involving an application for an order, or for the variation or revocation of an order, children under 16 years should not usually be required to give evidence.[1036] The court may order that a child under 16 years shall give evidence if it considers that insufficient evidence will be adduced without the child's evidence.

11.37 Anecdotal information provided to the NSWLRC suggested that despite this provision, children in NSW are increasingly being called to give evidence and are cross-examined in apprehended violence order cases.[1037] The NSWLRC recommends that:

- children should only be permitted to give evidence by affidavit or oral testimony in apprehended violence order proceedings by order of the court upon application by any party to the proceedings; and
- there should be a presumption against the making of an order that such evidence be given and the court should exercise its discretion by reference to the interests of justice.[1038]

11.38 In addition to these examples from family violence legislation in other Australian jurisdictions, the *Family Law Act 1975* (Cth) provides that children under 18 years must not be called as a witness or be present during court proceedings unless the court orders otherwise.[1039]

1034 *Domestic and Family Violence Protection Act 1989* (Qld) s 81A. Section 81A also provides that, unless the court orders otherwise, children may not be asked to swear an affidavit or remain in the court during proceedings: see s 81A(2)(b), (c).

1035 Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 36, inserting new s 53A(1). A court may only make an order allowing a child to give oral evidence if it is satisfied that there are exceptional circumstances which, in the interests of justice, justify making it: see Acts Amendment (Domestic Violence) Bill 2004 (WA) clause 36, inserting new s 53A(2).

1036 *Crimes Act 1900* (NSW) s 562NA(3).

1037 NSW Law Reform Commission (2003), above n 350, 223.

1038 Ibid 224–5.

1039 *Family Law Act 1975* (Cth) s 100B(2).

MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

11.39 The proposed amendments in the Magistrates' Court (Family Violence) Bill seek to limit when children may give evidence, or be present, during intervention order proceedings. The Bill proposes to insert a new provision into the Crimes (Family Violence) Act such that, except child respondents, children who are:

- the person on whose behalf an order is sought; or
- a family member of a party to the proceedings

must not be present or called as a witness unless the 'court makes an order allowing the child to be present or called'.[1040] The provisions do not guide magistrates in relation to when they should make an order allowing child witnesses to be called. In addition, the new provisions will prevent children from giving evidence by affidavit unless the court makes an order allowing them to do so.[1041]

? QUESTION(S)

87. How often are children required to give oral evidence and be cross-examined in intervention order proceedings in Victoria?

88. The proposed amendments to the *Crimes (Family Violence) Act 1987* will restrict when children may be called to give evidence in intervention order proceedings. Are any other changes needed to prevent children from giving evidence in family violence matters?

EVIDENCE USED IN INTERVENTION ORDER PROCEEDINGS

11.40 It was suggested during our consultations that we should explore options for reducing the current reliance in intervention order proceedings on the oral testimony of people who have been subjected to violence.[1042] As we have discussed

1040 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21B(2) into the *Crimes (Family Violence) Act 1987* (Vic).

1041 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21B(1) into the *Crimes (Family Violence) Act 1987* (Vic).

1042 Consultations 5, 9, 20.

in Chapters 7 and 9, one of the changes that may lead to less reliance on the testimony of a person seeking protection is to increase the consistency with which police members engage in gathering evidence at family violence incidents.[1043]

11.41 Even if police adopt a different approach to investigating reports of family violence, the experiences of the person in need of protection will still be central to the court's approach in most intervention order cases. It is therefore useful to consider other ways in which evidence about these experiences can be brought to the court's attention without compromising fairness to the respondent.

11.42 In this section, we will discuss three issues:

- whether the court can rely on the affidavit evidence of persons in need of protection;
- whether the court should be permitted to admit hearsay evidence, or evidence of the protected person's out-of-court statements; and
- whether the court should admit expert evidence about the dynamics and characteristics of family violence to assist the court's understanding of the material presented to it.

ADMISSIBILITY OF AFFIDAVIT EVIDENCE

11.43 The Act 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.[1044]

In these limited situations, a magistrate may dispense with the ordinary rules of evidence and may allow evidence to be provided by affidavit without requiring evidence to be given in person.

1043 See paras 7.49, 9.21–9.27.

1044 *Crimes (Family Violence) Act 1987* (Vic) s 13A(1), (2).

MAGISTRATES' COURT (FAMILY VIOLENCE) BILL 2004

11.44 The Magistrates' Court (Family Violence) Bill 2004 will, if passed, clarify that the court is not required to receive evidence from the person in need of protection in the limited circumstances described in section 13A.[1045]

11.45 The amendments will also enable a court to admit affidavit evidence despite any rules of evidence to the contrary, except in stalking proceedings arising under section 21A of the *Crimes Act 1958*.[1046] The new provisions allow a person who has given evidence by affidavit to be called as a witness and cross-examined, with the leave of the court.[1047]

OTHER AUSTRALIAN JURISDICTIONS AND NEW ZEALAND

11.46 NSW allows evidence to be provided by affidavit in interim order proceedings if the person in need of protection is unable, for any good reason, to attend the proceedings and the court is satisfied that the matter requires urgent consideration.[1048] The NSWLRC has found this provision is rarely used because the preparation of an affidavit requires legal assistance. The NSWLRC therefore recommends that, in interim proceedings, people seeking protection be permitted to tender their evidence by sworn complaint or police statement.[1049]

11.47 Legislation in some other jurisdictions allows affidavit evidence to be used in broader circumstances. In Queensland, the court is not bound by the rules of evidence in any proceeding that relates to the making, varying or revocation of an order.[1050] In addition, the court need not have the personal evidence of the person in need of protection before making an order.[1051]

11.48 In proceedings under the *Protection Orders Act 2001* in the ACT, evidence must be given orally except where the parties agree to allow affidavit evidence,[1052]

1045 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 17, inserting a new provision into s 13A(1) of the *Crimes (Family Violence) Act 1987* (Vic).

1046 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21A(1) into the *Crimes (Family Violence) Act 1987* (Vic).

1047 Magistrates' Court (Family Violence) Bill 2004 (Vic) clause 27, inserting new s 21A(2) into the *Crimes (Family Violence) Act 1987* (Vic).

1048 *Crimes Act 1900* (NSW) s 562BB(3).

1049 NSW Law Reform Commission (2003), above n 350, 222.

1050 *Domestic and Family Violence Protection Act 1989* (Qld) s 84(2).

1051 *Domestic and Family Violence Protection Act 1989* (Qld) s 84(3).

1052 *Protection Orders Regulations 2002* (ACT) reg 20(1)(a).

or where the court grants leave.[1053] This gives the court a broad discretion to allow affidavit evidence in any protection order proceeding, including hearings for a temporary or final order, or potentially during criminal proceedings for breach of an order.

11.49 The New Zealand *Domestic Violence Act 1995* provides the court with a broad discretion to admit evidence as it thinks fit, regardless of the rules of evidence, in any protection order proceedings other than criminal proceedings. In New Zealand, all applications for temporary protection orders are only supported by affidavit evidence, and most people seeking protection obtain legal assistance to prepare their affidavits and other documentation.

? QUESTION(S)

89. Are the current provisions at section 13A of the *Crimes (Family Violence) Act 1987*, which allow protected persons in certain, limited situations to provide their evidence by affidavit, used frequently?

90. The proposed amendments will allow the court to admit affidavit evidence in family violence intervention order proceedings. Are other changes needed to reduce the need for people in need of protection to attend court and testify in all matters?

ADMISSIBILITY OF EVIDENCE OF OUT-OF-COURT STATEMENTS

11.50 As family violence usually occurs in private, there are often no independent witnesses who can testify about their observations of the respondent's violence towards the person seeking protection. In many cases, the evidence available to the court is perceived as one person's testimony against another's. This can make it difficult to prove that the violence has occurred, to the standard required by the law. In civil proceedings, such as an application for an intervention order, the risk of future violence must be proved on the balance of probabilities, that is, it is more likely than not that the alleged violence occurred and may re-occur. In criminal proceedings, such as proceedings for breach of an

1053 *Protection Orders Regulations 2002* (ACT) reg 20(1)(b). The regulations provide an example of when the court might give leave: 'If the court is satisfied that it would be unreasonable to require the applicant to give oral evidence'.

intervention order, the violence or other behaviour that constitutes the breach must be proven beyond reasonable doubt.

11.51 In this context, evidence from friends, family members, counsellors and other people the person seeking protection has told about the abuse may be the only information available to support that person's version of events.[1054] Another important source of information that might increase the court's knowledge about the respondent's use of violence is information from the police about the number of calls the protected person or neighbours have made to the police. The rule against hearsay, however, usually prevents evidence of these out-of-court statements by the protected person or others from being admitted during intervention order proceedings. The hearsay rule applies in civil and criminal proceedings and is intended to ensure the court only hears reliable evidence. The rule prevents evidence of a statement made to a witness by a person who is not called to give evidence from being admitted, when the object of the evidence is to establish that the content of the statement is true.[1055]

11.52 As discussed above,[1056] section 13A of the Act allows the court to dispense with the rules of evidence if the protected person is a child or if the hearing relates to an interim order and the applicant is someone other than the protected person.[1057] This means that, under the Act, magistrates hearing intervention order proceedings are only able to admit hearsay evidence in these limited circumstances.

11.53 The Office of the Public Advocate (OPA) provided a submission on issues affecting its applications for intervention orders made for people who have a disability and are unable, because of the disability, to make reasonable judgments for themselves.[1058] A guardian can apply for an order on behalf of a person who

1054 A number of family violence workers expressed frustration that in cases where the magistrate questioned the protected person's experience of abuse and perception of whether the respondent is likely to re-abuse, workers are unable to give evidence about occasions when their clients had contacted them in fear because the respondent had just threatened or abused them. Some workers also stated that they would be able to, if permitted, assist the court to understand the protected person's level of fear of the respondent, based on what their clients had told them and the way their clients has presented to them: Consultations 2, 12, 16, 28.

1055 JD Heydon, *Cross on Evidence* (6th ed, 2000) 846–847.

1056 See para 11.43.

1057 *Crimes (Family Violence) Act 1987* (Vic) s 13A(1), (2).

1058 Submission 6. The OPA states that in certain circumstances the VCAT appoints a guardian to make judgments as to whom the person under his or her care can associate with. They go on to say that

needs protection in that circumstance, pursuant to section 7(1)(e) of the Crimes (Family Violence) Act. In its submission the OPA raised concerns that although section 13A states that the court can dispense with the rules of evidence if the applicant is someone other than the protected person, this does not seem to be interpreted by magistrates as applying to an order applied for by a guardian. The OPA submission states:

> Whilst there are legitimate concerns a magistrate must have in relation to hearsay evidence, there must be greater recognition of the particular difficulties people who have a cognitive disability have when accessing the justice system.

It suggests that section 13A specifically includes the circumstance where a person in need of protection is a 'represented person' within the meaning of the *Guardianship and Administration Act 1986*.

OTHER AUSTRALIAN JURISDICTIONS AND NEW ZEALAND

11.54 As with the admission of affidavit evidence, the legislation in other jurisdictions is less restrictive than the Victorian Act regarding the admission of hearsay evidence. In Queensland, the ACT and New Zealand, the court may inform itself in any way it considers appropriate in a protection order proceeding.[1059]

11.55 Some Australian jurisdictions have adopted model uniform evidence legislation (known as the Uniform Evidence Act).[1060] These jurisdictions, which include NSW, Tasmania and the ACT, provide a number of exceptions to the hearsay rule[1061] and reflect a trend towards relaxing the rule. The Domestic Violence Legislation Working Group considered this when developing the Model Domestic Violence Laws. The model laws provide that courts exercising power

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guardians with power in relation to: access to person, accommodation, or health care may apply for orders under the *Crimes (Family Violence) Act 1987* (Vic).

1059 *Domestic and Family Violence Protection Act 1989* (Qld) s 84(2); *Protection Orders Regulations 2002* (ACT) reg 21; *Domestic Violence Act 1995* (NZ) s 84. Only the ACT provisions contemplate that the rules of evidence might be relaxed in criminal proceedings for breach of an order.

1060 *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 to proceedings in ACT courts except to the extent that they are excluded by regulation.

1061 *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 applies to proceedings in ACT courts as well, see above n 1060.

under the legislation 'may admit and act on hearsay evidence unless the interests of justice require otherwise'.[1062]

? QUESTION(S)

91. Should the *Crimes (Family Violence) Act 1987* be amended to allow hearsay evidence to be given in a broader range of circumstances for adult witnesses? If so, in which circumstances should hearsay evidence be permitted?

92. Should the *Crimes (Family Violence) Act 1987* allow hearsay evidence to be given in an application by the guardian or administrator of a person in need of protection?

93. Should the *Crimes (Family Violence) Act 1987* contain different provisions in relation to the admission of hearsay evidence in criminal as distinct from civil intervention order cases?

EVIDENCE ABOUT THE NATURE AND EFFECTS OF FAMILY VIOLENCE

11.56 During our consultations, a number of participants expressed concern that some magistrates do not appear to understand certain important aspects of family violence. Participants said that this lack of understanding is demonstrated by comments some magistrates make during a hearing, as well as being reflected in some magistrates' decisions.[1063] Among those who raised this issue were family violence workers who were frustrated that the court process does not allow family violence workers, or other expert witnesses, to give evidence about the distinctive and frequently misunderstood features of family violence.[1064]

11.57 Consultation participants said in certain intervention order cases, it would be useful to bring to the court's attention information about:

- the general dynamics of family violence and abusive relationships;

1062 Model Domestic Violence Laws s 30: see Domestic Violence Legislation Working Group (1999), above n 258, 134–137. The Acts Amendment (Domestic Violence) Bill 2004 (WA) will, if passed, allow representations made by children about a matter relevant to proceedings to be admitted despite the rule against hearsay: see clause 36, inserting new s 53E.

1063 Consultations 2, 5, 7, 9, 11, 12, 14, 15, 19, 21, 23, 26, 28, 29, 30, 33, 36, 39, 40, 41.

1064 Consultations 2, 14, 28, 40.

- the psychological and emotional effects of abuse;
- the increased risk of violence following separation;
- the low level of reporting by women who have experienced family violence, and the factors that prevent most women from disclosing violence;
- the way that family violence is dealt with in particular cultures and communities, and the effects of family violence within particular communities; and
- the increased rate of victimisation of women with disabilities in their place of residence compared to the general population.

11.58 One option for addressing magistrates' misunderstanding of family violence is to make education and training on family violence more readily available to the magistracy, and encourage magistrates to participate in professional development on family violence. This option, however, will not ensure that all magistrates who deal with family violence cases access relevant information. Further, training in general terms about the nature and dynamics of family violence may not always ensure that a judicial officer will apply the general knowledge to a specific fact situation in court.

11.59 Information about family violence could also be brought to the attention of a magistrate through an expert witness, who might give the information as evidence in cases where the knowledge is likely to be especially relevant. This kind of evidence is called 'opinion evidence' because witnesses give evidence about something other than facts or events they have directly observed.[1065] Opinion evidence about a particular topic may be given when:

- the evidence relates to matters which cannot be considered 'common knowledge';[1066] and
- the evidence is given by someone who is, on the basis of their qualifications, training and expertise, an expert in an established area of knowledge.[1067]

11.60 'Social framework evidence' is the term used to describe information obtained through social science research that is used in a legal hearing to inform

1065 For a detailed discussion of opinion evidence, see Heydon (2000), above n 1055, ch 15.

1066 For a detailed discussion of the 'common knowledge' rule, see Ian Freckelton and Hugh Selby (eds) *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed, 2002) ch 6.

1067 For a detailed discussion of these rules, see ibid, ch 4 and Heydon (2000), above n 1055, 811–827.

the fact finder about the social and psychological context in which contested facts occurred. Such evidence is used to assist fact finders, such as magistrates, to understand and evaluate claims presented to them.[1068]

11.61 The concept of calling expert witnesses to give 'social framework evidence' about the general nature and dynamics of family violence has been raised recently in the context of the legal system's treatment of women who kill violent partners.[1069] Commentators have suggested that broader contextual evidence about family violence would be beneficial when establishing defences used by women who kill in response to violence, such as self-defence.[1070]

11.62 The following are examples of cases in which such evidence might be useful and relevant:

* CASE STUDY 1

An application for an intervention order is based on the applicant's experience of verbal abuse by her husband. There has been no physical violence in the relationship, but the applicant says the respondent has threatened to hurt her on several occasions and she is scared that he will do so in the future. The parties have separated. The magistrate hearing the application forms the view that there are no grounds for an order to be made because, based on the evidence presented and the fact that the parties have separated, the magistrate does not consider it likely that the respondent is likely to assault the applicant in the future.

1068 Laurens Walker and John Monahan, 'Social Frameworks: A New Use of Social Science' (1987) 73 *Virginia Law Review* 559; Neil Vidmar and Regina Schuller, 'Juries and Expert Evidence: Social Framework Testimony' (1989) 52 (4) *Law and Contemporary Problems* 133.

1069 See, for example, Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; Robbin Ogle and Susan Jacobs, *Self-Defense and Battered Women Who Kill, A New Framework* (2002); Zoe Rathus, *Rougher Than Usual Handling, Women and the Criminal Justice System, A Gender Critique of Queensland's Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed, 1995) 136–140.

1070 For a full discussion of social framework evidence and its potential use in trials involving women who have killed in response to family violence, see Victorian Law Reform Commission, *Defences to Homicide Options Paper* (2003) 129–136. The Commission also discussed social framework evidence in Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) ch 4, especially paras 4.96–4.104.

* CASE STUDY 1

In this situation, social framework evidence about certain matters may assist the magistrate's decision-making, including evidence about:

- women's increased vulnerability to violence after separation;
- the proportion of men who use physical violence for the first time after separation;

the capacity of women who have lived in abusive relationships to read subtle clues and to accurately predict their partner's use of violence.

* CASE STUDY 2

An applicant for an intervention order describes a long history of severe physical and sexual violence, spanning more than ten years. The respondent denies the allegations and calls long-term, mutual friends who testify that the couple have always seemed happy and they have never seen any sign that the respondent uses violence. In addition, the respondent calls several of his own relatives to counter the applicant's allegations that the respondent has assaulted her at various family functions. When giving evidence, the applicant appears anxious, uncertain and confused about dates, times and events. The magistrate finds the applicant to be a less credible witness than the respondent, taking into account the applicant's lack of certainty about particular matters, her overall presentation and evidence from long-term friends of the couple who say they never saw any signs of violence within the relationship.

Social framework evidence about family violence that may assist the magistrate's decision-making in this case includes evidence about:

- some of the mental and psychological effects, including post-traumatic stress symptoms, of long-term exposure to family violence;
- the dynamics of family violence, including the capacity of some men who use violence to restrict abusive behaviours to private settings;
- the shame and stigma felt by many women who experience violence; and
- the factors that motivate women who are subjected to violence to hide the incidence of violence from family and friends.

11.63 In order for one of the parties in an intervention order application to call expert evidence about family violence, the evidence would have to comply with the above rules for expert evidence and would have to be relevant to a fact in issue. We are interested in receiving your views about whether, in certain cases, it would be useful to introduce social framework evidence in the context of intervention order proceedings and, if so, what practical and legal barriers may prevent this from happening.

? QUESTION(S)

94. Should there be a capacity to call expert witnesses to give broad contextual evidence about the nature, dynamics and effects of family violence in intervention order cases? Why or why not? If so, what changes would be required to enable this to occur?

Appendix 1

CONSULTATIONS

Consultation Reference	Meeting with	Region	Date
1	Service providers and legal workers	Melbourne	27/01/2004
2	Court Network	Melbourne	29/01/2004
3	Victoria Legal Aid	Melbourne	09/02/2004
4	Elizabeth Hoffman House	Melbourne	17/02/2004
5	Immigrant Women's Domestic Violence Service	Melbourne	18/02/2004
6	Indigenous service providers and legal workers	Hume	25/02/2004
7	Service providers	Hume	25/02/2004
8	Court personnel and magistrates	Hume	25/02/2004
9	Service providers and women who have experienced family violence	Hume	26/02/2004
10	Service providers and police	Hume	27/02/2004
11	Federation of Community Legal Centres Violence Against Women and Children Working Group	Melbourne	03/03/2004
12	Service providers and legal workers	Melbourne	10/03/2004
13	No To Violence	Melbourne	03/03/2004
14	Indigenous service providers (no 1)	Gippsland	24/03/2004
15	Indigenous service providers (no 2)	Gippsland	24/03/2004
16	Service providers, police and legal workers	Gippsland	25/03/2004

Consultation Reference	Meeting with	Region	Date
17	Indigenous service providers	Gippsland	25/03/2004
18	Service providers (Migrant Women's Service)	Gippsland	25/03/2004
19	Legal workers	Gippsland	25/03/2004
20	Service providers and police	Barwon SW	21/04/2004
21	Service providers and legal workers	Barwon SW	22/04/2004
22	Indigenous Family Violence Action Group	Barwon SW	22/04/2004
23	Service providers and legal workers	Murray Mallee	26/04/2004
24	Legal workers	Murray Mallee	26/04/2004
25	Court personnel	Murray Mallee	26/04/2004
26	Indigenous Family Violence Action Group	Murray Mallee	27/04/2004
27	Service providers	Murray Mallee	27/04/2004
28	Indigenous Family Violence Action Group	Grampians	28/04/2004
29	Service providers and legal workers	Grampians	28/04/2004
30	Legal workers	Grampians	28/04/2004
31	Service providers, police and legal workers	Melbourne (South)	30/04/2004
32	Service providers, police, legal workers and court personnel	Melbourne (East)	10/05/2004
33	Service providers and legal workers	Melbourne (North West)	19/05/2004
34	Victorian Aboriginal Legal Service	Melbourne	7/06/2004
35	Service providers	Melbourne (North)	21/06/2004
36	Service providers and legal workers	Loddon Mallee	23/06/2004
37	Indigenous Family Violence Action Group	Loddon Mallee	23/06/2004
38	Magistrates	Loddon Mallee	23/06/2004

Consultation Reference	Meeting with	Region	Date
39	Indigenous Women's Justice Forum	Melbourne	14/07/2004
40	Service providers and police	Melbourne (North West)	26/07/2004
41	Immigrant Women's Domestic Violence Service	Melbourne	27/7/2004

Appendix 2

LIST OF SUBMISSIONS RECEIVED

No	Date received	Name	Affiliation
1	2 Jan 2003	Phillip Westwood	Blue Mountain Creek
2	16 Feb 2004	Nha Nguyen	Vietnamese Community in Australia
3	29 June 2004	Vanessa Kearney	Eastern Domestic Violence Outreach Service
4	16 July 2004	Vanessa Kearney	Eastern Domestic Violence Outreach Service
5	16 July 2004	Sam Iliadis	Victoria Police
6	17 June 2004	Julian Gardner	Public Advocate, Office of the Public Advocate
7	31 Aug 2004	Barbara Roberts	
8	16 Sep 2004	Emma Asscher	Family Violence Support Project Solicitor, Werribee Legal Service
9	5 Oct 2004	Cindy Smith	Social Worker, Darebin Community Health

Appendix 3

POLICE DEPARTURE TIME FROM FAMILY VIOLENCE INCIDENTS WHERE A COMPLAINT AND WARRANT WAS SOUGHT: 01/07/99–30/06/03

Hours	Day of Week						
	Sun	Mon	Tue	Wed	Thu	Fri	Sat
0.00 – 0.59	117	87	79	75	83	95	107
1.00 – 1.59	91	55	56	67	75	72	99
2.00 – 2.59	94	32	37	54	49	57	85
3.00 – 3.59	82	42	23	34	29	38	90
4.00 – 4.59	60	17	16	16	26	38	62
5.00 – 5.59	35	10	16	12	17	21	49
6.00 – 6.59	46	7	6	10	13	20	39
7.00 – 7.59	39	9	11	12	11	17	28
8.00 – 8.59	30	21	20	22	18	24	36
9.00 – 9.59	57	40	26	36	26	31	49
10.00 – 10.59	80	31	40	32	39	43	54
11.00 – 11.59	82	47	45	31	49	47	72
12.00 – 12.59	71	49	40	37	33	35	64
13.00 – 13.59	72	49	40	29	41	36	68
14.00 – 14.59	57	49	50	32	26	41	71
15.00 – 15.59	83	45	34	41	39	47	67
16.00 – 16.59	76	61	64	65	45	55	76
17.00 – 17.59	114	71	61	82	65	75	94
18.00 – 18.59	114	105	84	76	79	74	89
19.00 – 19.59	117	106	82	85	73	105	92
20.00 – 20.59	132	92	104	87	91	91	113
21.00 – 21.59	141	93	90	97	109	106	131
22.00 – 22.59	123	92	97	82	84	110	119
23.00 – 23.59	99	98	89	81	96	112	128

Produced by Statistical Services Division Victoria Police. Data extracted from LEAP on 30 August 2004 and is subject to variation. Note: This data is the summation of all departure times where a complaint and warrant has been issued by hour between 01/07/99 to 30/06/03.

Glossary

affidavit
A written statement made under oath out of court.

balance of probabilities
This 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.

beyond reasonable doubt
This is the standard of proof in criminal cases and requires the magistrate to find a defendant not guilty, unless the evidence presented leaves no doubt that the defendant is guilty.

CCTV
Closed circuit television allows witnesses to give their evidence in a room separate from the court. Their testimony is then transmitted to/shown on a TV monitor in the courtroom.

circle sentencing
This type of sentencing is used by some Indigenous Canadian communities. The defendant's community and the person who has experienced violence make recommendations to the sentencing judge.

complaint
A complaint is a formal accusation of a crime occurring.

Court Network
This is an organisation of volunteers who help people navigate their way through the court system.

cross-examination
When a witness is questioned by the lawyer from the opposing side. A witness called by the applicant is cross-examined by the respondent or respondent's lawyer.

defendant
The term defendant is used to describe an accused person in criminal proceedings.

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

evidence
Any statement, object or other thing 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.

interim order
These are temporary orders, which are 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 in chambers
When a magistrate makes a decision out of the court.

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.

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

restorative justice
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 court documents, such as an intervention order, to the person named in the document.

social framework evidence
Social research evidence given to a court by experts in a field, which explains the broader issues involved.

standard of proof
The standard of proof refers to the level to which a fact must be proven—in a criminal case the standard of proof is 'beyond reasonable doubt' and in civil cases it is 'on the balance of probabilities'.

statement of no complaint
Telling the police you no longer want them to act on the complaint you have made. Depending on the seriousness of the charge and the availability of other evidence the police may still continue with the charge.

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.

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.

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
This is a court document that allows police to arrest the accused or bring him or her before the court.

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