Law Reform Commission of Western Australia

Enhancing Family and Domestic Violence Laws

DISCUSSION PAPER

Project No. 104

December 2013

The Law Reform Commission of Western Australia

Commissioners

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Abbreviations used

ALRC	Australian Law Reform Commission
COPS	Commissioner's Operations and Procedures
CRARMF	Common Risk Assessment and Risk Management Framework
CWS	Child Witness Service (Department of the Attorney General)
DCPFS	Department for Child Protection and Family Support
DVLU	Domestic Violence Legal Unit (Legal Aid WA)
DVIR	Domestic Violence Incident Report
DVLWN	Domestic Violence Legal Workers Network
ICMS	Integrated Courts Management System (Department of the Attorney General)
IFVP	Indigenous Family Violence Program
FCCCS	Family Court Counselling and Consultancy Service
FDVAG	Family and Domestic Violence Advisory Group
FDVRT	Family and Domestic Violence Response Team
FPU	Family Protection Unit
FVSCU	Family Violence State Coordination Unit
GPS	Global Positioning System
LRCWA	Law Reform Commission of Western Australia
MOU	Memorandum of Understanding
NSWLRC	New South Wales Law Reform Commission
SCLJ	Standing Council on Law and Justice
SOG	Senior Officers' Group (Family and Domestic Violence)
STIR	Supervised Treatment Intervention Regime
VLRC	Victorian Law Reform Commission
VSS	Victim Support Service (Department of the Attorney General)

Foreword

In July 2013 the Law Reform Commission received terms of reference from the Attorney General, the Hon Michael Mischin MLC, to review the laws concerning family and domestic violence. The reference directed the Commission to review the operation of the *Restraining Orders Act 1997* (WA) and to consider whether there would be benefits in having separate legislation governing family and domestic violence restraining orders, or separate legislation that only deals with family and domestic violence.

It is difficult to imagine a more important area for the state's laws to be effective and just. Family and domestic violence has significant and enduring effects on the victims (who are principally women and children), on the broader family (including those who are not the direct victims) and, by way of the necessary civil and criminal consequences, on the perpetrators (who are principally men). Those adverse impacts last long after particular events, which often form part of a pattern, have concluded. Proceedings in which family and domestic violence is alleged are frequently traumatic experiences, and consume significant court time and party resources.

The Commission notes with concern the number of reported family and domestic violence incidents. The number of reported incidents has increased substantially over the past eight years in absolute and per capita terms. In 2012 it was close to 45,000 incidents. That figure very likely underreports the true scope of family and domestic violence, given the obstacles which confront, and the great courage required for, a victim to take steps to recognise, make and persist with a complaint of such violence.

Family and domestic violence is particularly traumatic precisely because it takes place in an environment which we hope and expect will be one of nurturing and care. The family is the crucible in which the expectations, hopes and behaviours of the state's future citizens develop.

The rending of a family by family and domestic violence is, therefore, necessarily a public matter. Accordingly, it is now acknowledged that acts of family and domestic violence are not, and cannot be, private matters. As such, the laws of the state respond with civil and criminal consequences for apprehended and committed family and domestic violence. There have been significant changes, not only in legislation, but also in the way the law is administered, enforced and understood. However, as the frequency and increase in reported incidents demonstrate, the existing arrangements require scrutiny and demand improvement.

Contemporary scholarship observes that family and domestic violence is to be understood not as a series of isolated episodes, but as a damaging pattern. The most obvious examples comprise a perpetrator committing acts of violence towards an intimate partner or former partner, or to children in the family. But those acts are rarely isolated: they often occur within the context of sexual violence, emotional abuse and other forms of coercive and abusive behaviour which, beyond actual violence, include threats of violence (which may be insinuated rather than made directly), withholding economic support or medical care and conduct inducing a sense of worthlessness and weakness in the victim which may arise before, and persist long after, specific acts of violence.

Such family and domestic violence affects every sector of Western Australian society, but its impact is often greatest on those who already suffer social disadvantage. The effect of family and domestic violence on the first Western Australians – Aboriginal families – is a particular blight.

The restraining order system is one aspect of the state's response. Such orders comprise part of civil law, and may result in orders on the balance of probabilities and, often, on an interim basis before the court has heard from the respondent. Restraining orders were first introduced in Western Australia in 1982 following amendments to the *Justices Act 1902* (WA). Since then, a review in 1995 saw the enactment of the *Restraining Orders Act 1997* which established a system of violence restraining orders to address personal violence and misconduct, and misconduct restraining orders to address other forms of non-violent public nuisance.

This Discussion Paper provides an overview of the nature and extent of family and domestic violence and the major national and state policy initiatives that have been developed in the area. The Commission has given consideration to the Western Australian justice system's current

response to family and domestic violence and the major problems now faced, a detailed review of the current laws pertaining to violence restraining orders and considers the response of those who bear the principal responsibility for enforcing the law, the Western Australia Police.

The Commission has considered specialist family violence courts, and examined the operation of the criminal justice process, which is triggered once a criminal charge in relation to family and domestic violence offences is made.

Finally in response to the specific directives outlined in the terms of reference, the Commission has considered whether victims of family and domestic violence would be better served by having a separate Act that deals only with family and domestic violence offences, and the utility and consequences of such a reform.

The result is a Discussion Paper which sets out 29 questions and 53 proposals arising from the terms of reference, which have been drafted after consultations with over 150 individuals and representatives from government and non-government organisations with experience and expertise in the area of family and domestic violence.

The Commission is indebted to all those who generously gave their time experience and expertise, and have altered their family and professional arrangements, to assist the Commission during an intensive consultation and research period, particularly one as brief as this report required. For reform of the area of family and domestic violence to be successful, the collaboration of child protection, corrective services, victims' services, the justice system, health, community legal services and other support agencies is essential.

Victoria Williams produced this comprehensive Discussion Paper under challenging circumstances and within an extremely limited timeframe. Her thoroughness in consultations, research and analysis, her commitment to eliciting the perspectives of victims as well as comprehending and distilling the (sometimes competing) views of the agencies, organisations and individuals who work in this difficult and often distressing area of the law is peerless.

Executive Officer Heather Kay and Executive Assistant Sharne Cranston provided first class project management, research and support for the project writer and Commissioners throughout the project. As always, we are also indebted to our technical editor Cheryl MacFarlane for the swift, detailed and thorough attention to the professional presentation of the report.

The Commission invites and welcomes submissions on this sensitive and complex area of law. The Commission's final recommendations for improvement of our state's legal response to family and domestic violence very much depends upon them.

Richard Douglas
Chairman

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Introduction

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Terms of reference

In July 2013 the Law Reform Commission of Western Australia ('the Commission') received a reference from the Attorney General, the Hon Michael Mischin, to examine and report on laws concerning family and domestic violence. The terms of reference require the Commission to:

- Investigate and consider the benefits (or otherwise) of having separate family and domestic violence legislation including the outcomes and effectiveness of separate legislation;
- Provide advice on the utility and legal consequences of separating family and domestic violence restraining orders from the *Restraining Orders Act 1997*; and
- Provide advice on the provisions which should be included in family and domestic violence legislation if it were to be developed (whether in a separate Act or otherwise).

And report on the adequacy thereof and on any desirable changes to the existing law of Western Australia and the practices in relation thereto.

BACKGROUND TO REFERENCE

A number of concerns about Western Australian laws pertaining to family and domestic violence had been raised in the public domain prior to the Commission receiving this reference. These concerns provide a backdrop to the reference and have, in part, informed the Commission's approach to its consultations and research.

In May 2012 the Western Australian Parliament received a petition from over 2,600 residents expressing disquiet about certain laws dealing with family and domestic violence. The petition noted the inappropriate use of the offence of unlawful assault causing death for family and domestic violence related fatalities. Specifically, the principal petitioner (Angela Hartwig, CEO of the Women's Council for Domestic and Family Violence Services) argued that the offence of unlawful assault causing death 'should not apply in cases where it can be established that there has been a history of physical violence and abuse'.[1] The petition was referred to the Legislative Council Standing Committee on Environment and Public Affairs and the Committee recommended that:

> [T]he Government urgently review the legislative framework for addressing family and domestic violence incidents to ensure that it appropriately acknowledges and reflects any history of violence and abuse associated with such incidents.[2]

In response to the concerns about the offence of unlawful assault causing death, the Hon Mark McGowan introduced a private member's bill on 26 September 2012 to increase the penalty for that offence to a maximum of 20 years' imprisonment if the offence was committed in circumstances of aggravation (which includes that the victim and the offender were in a family and domestic relationship).[3] This bill was defeated and the government indicated that it was seeking advice in relation to the abovementioned report of the Standing Committee on Environment and Public Affairs.

In June 2012 the State Coroner handed down his decision into the investigation of the death of Andrea Pickett and emphasised a number of system failures surrounding the circumstances of her death at the hands of her estranged husband.[4] In particular, as was subsequently highlighted in Parliament, the offender was subject to a violence restraining order and parole (for an offence of threatening to kill the deceased) at the time of her death. In response to this case, it was suggested in Parliament that serious domestic violence offenders should be subject to GPS monitoring.[5] In January 2013 the Attorney General stated that the government was considering legislation to enable GPS tracking of 'repeat domestic violence offenders'.[6]

In October 2012 *The Sunday Times* reported on the apparent ineffectiveness of harsher sentencing laws for repeat breaches of violence restraining

1. Western Australia, Legislative Council Standing Committee on Environment and Public Affairs, *Petition Number 161: Review of the Laws Pertaining to Domestic Violence*, Report No. 27 (2012) 7.
2. Ibid 3.
3. See further below Chapter Four, Assault causing death.
4. For discussion on the recommendations of the State Coroner, see below Chapter Four, Parole.
5. Western Australia, *Parliamentary Debates*, Legislative Council, 12 September 2012, 5662 (Hon Linda Savage).
6. Hon Murray Cowper & Hon Michael Mischin, *Government to Expand GPS Tracking of Offenders*, Ministerial Media Statement (20 January 2013).

orders that commenced in May 2012.[7] These laws provide that an offender who has accumulated three breaches of a violence restraining order or a police order within a two-year period must be sentenced to imprisonment unless it would be clearly unjust and the person is 'unlikely to be a threat to the safety of a person protected or the community generally'.[8] The media report claimed that only 20% of 'third strikers' went to prison.[9] Soon after the Commission received this reference the apparent failure of the 'third strike laws' was again referred to in the media and it was reported that since the laws came into effect in May 2012 only 33% of offenders 'had been sent to jail for breaching a [violence restraining order] three times or more'.[10]

In November 2012 the Attorney General was asked in Parliament why Recommendation 8 from the 2008 review of the *Restraining Orders Act 1997* (WA) had not been implemented.[11] Recommendation 8 of that review provided that:

> [U]pon conviction of a domestic violence offence, the court must make a final violence restraining order for the protection of the person against whom the offence was committed, provided that the person to be protected has indicated to police that they require the order to be made.[12]

In response, it was explained that there is already the power for courts to make a violence restraining order during criminal proceedings; however, 'it appears [violence restraining orders] are not being granted under section 63 when they are warranted'.[13]

On 19 June 2013 the Attorney General introduced the Restraining Orders Amendment Bill 2013 to amend the *Restraining Orders Act* to make it clear that an application for a restraining order in favour of a child can be made in the Magistrates Court (as well as in the Children's Court). This Bill was passed on 4 October 2013 and the Act commenced operation on the same day. During parliamentary debates in relation to the Bill the Attorney General implied that other amendments to the *Restraining Orders Act* may be required:

> Legislation such as the Restraining Orders Act, because of the subject matter with which it deals, requires constant monitoring and review. Of course, it would be wonderful if I could at this stage introduce a bill that covers other areas that may be causing difficulty, but it seemed to me that this one was of particular note.[14]

As evident from the above discussion, there is a wide range of perceived problems with the laws that deal with family and domestic violence matters in Western Australia – the concerns encompass both the restraining order system and the criminal justice process.

SCOPE OF REFERENCE

The Commission's terms of reference require consideration of the utility or otherwise of enacting separate family and domestic violence legislation (and, more specifically, whether there should be separate family and domestic violence *restraining order* legislation). In order to address the terms of reference it is important to bear in mind that there are a number of Western Australian laws that explicitly deal with family and domestic violence, including the *Restraining Orders Act 1997*, *Criminal Code*, *Bail Act 1981*, *Criminal Investigation Act 2006*, and the *Family Court Act 1997*. In addition, there are other laws that are potentially relevant to family and domestic violence including the *Sentencing Act 1995, Sentencing Administration Act 2003*, *Evidence Act 1906*, *Magistrates Court Act 2004*, *Criminal Procedure Act 2004*, *Criminal Injuries Compensation Act 2003*, *Victims of Crime Act 1994* and *Children and Community Services Act 2004*.

The range of laws relating to family and domestic violence, coupled with the aforementioned concerns in regard to those laws, means that the Commission's terms of reference inevitably cover the entire legal process including the response by police to incidents of family and domestic violence, the restraining order system, the criminal justice process from charge to expiration of sentence, and other matters such as a victim's right to compensation. It is also recognised that those affected by family and domestic violence can find themselves involved in concurrent proceedings in a number of different jurisdictions (eg, violence restraining order proceedings, criminal

7. During parliamentary debates it was stated that prior to these amendments over 40% of offenders who had breached their restraining orders for the fourth time received only a 'modest fine' of approximately $200: Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 June 2011, 4622 (Hon Christian Porter).
8. *Restraining Orders Act 1997* (WA) s 61A.
9. Moulton E, 'Domestic Violence Victims Let Down', *Perth Now*, 28 October 2012.
10. Moulton E, 'WA Domestic Violence Laws Set for Revamp Following Comprehensive Review', *Perth Now*, 18 July 2013.
11. Western Australia, *Parliamentary Debates*, Legislative Council, 6 November 2012, 7783 (Hon Giz Watson).
12. Department of the Attorney General, *A Review of Part 2 Division* 3A *of the Restraining Orders Act 1997* (March 2008) 38.
13. Western Australia, *Parliamentary Debates*, Legislative Council, 6 November 2012, 7783 (Hon Michael Mischin).
14. Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2013, 3197 (Hon Michael Mischin).

proceedings, child protection proceedings[15] and proceedings in the Family Court).[16]

A typical area of jurisdictional intersection involves the child protection jurisdiction of the Children's Court and the parenting order jurisdiction of the Family Court. Such intersection generally arises where the Department for Child Protection and Family Support seeks a protection order in relation to a child (because of concerns about the child's safety as a consequence of family and domestic violence), while at the same time family members are seeking parenting orders in respect of the child. This issue has recently been examined in some detail on behalf of the Family Court of Western Australia and a comprehensive report with recommendations for reform has been made available to the Attorney General.[17] For this reason, the Commission has not considered this area in discharging the reference. However, the intersection of the violence restraining order jurisdiction of the Magistrates Court and the parenting order jurisdiction of the Family Court remains a key issue, as highlighted in consultations.

Given the breadth of the terms of reference, the Commission has intentionally focused on those aspects of the legal system that appear to be causing the greatest difficulty or concern. However, it must be emphasised that the ability of the legal system to reduce family and domestic violence and protect victims from harm is limited. A satisfactory response to family and domestic violence requires preventative measures which seek to address and minimise the risk of such violence occurring in the first place. Most acts of family and domestic violence are perpetrated in private and victims may be unwilling or unable to involve the legal system for a variety of reasons. It is therefore essential that community services to support and protect families and victims[18] are visibly available and adequately resourced. During consultations the need for additional resources for service provision in the area of family and domestic violence was repeatedly highlighted. A recent announcement by the Minister for Child Protection, Helen Morton, indicates that government is preparing to act on this issue. Among other initiatives, it was announced that there 'will be an improved 24/7 co-ordinated emergency response [to family and domestic violence] including working with Western Australia Police, in the metropolitan area' and that '[r]egional safe houses will be supported by an on-call system and outreach services tailored to the needs of these areas'.[19]

15. In 2012–2013 there were more than '90,500 contacts by the Western Australian community with the Department, involving more than 100,000 individuals'. Family and domestic violence was the 'main presenting issue' in 30% of these contacts; the next highest main presenting issue was 'a family problem' (16%): Department for Child Protection and Family Support, *Annual Report 2012–2013* (2013) 9.
16. In 2010–2011 over 44% of parenting cases seen by the Family Court Counselling and Consultancy Service involved family and domestic violence issues: Family Court of Western Australia, *Annual Review 2010–2011* (2011) 17.
17. See Hands TL & Williams VM, *Report on the Intersection of the Federal Family Law and State Child Protection Jurisdictions in Western Australia* (July 2012) (unpublished).
18. These include such services as refuges, safe houses, temporary accommodation options, counselling services, programs (for both victims and perpetrators), victim support workers and victims' advocates.
19. Hon Helen Morton, *Minister Leads March to End Violence*, Ministerial Media Statement (22 November 2013).

Methodology

The Commission received draft terms of reference on 16 July 2013 and the final terms of reference were obtained on 20 August 2013. At the end of July the Commission commenced preliminary research to inform its extensive consultation process.

CONSULTATIONS

Consultations commenced on 19 August 2013 and continued through until early November 2013. During this period the Commission consulted with over 150 individuals from various government and non-government agencies including Aboriginal Family Law Services, Aboriginal Legal Service of Western Australia, Albany Family Violence Prevention Legal Service, Anglicare, Centacare, Commissioner for Children and Young People, Communicare, Department of Corrective Services, Department for Child Protection and Family Support, Department of Health, Disability Services Commission, Domestic Violence Legal Workers Network, Family Court Counselling and Consultancy Service, Family Violence Services (Department of the Attorney General), Legal Aid WA, Marnja Jarndu Women's Refuge, Multicultural Women's Advocacy Service, Office of Criminal Injuries Compensation, Office of the Director of Public Prosecutions, Ombudsman, SCALES Community Legal Centre, Commissioner for Victims of Crime, Victims of Crime Reference Group, Victim Support Services and Child Witness Service (Department of the Attorney General), Western Australia Police, Women's Council for Domestic and Family Violence Services (Inc), Women's Law Centre and members of the judiciary from the Magistrates Court of Western Australia (including magistrates who sit in the specialist Family Violence Courts), the Children's Court of Western Australia and the Family Court of Western Australia along with various other individuals with experience working in the area of family and domestic violence. Three written submissions were received by the Commission and a further two submissions were forwarded by the Attorney General. A list of people consulted for this reference and a list of written submissions appears in Appendix C.

OTHER INPUT

In addition to conducting consultations, the Commission observed the operation of Family Violence Courts in Midland, Joondalup and Perth and the Barndimalgu Aboriginal Family Violence Court in Geraldton.[1] Further regional input was obtained from consultations with various stakeholders in Broome and Kununurra in mid-October 2013.

To inform its work on this reference, the Commission engaged Professor Donna Chung, Head of Social Work at Curtin University, to prepare a detailed report on the complex nature and dynamics of family and domestic violence. A copy of this report is annexed to this paper (see Appendix B).

The Commission requested and obtained data from the Department of the Attorney General, the Office of Criminal Injuries Compensation, the Office of the Director of Public Prosecutions and the Western Australia Police. Specific information was also sought from various individuals during the research and consultation phase of this reference and the Commission is grateful to those persons for their invaluable assistance. On 11 October 2013 the author of this Discussion Paper attended a full-day seminar, *Domestic and Family Violence and the Law*, which was convened by the Women's Council for Domestic and Family Violence Services and made a short presentation about the Commission's reference. Presenters and attendees openly shared some of their ideas for reform at the end of the seminar and the Commission has taken those views into account.

ABOUT THIS DISCUSSION PAPER

This Discussion Paper is divided into six chapters. Chapter One provides a brief overview of the nature and extent of family and domestic violence and has been informed, in part, by the report commissioned from Professor Chung (see Appendix B). This chapter also discusses the major national and state policy initiatives in the area of family and domestic

1. The Commission also consulted with a number of stakeholders in the Barndimalgu Court and with people who work generally in the area of family and domestic violence in Geraldton.

violence, including key principles and strategies in Western Australia.

Chapter Two provides a summary of the major problems encountered in practice with the current Western Australian legal system's response to family and domestic violence. This chapter has been largely informed by the Commission's consultations. It also contains the Commission's objective of reform and includes an explanation of terminology used in this Paper.

Chapter Three sets out the current law in relation to violence restraining orders as well as the Western Australia Police response to incidents of family and domestic violence (including relevant policies, procedures and responsibilities of investigation). Matters of concern in these areas are discussed in this chapter, along with specific proposals for reform and questions for consideration. The proposals in this chapter (as well as in the following two chapters) are designed to be capable of implementation, irrespective of whether new legislation is enacted to deal specifically with family and domestic violence in Western Australia.

Chapter Four examines the criminal justice process in relation to family and domestic violence offences (from the commencement of a criminal charge to the expiration of any sentence imposed for an offence). This chapter also looks at the specialist family violence courts in Western Australia and makes various proposals for reform.

Chapter Five deals with other issues including the intersection of the restraining order jurisdiction with family law proceedings, the criminal injuries compensation scheme and other areas in regard to victim's rights. As with the previous two chapters, an overview of the current law is included together with proposals for reform and questions for consideration.

The final chapter, Chapter Six, specifically considers whether separate family and domestic violence legislation is necessary or desirable including, but not limited to, whether separate family and domestic violence restraining order legislation should be developed for Western Australia.

A total of 53 proposals for reform are included in this Discussion Paper, along with 29 questions (see Appendix A). The Commission strongly encourages all of the agencies and individuals consulted for this reference, as well as any other interested persons, to respond to the proposals and questions in this Paper. The Commission is also interested to hear from people who have had direct experience of family and domestic violence, in particular people who have accessed or been involved in the various legal processes considered in this Paper. The Commission appreciates that for many people telling their personal story may be traumatic and, therefore, emphasises that submissions can be made on an anonymous or confidential basis. If you would like your submission to remain confidential please indicate this clearly at the beginning of your submission.

Submissions may be made in writing, by telephone, by fax or by email. Those who wish to request a meeting with the Commission may telephone for an appointment. Submissions are invited until the end of January 2014.

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Submissions received by **5.00 pm on 31 January 2014** will be considered by the Commission in the preparation of its Final Report.

Chapter One

Background

Contents

Nature and extent of family and domestic violence

As explained in the introduction to this Paper, the Commission engaged Professor Donna Chung, Head of Social Work, Curtin University to prepare a report on the complex nature and dynamics of family and domestic violence. A copy of this report is annexed to this Paper (see Appendix B). This section provides a brief overview of the nature and extent of family and domestic violence and has been largely informed by Professor Chung's report.

Since the mid-1970s family and domestic violence began to move out of its private domain and into the public spotlight. Professor Chung explains that the recognition by governments since the 1990s that family and domestic violence is a 'major social problem' has led to the development of more effective interagency responses[1] and, as discussed later in this Chapter, a raft of policy initiatives at the federal and state level. Family and domestic violence has devastating consequences for victims and their children but it also represents an enormous cost burden to the community. In 2004, Access Economics estimated that the total annual cost of domestic violence to the Australian economy for 2002–2003 was $8.1 billion. In 2009 a study conducted by KPMG estimated that 750,000 women will experience and report violence in 2021–2022 and this will cost $15.6 billion.[2]

It is well recognised that family and domestic violence occurs in all societies, communities and cultures; however, it is mainly perpetrated by men against women.[3] It has been stated that 95% of victims of family and domestic violence are female and 90% of perpetrators are male.[4] It has also been observed that, while there may be some men who are the 'sole' victims in a relationship, where men are subjected to violence it is more common for both parties to be engaging in violent behaviour (and, in such cases, the actions of the female are more likely to be defensive).[5] The Commission acknowledges the gendered nature of family and domestic violence but has decided to adopt gender neutral terminology in this Paper in recognition of the fact that some victims of family and domestic violence are male.[6]

DEFINITION OF FAMILY AND DOMESTIC VIOLENCE

The term 'domestic violence' is used in reference to behaviour occurring between people who are in or have been in an intimate relationship. In contrast, the term 'family violence' is used in a broader sense to cover violence between family members and has particular relevance for Aboriginal[7] communities. As Professor Chung observes, there has been a 'shift in terminology from domestic violence to "family and domestic violence" or in some states, such as Victoria, to "family violence".'[8] The National Plan to Reduce Violence against Women and their Children explains that a key component of family and domestic violence is an 'ongoing pattern of behaviour aimed at controlling a partner through fear'.[9] The Commission refers to the definitions of family and domestic violence adopted by state and federal policies in more detail in the next section of this Chapter.

Professor Chung usefully summarises behaviours that feature in family and domestic violence as follows:

- **Physical violence (including threats of violence) and damage to property:** Once physical violence has been used against the victim, future threats of violence are used to control the victim through fear.
- **Psychological and emotional abuse:** Examples include put downs, degradation, verbal abuse and threats to hurt others. The Commission notes that harassment and stalking

1. Chung D, *Family and Domestic Violence* (report prepared for the LRCWA): see Appendix B, below 185.
2. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [1.16].
3. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 20.
4. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 9.
5. Ibid.
6. However, some direct references to cited work may refer to victims as female and perpetrators as male.
7. In this Discussion Paper the Commission uses the term 'Aboriginal people' to refer to Aboriginal and Torres Strait Islander people.
8. See Appendix B, below 186.
9. *National Plan to Reduce Violence against Women and their Children 2010–2022* (undated) 2.

would also constitute forms of psychological and emotional abuse.

- **Sexual violence:** This includes 'rape', sexual assault, coerced sexual relations, distribution of sexualised images of the victim without consent and unwanted exposure to pornography.
- **Economic abuse:** Perpetrators may deny victims access to money for general living expenses or access the victim's funds without authority. Economic abuse may also include preventing the victim from working to obtain financial independence.
- **Social abuse:** Victims may be prevented from contact with family and friends or prevented from practising their own culture or faith. [10]

The Commission has previously commented that family and domestic violence is different from other forms of violence for a number of reasons: it is usually hidden, ongoing, and as a result of the relationship between the victim and the perpetrator it can be difficult for the victim to resist the abuse or leave.[11] In fact, as Professor Chung highlights, separation may be the most dangerous time and a time when the level of violence is likely to escalate.[12] One explanation is that following separation the perpetrator is no longer in control and increased violence is used to 'reassert control'.[13] In the Commission's reference on homicide, Justice Wheeler submitted that:

> The reality that confronts women who are subject to domestic violence is frequently brought home to judges of this court who preside over wilful murder trials, in which, in a depressing number of cases, the victim is a woman who has been killed by her husband or de facto, very often in circumstances in which she is seeking to assert herself and to separate from him, or to continue to live separately from him.[14]

Professor Chung explains that post separation family and domestic violence may also occur in a less drastic way (eg, behaving in an abusive manner at child contact handover times, not returning children from access visits and unnecessarily drawing out legal proceedings).

10. See Appendix B, below 186.
11. LRCWA, *Court Intervention Programs,* Project No. 96 (2008) 120.
12. It has been observed that 75% of Australian women who had experienced family and domestic violence and who ended their relationship suffered violence after separation: Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 26.
13. See Appendix B, below 187.
14. LRCWA, *Review of the Law of Homicide*, Project No 92 (2007) 268.

The term 'cycle of violence' (developed in the late 1970s) is often used to explain patterns of behaviour in family and domestic violence relationships. It has been observed that the cycle has six phases: honeymoon phase (no physical or sexual violence); tension building; standover (use of anger and threats to maintain control); explosion (physical, sexual, emotional or verbal abuse); remorse (justifying behaviour and victim blaming); and buyback (apologises and promises to change). It is said that this cycle continues to repeat itself and each time the 'explosion' phase may be more serious.[15]

EXPLANATIONS OF FAMILY AND DOMESTIC VIOLENCE

Professor Chung discusses a number of different theories that are relied on to explain why family and domestic violence occurs.[16] These are very briefly summarised below:

- **Individual pathology theories:** These theories assert that the perpetrator suffers from an 'inherent psychological problem'; however, she notes critics have emphasised that these theories do not take into account other factors such as social circumstances and gendered power imbalances.
- **Social stressors and individual risk:** This hypothesis focuses on poor anger management and impulse control as the precursor to family and domestic violence but, as Professor Chung observes, it fails to take into account that psychological abuse and social isolation are not directly related to anger or loss of control by the perpetrator.
- **Intergenerational transmission of family and domestic violence:** It has been contended that past experience of family and domestic violence is a factor that contributes to future commission of family and domestic violence and, further, observing family and domestic violence teaches the observer that violence is a 'successful strategy'. This theory is criticised on the basis that the relevant research relates to people who are currently experiencing family and domestic violence and does not consider those people who witness family and domestic violence as a child but have not become perpetrators as adults.

15. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework (*2011) 22.
16. See Appendix B, below 187–90. Professor Chung notes that this discussion is explicitly focused on intimate partner violence.

- **Gendered explanations:** Feminist theories claim that violence by men is a 'choice and a powerful means of maintaining gender inequality' and is based on 'patriarchal attitudes and beliefs about entitlement, male ownership and control of female partners'.[17] However, they have been critiqued on the basis that not all men are violent and abusive to their female partners. Nonetheless, Professor Chung notes that family and domestic violence occurs more frequently in societies with greater gender inequality.

- **Indigenous family violence theories:** Aboriginal commentators have argued that feminist theories of family and domestic violence do not adequately accommodate the experiences of Aboriginal communities and that family violence in these communities is caused by a multitude of factors including colonisation, dispossession and cultural breakdown, stolen generation, racism, marginalisation, welfare dependency, unemployment, past history of abuse, substance abuse, health and mental health issues, and low self esteem. This accords with opinions expressed in the Commission's consultations with Aboriginal people and various stakeholders in the Kimberley region and Geraldton.

- **Coercive control:** This theory is based on 'the assumption that there are gendered power differences in the heterosexual relationship and that the perpetrator exploits these through using a range of continuous tactics of violence and abuse' and it helps to explain the common question 'why doesn't she leave?' Professor Chung comments that this theory asserts that often victims remain in violent relationships because 'their will and resistance has been eroded'.[18] However, it is also noted that some victims do not leave for practical reasons such as lack of accommodation or because they believe that the perpetrator will change.

EXTENT OF FAMILY AND DOMESTIC VIOLENCE

It is indisputable that data about the extent of family and domestic violence will underestimate the true level of family and domestic violence because it is significantly underreported or undisclosed.[19] The barriers to disclosure for victims of family and domestic violence include low self esteem, depression, anxiety, social and economic isolation, fear, and concern about being reported to government agencies such as child protection or immigration.[20] There are additional specific barriers for certain groups and these are mentioned where relevant below. It is also important to acknowledge that some victims of family and domestic violence will remain in an abusive relationship because they genuinely love their partners and/or wish to maintain the family unit.[21]

Incidence of family and domestic violence

The number of reported incidents of family and domestic violence in Western Australia has increased considerably over the past 10 years. The total number of incidents reported to police is now more than two-and-a-half times the level in 2004 and in 2012 the data provided to the Commission suggests that there were 44,947 family and domestic violence incidents reported to police.[22] It is difficult to know whether this reflects an increase in the prevalence of family and domestic violence in Western Australia or an increased willingness to report family and domestic violence to police.

A study of family and domestic violence police data for 2005 reportedly found that 75% of victims were female, 20% were male and 5% were unknown. The majority of victims were aged between 18–39 years (70%) with 19% aged between 40–49 years, 8% aged over 50 years and 3% aged less than 18 years. Eighty-three per cent of perpetrators were male.[23]

IMPACT ON PARTICULAR GROUPS

Women and children

Australian Bureau of Statistics (ABS) data show that one in three women have experienced physical

17. See Appendix B, below 188.
18. See Appendix B, below 190.
19. Professor Chung refers to research which shows that less than 50% of women who had experienced family and domestic violence reported the incident to police: see Appendix B, below 191.
20. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 34.
21. Ibid 35.
22. The material provided to the Commission in October 2013 explains that the statistics 'must be used as an indication only and not classified as verified. Verified statistics are those matters that are reported to the police within the relevant time period that have not been determined to be falsely or mistakenly reported.' The material advises that verified statistics are not available: Western Australia Police, *Statistics for Law Reform Commission of Western Australia* (undated).
23. Leggett N, 'Violence against Women in Western Australia: A summary about the prevalence, effects and community awareness of domestic and family violence (Women's Council for Domestic and Family Violence Services, 2007) 23–4.

violence since the age of 15 years and nearly one in five have experienced sexual violence.[24] In addition to physical injuries and death, female victims of family and domestic violence may suffer a range of problems such as financial hardship, homelessness, depression, anxiety, low self esteem, social isolation, suicidal thoughts and reduced parenting capacity.[25]

Children may be the direct victims of family and domestic violence or indirect victims as a consequence of exposure to family and domestic violence. The Department for Child Protection and Family Support (DCPFS) states that:

> The world of a child or young person growing up with family and domestic violence is characterised by fear, constant worry and unpredictability, confusion about their feelings for the victim and perpetrator and threats to physical wellbeing. Overtime, these experiences can have significant consequences for children and young people's social and emotional health. In fact, research suggests that exposure to violence (hearing, seeing, knowing) is just as damaging to a young person as being the direct target of abuse.[26]

The 1996 *Women's Safety Survey* conducted by the ABS questioned women about their experience of violence (defined as an incident involving attempted, threatened or actual physical or sexual assault). This study found that 46% of women who experienced violence by a previous partner reported children in their care had witnessed the violence.[27] DCPFS explains that children exposed to family and domestic violence may suffer direct harm such as injury, 'disrupted attachment and disrupted development'. They may also experience indirect harms such as homelessness and interrupted schooling.[28]

Aboriginal people

It is well-known that Aboriginal women are more likely to be victims of family and domestic violence than non-Aboriginal women (statistics from the mid-1990s estimated that Aboriginal women are 45 times more likely to be victims of family and domestic violence than non-Aboriginal women).[29] Further, Aboriginal women are 35 times more likely to be hospitalised as a result of family and domestic violence than non-Aboriginal women; nine times more likely to be the victim of domestic homicide; and 40% of Aboriginal children 'grow up witnessing family and domestic violence'.[30] Aboriginal people experience additional complications and barriers to reporting family and domestic violence including fear of authorities (eg, fear that children will be removed by child protection agencies[31]); distrust of the legal system (and fear that the perpetrator will be imprisoned); and a lack of ability or willingness to leave family, culture and community.[32]

People from rural and remote communities

The geographical isolation of rural and remote communities (particularly in Western Australia) gives rise to specific barriers such as lack of access to support services, lack of transport and lack of alternative accommodation options. During the Commission's consultations with victim support workers in the Kimberley, the lack of alternative accommodation was cited as one of the main obstacles facing Aboriginal victims of family and domestic violence: there is simply nowhere else for them to go. Additionally, victims from smaller local communities may experience greater shame from the disclosure of family and domestic violence because others in the community are likely to find out.[33] Again this was reiterated to the Commission and specifically the Commission was told that some victims will not apply for a violence restraining order in case a family or community member sees them at the court building.

People from culturally and linguistically diverse backgrounds

There is limited data about the prevalence of family and domestic violence within immigrant and refugee communities[34] and Professor Chung comments that there is no consensus among commentators as

24. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013: Mid-term progress repor*t (undated) 2.
25. See Appendix B, below 192.
26. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework (*2011) 25.
27. ABS, *Women's Safety Australia* (1996) Catalogue No 4128.0.
28. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 10.
29. *WA Strategic Plan for Family and Domestic Violence 2009–2013* (undated) 4.
30. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 26.
31. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 34.
32. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework (*2011) 26.
33. Ibid 28.
34. Trijbetz T, *Domestic and Family Violence and People from Immigrant and Refugee Backgrounds* (Australian Domestic and Family Violence Clearinghouse, 2013) Fast Facts No 11, 1.

to whether the prevalence of family and domestic violence is higher in culturally and linguistically diverse (CALD) communities than in the general population. What is clear is that there are additional barriers to disclosure. For example, it has been noted that some women from CALD backgrounds will experience considerable shame if they leave their husband irrespective of whether he is abusive.[35] Further, language barriers, lack of family and social support, lack of financial support, fear of deportation,[36] and unwillingness to access mainstream services impact on whether CALD victims will report family and domestic violence to authorities.[37] The situation for refugees is further complicated by past experience of trauma in the originating country.[38]

People with disabilities

DCPFS has stated that 'women with a disability are among the most vulnerable in the community'.[39] Women with an intellectual disability are 10 times more likely to be assaulted than other women and 90% of women with an intellectual disability have been sexually abused.[40] The difficulties people with disabilities face in reporting family and domestic violence or leaving an abusive relationship are magnified if the perpetrator is the victim's carer and where there is no other care option available.[41] During consultations the Disability Services Commission also highlighted a lack of understanding of legal processes as an impediment to this cohort seeking help. It was also explained that people with disabilities may experience abuse differently to other people (eg, the perpetrator may take physical control of a wheelchair or refuse to administer medication). Additional barriers to disclosure for people with disabilities include financial dependence on the perpetrator, the concern that they will not be believed because of their disability and reluctance to access mainstream services.[42]

35. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 34.
36. Trijbetz T, *Domestic and Family Violence and People from Immigrant and Refugee Backgrounds* (Australian Domestic and Family Violence Clearinghouse, 2013) Fast Facts No 11, 2.
37. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 28.
38. Ibid 27.
39. Ibid 29.
40. Ibid.
41. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 34.
42. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 30.

Gay, lesbian, bisexual, transgender and intersex people

It has been reported that approximately 30% of men and 40% of women in same sex relationships, 62% of transgender men, 36% of transgender women, 36% of intersex males and 43% of intersex females experience intimate partner violence.[43] Additional barriers faced by these groups include fear of prejudice and stereotypical responses from mainstream agencies and limited accommodation options.[44] However, it has been noted that research in this area is limited.[45]

CONCLUSION

Professor Chung usefully highlights at the end of her paper that people who experience family and domestic violence are often also experiencing a range of other issues such as poverty, mental health problems, disability and substance abuse. As a consequence, responses and interventions focused solely on the occurrence of family and domestic violence are likely to be ineffective and the need to 'understand and respond more effectively to the complexity of people experiencing [family and domestic violence] remains the biggest challenge to stopping [family and domestic violence] and promoting women's and children's safety'.[46]

43. Ibid 31.
44. Ibid.
45. Leggett referred to these statistics in her 2007 report and states that these statistics were obtained from a sample of 5,476 people between the ages of 16 and 92 who completed an online survey: Leggett N, *Violence Against Women in Western Australia: A summary about the prevalence, effects and community awareness of domestic and family violence* (Women's Council for Domestic and Family Violence Services, 2007) 12.
46. See Appendix B, below 194.

Family and domestic violence policy

In recognition of the high incidence of family and domestic violence in Australia, and its devastating impact on victims, who are very often women and children, all governments have developed specific policies designed to reduce family and domestic violence and protect women and children.[1] The section below provides an overview of the national and Western Australian policies, including a discussion of key objectives and principles. An understanding of the broad policy landscape provides a useful starting point for consideration of possible reforms to the Western Australian legal system.

AUSTRALIA

In May 2008 the Australian Government established the National Council to Reduce Violence against Women and their Children ('the National Council') 'to develop a national plan to reduce the incidence and the impact of violence against women and their children'.[2] A report including a proposed national plan was released in March 2009.[3] The report cautioned against a 'one-size-fits-all' approach and highlighted that responses must address the diverse experiences of women and children suffering family and domestic violence (eg, women from regional and remote locations, Aboriginal women, and immigrant and refugee women).[4] The National Council's plan included six outcomes, namely that:

1. Communities are safe and free from violence.
2. Relationships are respectful.
3. Services meet the needs of women and their children.
4. Responses are just.
5. Perpetrators stop their violence.
6. Systems work together effectively.

The last three outcomes are of particular significance for the Commission's reference. In regard to Outcome 4 it was explained that:

> Legal protection cannot be delivered if the laws are inadequate, if they are not applied in the way they were intended, if women experience re-victimisation in the justice process, or where the justice system is inaccessible or inequitable.[5]

The strategies suggested to achieve Outcome 4 included ensuring 'accessible and equitable justice for women and their children'; ensuring legal remedies under the civil law operate alongside the criminal law and prioritise safety; and ensuring 'judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise'.[6] The discussion in regard to Outcome 5 emphasised the importance of access (at the earliest opportunity) to effective programs for perpetrators to facilitate and maintain changes in their behaviour.[7] Finally, to achieve Outcome 6 it was argued that services needed to be delivered in an integrated and coordinated manner.[8] The National Council recommended that the Council of Australian Governments (COAG) should have responsibility for implementing the plan.

The National Plan

The federal government, in conjunction with state and territory governments, developed the *National Plan to Reduce Violence against Women and their Children 2010–2022* ('the National Plan'), which was endorsed by COAG in 2011. The National Plan is explicitly aimed at two forms of violence: family and domestic violence and sexual assault. Domestic violence is defined as violence that occurs between

1. See, eg, Australian Capital Territory Government, *Our Responsibility: Ending violence against women and children – ACT Prevention of Violence Against Women and Children Strategy 2011–2017* (2011); New South Wales Government, *It Stops Here: Standing together to end domestic and family violence in NSW* (2013); Victorian Government, *Everybody has a Responsibility to Act: Victoria's action plan to address violence against women and children 2012–2015* (2012); Queensland Government, *For Our Sons and Daughters: A Queensland Government strategy to reduce domestic and family violence 2009–2014* (2009); South Australian Government, *A Right to Safety: The next phase of South Australia's women's safety strategy 2011–2022* (2011). These and other policy documents can be accessed from the Australian Domestic and Family Violence Clearinghouse website: see <http://www.adfvc.unsw.edu.au/au_resources.html>.
2. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's plan for Australia to reduce violence against women and their children, 2009–2012* (2009) 11.
3. Ibid.
4. Ibid 14.
5. Ibid 18.
6. Ibid 19.
7. Ibid.
8. Ibid 20.

people who are in or have been in an intimate relationship. It is stated that:

> While there is no single definition, the central element of domestic violence is an ongoing pattern of behaviour aimed at controlling a partner through fear, for example by using behaviour which is violent and threatening. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over women and their children, and can be both criminal and non-criminal.[9]

In contrast, the term 'family violence' is used in a broader sense to cover violence between family members and it 'involves the same sorts of behaviours as described for domestic violence'.

> As with domestic violence, the *National Plan* recognises that although only some aspects of family violence are criminal offences, any behaviour that causes the victim to live in fear is unacceptable. The term, 'family violence' is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur. [10]

The National Plan contains six national outcomes (similar, but not identical, to the six national outcomes promoted by the National Council). The National Plan provides that these outcomes are to be delivered by all governments over the 12-year period.[11] The implementation of the plan is designed around four separate three-year action plans. The six outcomes are:

1. **Communities are safe and free from violence:** This outcome focuses on community-based prevention strategies (eg, social marketing, school-based programs and initiatives designed to promote gender-equality). The National Plan highlights that '[p]rimary prevention strategies have successfully reduced other complex social or health problems such as drink-driving and smoking'.[12] The need to address broad community attitudes to family and domestic violence was emphasised by many of those consulted for this reference.

2. **Relationships are respectful:** The National Plan advocates for appropriate education strategies for young people to ensure that they develop positive relationships along with positive parenting practices, and encouragement for non-violent men to speak out against violence.[13]

3. **Indigenous communities are strengthened:** The National Plan recognises that Indigenous women experience far higher rates of family and domestic violence than non-Indigenous women and this outcome aims to support Indigenous communities to develop local solutions as well as 'encouraging Indigenous women to have a stronger voice as community leaders and supporting Indigenous men to reject violence'.[14]

4. **Services meet the needs of women and their children experiencing violence:** The aim of this outcome is to ensure that services are 'high-quality, accessible and responsive' and that specialist services are provided in recognition of the diverse circumstances of women and their children experiencing violence.[15] Specifically, it is stated that '[w]omen should not have to tell their story multiple times to multiple services. The first response should be the right one.'[16]

5. **Justice responses are effective:** Outcome 5 focuses on improving the criminal justice response to violence against women and their children, including improving access to justice and ensuring that the justice sector and external agencies work together.[17]

6. **Perpetrators stop their violence and are held to account:** The National Plan emphasises the importance of stronger policing and sentencing, including ensuring that there are serious consequences for perpetrators who breach orders. However, research indicates that the likelihood of reoffending is reduced if the causes of offending behaviour are addressed and, therefore, this outcome encompasses more than punishment. Perpetrators require assistance to end their violent behaviour.[18]

National Plan Progress Report

The National Implementation Plan for the first three-year period – *Building a Strong Foundation 2010–2013* – was released in September 2012.[19] Under this first action plan, there are 68 initiatives at a national level coupled with local actions for states

9. National Council to Reduce Violence against Women and their Children, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (2010) 2.
10. Ibid.
11. For a summary of the four three-year action plans, see ibid 13–14.
12. Ibid 15.
13. Ibid 18.
14. Ibid 20.
15. Ibid 23.
16. Ibid 23.
17. Ibid 26.
18. Ibid 29.
19. National Council to Reduce Violence against Women and their Children, *National Plan to Reduce Violence against Women and their Children 2010–2022, Progress Report to the Council of Australian Governments 2010–2012* (2013) 17.

and territories.[20] The 2013 progress report to COAG outlines various initiatives implemented to date. Of particular relevance to this Discussion Paper are the following Western Australian initiatives:

- The development in Western Australia of the Family and Domestic Violence Co-location Model and the Family and Domestic Violence Case Management and Coordination Services (CMCS) (this has now been replaced with the Family and Domestic Violence Response Teams, discussed below). These models involve a coordinated response to reported incidents of family and domestic violence by the Department for Child Protection and Family Support (DCPFS), the Western Australia Police and non-government agencies.[21]
- The publication by DCPFS of the *Family and Domestic Violence Common Risk Assessment and Risk Management Framework* which is designed to provide a 'minimum requirement for screening and the assessment, management and monitoring of risk across the entire service system'.[22]
- The establishment of the Family and Domestic Violence Advisory Group (FDVAG) by the Department of Health with various representatives from the Department of Health, DCPFS, community-based services and academics.[23]
- The development by the Western Australia Police of the *Domestic Violence Incident Report 1–9* (DVIR1–9) which provides a standard template for collecting and recording information by frontline police attending incidents of family and domestic violence.

ALRC/NSWLRC Report on Family Violence

In its report the National Council recommended that the Australian Law Reform Commission (ALRC) examine state and territory family and domestic violence and child protection legislation and federal family law 'and propose solutions to ensure that the inter-relationship in the application of these laws works to protect women and children from violence'.[24] The ALRC received its reference in relation to family violence on 17 July 2009 and it was directed to work in conjunction with the New South Wales Law Reform Commission (NSWLRC). On 11 November 2010 the ALRC and the NSWLRC published their report, *Family Violence – A National Legal Response*. The report examined the intersection of state and federal laws dealing with family violence, child protection and family law and it contained 187 recommendations for reform.

The federal government published its response to the 56 recommendations that related to the federal legal system in June 2013.[25] It highlighted a number of reforms that had been implemented in consequence of the report including reforms to the *Family Law Act 1975* (Cth).[26] Of note, s 4AB of the *Family Law Act* now contains the broader definition of family violence recommended by the ALRC/NSWLRC report. The term 'family violence' is defined as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. The provision also contains a list of examples of behaviour that may constitute family violence. Further, the term 'abuse' in s 4 of the Act (when used in relation to a child) was extended to include 'causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence'.[27] Significantly, s 60CC of the *Family Law Act*, which deals with how the court is to determine what is in a child's best interests, now provides (in regard to the two primary considerations) that the court is to give greater weight to the 'need to protect the chid from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' than to the consideration of the 'benefit to the child of having a meaningful relationship with both of the child's parents'.[28]

In addition to the federal government response, the Standing Council on Law and Justice (SCLJ) formulated a response to 24 recommendations that were jointly relevant to the Commonwealth, states and territories. There are a further nine recommendations that deal with the link between the

20. Ibid 29.
21. Ibid 51.
22. Ibid 56.
23. The Commission met with representatives of the FDVAG on 22 October 2013.
24. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's plan for Australia to reduce violence against women and their children, 2009–2012* (2009) 168.
25. Australian Government, *Government Response to the Australian and NSW Law Reform Commissions': Family Violence – A national legal response* (June 2013).
26. See *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
27. Pursuant to s 4AB(3) of the *Family Law Act 1975* (Cth) a 'child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence'. Examples of situations that may constitute a child being exposed to family violence are listed in s 4AB(4).
28. Corresponding amendments to the *Family Court Act 1997* (WA) were made by the *Family Court Amendment (Family Violence and Other Measures) Act 2013* (WA) and these amendments commenced on 4 October 2013.

state child protection systems and family law, and these are being considered by a project of national justice CEOs. The remaining recommendations will be responded to by states and territories individually.[29]

The SCLJ response was endorsed in April 2013 and provided comments under four key themes: education and training; common principles; inconsistencies between family violence protection orders[30] and family court orders; and data collection.[31] A number of the ALRC/NSWLRC report's recommendations dealt with education and training for professionals working in the legal system. The SCLJ response states that the federal, state and territory Attorneys-General agree in principle with recommendations in relation to improved education and training because '[a]ppropriate education and training ensures the best outcomes for persons who experience family violence and come into contact with professionals working within this sphere'.[32] A number of initiatives in this regard are referred to including the federal government's program for professionals in the family law system, *AVERT – Addressing Violence: Education, Resources, Training; Family Law System Collaborative Responses to Family Violence*,[33] which commenced in March 2011. The SCLJ will conduct a 'national audit of family violence training to identify best practice'.[34] Additionally, support for the development of a national bench-book on family violence was expressed.

Recommendation 29-1 of the ALRC/NSWLRC report provides that:

> The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure that any such response is based on common principles and objectives, developed in consultation with relevant stakeholders.

The SCLJ response notes that the federal, state and territory Attorneys-General agree with this recommendation and this process has already commenced with the endorsement of the National Plan and the development by individual states and territories of their own implementation plans to address family violence.[35]

It is also highlighted that many of the ALRC/NSWLRC recommendations deal with inconsistencies between family violence protection orders and family court orders. The SCLJ response states that the Attorneys-General 'are of the view that one of the primary methods of resolving such inconsistencies is improving the way that information comes before each court system' and that they are 'investigating a number of ways to improve collaboration and communication between different courts systems, including the work that is being done between the child protection and family law system through the [national justice CEOs], to ensure that the right information is put before each court system at the right time'.[36]

In regard to data collection, the SCLJ response notes that the federal, state and territory governments have agreed under the National Plan to develop a national data collection system by 2022.[37] Further, recommendation 30-18 of the ALRC/NSWLRC report proposed the establishment of a national register with information about interim, final and police-issued family violence protection orders; child protection orders; and orders and injunctions made under the family law system. The report proposed that this information should be available to federal, state and territory police; family courts; state and territory courts dealing with family violence matters and child protection; and child protection agencies. The response notes that the Attorneys-General have set up a working group to consider this recommendation and jurisdictions are 'working on the development of the national domestic and family violence order (DVO) mutual recognition scheme agreed to by the Standing Committee of Attorneys-General in March 2011'.[38]

Recent initiatives

The Australian Domestic and Family Violence Clearinghouse is a nationally funded project 'that reviews and disseminates evidence-based research on the causes, effects and ongoing impacts of domestic and family violence'.[39] The Clearinghouse has been in operation for 13 years. As part of the National Plan the federal government has established the National Centre of Excellence (NCE)

29. Australian Government, *Government Response to the Australian and NSW Law Reform Commissions': Family Violence – A national legal response* (June 2013) 1–2.
30. In some jurisdictions, restraining orders are called protection orders.
31. Standing Council on Law and Justice, *National Response to Recommendations from the ALRC/NSWLRC Report into Family Violence that Jointly Affect the Commonwealth, States and Territories* (undated) 2. See further Standing Council on Law and Justice J, *Communique* (April 2013).
32. Ibid, *National Response to Recommendations from the ALRC/NSWLRC Report*, 3.
33. The AVERT website has various resources and training modules: see <http://www.avertfamilyviolence.com.au/about-avert/>.
34. Standing Council on Law and Justice, *National Response to Recommendations from the ALRC/NSWLRC Report into Family Violence that Jointly Affect the Commonwealth, States and Territories* (undated) 3–4.
35. Ibid 9.
36. Ibid 10.
37. Ibid 13.
38. Ibid 15.
39. See <http://www.adfvc.unsw.edu.au/About_us.htm>.

to 'build a strong and lasting evidence base that will drive reform and inform policy and practice in the reducing of violence against women and their children'.[40] The NCE commenced work in 2013 and will receive annual funding of $3 million ($1.5 million from the federal government and $1.5 million from the states and territories). On 26 September 2013 it was announced that the NCE will provide clearinghouse functions for family and domestic violence and sexual assault from 1 October 2014. In the meantime the Australian Domestic and Family Violence Clearinghouse and the Australian Centre for the Study of Sexual Assault will work with the NCE to facilitate the transition.[41] Further, on 26 July 2013 the federal and Victorian governments established the Foundation to Prevent Violence against Women and their Children. The stated role of the foundation is to 'drive cultural and attitudinal change to prevent violence against women and their children from the ground up through community engagement and advocacy'. This initiative is also part of the National Plan and is intended to augment the work of the NCE.[42]

WESTERN AUSTRALIA

In Western Australia, the Family and Domestic Violence Unit of the Department for Child Protection and Family Support (DCPFS)[43] is responsible for the development of state government policy on family and domestic violence. In addition, the unit oversees the administration of the Family and Domestic Violence Senior Officers' Group (SOG)[44] which is comprised of senior representatives from various state and federal government agencies along with the Women's Council for Domestic and Family Violence Services (as the representative for the non-government sector). The declared 'purpose of the SOG is to plan, manage and monitor a strategic across-government response to family and domestic violence in Western Australia'.[45]

The *Western Australia's Family and Domestic Violence Strategy to 2022* ('the Strategy') is the overarching long-term policy document for Western Australia's implementation of the National Plan and DCPFS is the lead agency implementing the plan in Western Australia. The Strategy has been approved by SOG. The *WA Strategic Plan for Family and Domestic Violence 2009–2013* ('the Strategic Plan') has been the 'key driver of current reform'.[46] A mid-term progress report on the Strategic Plan outlines achievements to date. Under the Strategy annual achievement reports will be published, with the first report due in January 2014.

Western Australia's Family and Domestic Violence Prevention Strategy to 2022

The Strategy enhances the Strategic Plan and is intended to provide long-term direction for the state's response to family and domestic violence. The Strategy highlights that, in the past, Western Australia's response to family and domestic violence had been disjointed with 'short term stand-alone strategies'.[47] The Strategy has three distinct three-year phases: Sustaining Change 2013–2016, Consolidating Change 2016–2019 and Achieving Change 2019–2022. These three phases correlate with the final three periods under the National Plan. The Strategy contains three main outcomes:

1. **Prevention and early intervention:** Community attitudes reflect that family and domestic violence is not acceptable.
2. **Safety for victims:** Adults and child victims are safe through the provision of timely and accessible services.
3. **Accountability for perpetrators**: Perpetrators are held accountable and supported to stop violent behaviour.[48]

WA Strategic Plan for Family and Domestic Violence 2009–2013

The Strategic Plan was launched in 2009. It defines 'family and domestic violence' as:

> [B]ehaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear. The term is usually used where abuse and violence take place in intimate partner relationships including same sex relationships, between siblings, from adolescents to parents or from family carers to a relative or a relative with a disability. A key characteristic of family and domestic violence is the use of violence or other forms of abuse to

40. See <https://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-centre-of-excellence>.
41. See <http://www.aifs.gov.au/acssa/docs/NCEcommunication20130926.pdf>.
42. See <https://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/foundation-to-prevent-violence-against-women-and-their-children>.
43. The Commission met with representatives of the Family and Domestic Violence Unit on 5 September 2013.
44. The Commission met with representative of the Family and Domestic Violence Senior Officers' Group on 25 September 2013.
45. See <http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/StateStrategicPlanning.aspx>.
46. Ibid.
47. DCPFS, *Western Australia's Family and Domestic Violence Strategy to 2022* (undated) 4.
48. Ibid 6.

control someone with whom the perpetrator has an intimate or family relationship.[49]

As with the National Plan (discussed above), the term 'domestic violence' is distinguished from 'family violence' because it is used to refer to abuse against an intimate partner. In contrast, the term 'family violence' is broader and includes domestic violence and the abuse of children, the elderly and other family members.[50] It is also noted that Aboriginal people usually prefer the term 'family violence' in recognition of Aboriginal kinship relationships; however, the 'use of this term should not obscure the fact that Aboriginal women and children bear the brunt of family violence'.[51] While clearly acknowledging both family and domestic violence, the Strategic Plan explicitly focuses on responding to intimate partner violence that is 'characterised by an imbalance of power and a pattern of behaviours which are used consciously by one person to control another'.[52]

The Strategic Plan incorporates eight principles that should underpin policies, practices and programs that address family and domestic violence in Western Australia.

1. Family and domestic violence and abuse is a fundamental violation of human rights and will not be tolerated in any community or culture.
2. Preventing family and domestic violence and abuse is the responsibility of the whole community and requires a shared understanding that it must not be tolerated under any circumstance.
3. The safety and wellbeing of those affected by family and domestic violence and abuse will be the first priority of any response.
4. Perpetrators of family and domestic violence and abuse will be held accountable for their behaviour and acts that constitute a criminal offence will be dealt with accordingly.
5. Responses to family and domestic violence and abuse can be improved through the development of an all-inclusive approach in which responses are integrated and specifically designed to address safety and accountability.
6. An effective system will acknowledge that to achieve substantive equality, partnerships must be developed in consultation with specific communities of interest including people with a disability, people from diverse sexualities and/or gender, people from Aboriginal and Torres Strait Islander communities and people from culturally and linguistically diverse backgrounds.
7. Victims of family and domestic violence and abuse will not be held responsible for the perpetrator's behaviour.
8. Children have unique vulnerabilities in family and domestic violence situations, and all efforts must be made to protect them from short and long term harm.[53]

The Strategic Plan identifies 11 key strategies to achieve the above outcomes:

1. Strengthen community understanding and awareness that domestic violence is not acceptable.
2. Focus family and domestic violence prevention and early intervention initiatives on children and young people and healthy, respectful relationships.
3. Support Aboriginal and new and emerging communities to develop greater awareness and understanding of family and domestic violence.
4. Develop a statewide integrated response to those experiencing family and domestic violence.
5. Provide an accessible, integrated 24 hour response to family and domestic violence throughout the State including crisis and post-crisis intervention.
6. Ensure a range of safe and supported emergency and longer term accommodation and housing options for those affected by family and domestic violence, with priority consideration given to regional and remote locations and Aboriginal communities.
7. Provide advocacy and support responses that address the health and wellbeing of those affected by family and domestic violence, with priority consideration given to regional and remote locations and Aboriginal communities.
8. Ensure access to specialist short and long term counselling and support services for children who are victims of family and domestic violence.
9. Ensure a range of evidence based programs and interventions for perpetrators of family and domestic violence.
10. Maintain and continue to develop a strong civil and criminal justice and statutory response to family and domestic violence.
11. Include family and domestic violence as a core unit in social science, justice and health related tertiary qualifications.[54]

49. Government of Western Australia, *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013* (2009) 6.
50. Ibid 6.
51. Ibid.
52. Ibid.
53. Ibid 7.
54. Ibid 8.

The Strategic Plan focuses on providing 'better integrated service responses to families who find themselves victims of domestic and family violence' and recognises that a multi-agency response is required from state and federal government agencies along with non-government agencies including police, courts, corrective services, child protection, health professionals, legal professionals, advocacy services, accommodation and support services, counselling services and education.[55]

The Strategic Plan mid-term progress report provides initial data for 2008–2009 and 2009–2010 to formulate an evidence base for informing future developments in relation to family and domestic violence in Western Australia. It also outlines various initiatives undertaken including social marketing and education campaigns in relation to family and domestic violence, alcohol abuse and respectful relationships;[56] and specific services for family and domestic violence (eg, the Men's Domestic Violence Helpline; the Women's Domestic Violence Helpline; the Safe at Home program, which aims to assist women and children experiencing family and domestic violence to remain in their own homes; and Breathing Space, which is a program for perpetrators of family and domestic violence).[57]

The mid-term progress report refers to the role and work of Family and Domestic Violence Case Management and Coordination Services (CMCS), which consisted of government and non-government agencies working 'collaboratively to manage the risk and safety of high-risk family and domestic violence cases'.[58] The CMCS have since been replaced by the Family and Domestic Violence Response Teams (discussed further below).[59] Other initiatives include the 'Memorandum of Understanding for Information Sharing between Agencies with Responsibilities for Preventing and Responding to Family and Domestic Violence in Western Australia' and the development of the 'Family and Domestic Violence Common Risk Assessment Risk Management Framework' which is a 'minimum standard for screening, assessment and response to family and domestic violence for all mainstream and specialist services' in Western Australia.[60]

55. Ibid 2–3.
56. *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013: Mid-term progress report* (undated) <http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/MidTermProgressReport.PDF> 7–8.
57. Ibid 9–11.
58. Ibid 12.
59. DCPFS, Western Australia Police & Women's Council for Domestic and Family Violence Services, *Family and Domestic Violence Response Team: Operating procedures* (July 2013) 4.
60. *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013: Mid-term progress report* (undated) 12.

In addition, the mid-term progress report notes specific actions taken in relation to the legal system including amendments to the *Restraining Orders Act 1997* (WA) in 2011; the existence of memoranda of understanding between the Family Court of Western Australia, Legal Aid WA and DCPFS and between the Magistrates Court of Western Australia and the Family Court of Western Australia; the establishment of six specialist Family Violence Courts in the metropolitan area along with the Barndimalgu Court in Geraldton; mandated men's behaviour changes programs operating in Armadale, Fremantle, Joondalup, Midland, Perth, Rockingham, Albany and Bunbury, as well as various voluntary programs for perpetrators of family and domestic violence; the Indigenous Family Violence Program; the employment of specialist family protection coordinators in all 14 Western Australia Police regions; and liquor restrictions and alcohol management plans in particular remote areas in recognition of the 'association between alcohol and family and domestic violence' in Aboriginal communities.[61]

Western Australia Family and Domestic Violence Common Risk Assessment and Risk Management Framework 2011 (CRARMF)

CRARMF was adapted from the Victorian counterpart by DCPFS under the direction of an interagency steering group. It is intended to be used by specialist family violence services (eg, crisis accommodation, counselling services and advocacy services), mainstream services (eg, health, education and housing), and legal and statutory bodies (eg, police, child protection, courts and legal services).[62] Victims of family and domestic violence may seek help from any one or more of these services or bodies and CRARMF highlights that:

> While it is important that these multiple entry points continue to be provided, integrated service delivery aims to ensure that all service providers adhere to a minimum standard of screening, assessment and response to victims of family and domestic violence, regardless of where they enter the system.[63]

The purpose of undertaking a risk assessment in the context of family and domestic violence is to gauge the risk of future assaults (and homicide); to inform responses from service providers and the justice system; to help victims appreciate their own

61. Ibid 14–17.
62. Family and Domestic Violence Unit, Department for Child Protection, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 7.
63. Ibid 8.

level of risk; and to act as a starting point for case management and ongoing monitoring.[64]

CRARMF is not a risk assessment tool but rather a framework for common language between government and non-government agencies which includes[65] shared principles,[66] a response continuum,[67] a common minimum standard, referral and information sharing, a shared commitment to perpetrator accountability, and risk management.

CRARMF contains minimum standards for screening, risk assessment and response. The minimum standards for screening indicate that all government and non-government services (mainstream and specialist) should screen for family and domestic violence 'as part of their standard intake procedures'. The 'common screening tool' provided for this purpose has three prompts: whether the person has been put down, humiliated or controlled by a family member; whether the person has been hurt or threatened by a family member; and whether the person is worried about their children's or someone else's safety. If the presence of family and domestic violence is identified, actions to ensure immediate safety should be taken. Further, if the agency is a specialist service it is expected that a formal risk assessment will be conducted and, if necessary, safety planning, referral and case management will be undertaken. For mainstream agencies, a referral should be made to a specialist agency.[68] The minimum standard for risk assessment requires a common approach whereby the risk assessment includes the victim's own assessment of risk, consideration of 'key risk indicators' and professional judgment. The 'key risk indicators' are contained in an aide memoir annexed to the CRARMF and include the following factors:

- **In respect to the victim:** Pregnancy or new birth; depression or mental illness; drug and/or alcohol abuse; suicidal ideas or attempts; and isolation.
- **In respect to the perpetrator:** Use of a weapon in most recent event; access to weapons; harm or threats to harm victim; sexually assaulted victim; attempted to kill victim; harmed or threatened to harm/kill children, other family members or pets/animals; threatened or attempted to commit suicide; stalked victim; engaged in controlling behaviour; unemployed; depression or mental health issues; drug and/or alcohol abuse; and history of other violent behaviour.
- **In respect to the relationship:** Recent separation; escalation in severity and/or frequency of violence; and financial difficulties.[69]

Once risk has been identified, agencies should develop a safety plan for the victim, work with other agencies to support the victim and regularly monitor and review the level of risk.

The framework emphasises the importance of information sharing between agencies to maximise protection for victims and to avoid victims being repeatedly required to tell their story to multiple service providers. Generally, the victim's consent is required for information to be shared; however, it is stated that information can be shared without the client's consent if a case is assessed as high risk; a crime has been or is going to be committed;[70] a child is likely to suffer significant harm;[71] or a client requires urgent medical or psychiatric care.[72] A *Memorandum of Understanding: Information sharing between agencies with responsibilities for preventing and responding to family and domestic violence in Western Australia* has been developed and is currently being revised.[73]

Ombudsman's family and domestic violence fatality review function

In July 2012 the Western Australian Ombudsman commenced a new function to review family and domestic violence fatalities. The purpose of this function is to 'identify the circumstances in which and why a person died; identify patterns and trends arising from fatalities; and to improve public administration to prevent or reduce family and domestic violence fatalities'.[74] The Western Australia

64. Ibid 14.
65. Ibid 33.
66. See the eight principles of the Strategic Plan discussed above.
67. The response continuum begins with 'screening', moves to 'risk assessment' then 'risk management' and, finally, to 'risk monitoring'. The diagram included in CRARMF shows that mainstream services and legal/statutory services should undertake screening while risk assessment, risk management and risk monitoring is undertaken to some extent by legal and statutory services but more specifically, by specialist family and domestic violence services: Family and Domestic Violence Unit, Department for Child Protection, *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2011) 34.
68. Ibid 35.
69. Ibid 64.
70. Contact is to be made with police.
71. Contact is to be made with DCPFS.
72. Contact is to be made with a hospital or mental health crisis assessment and treatment team.
73. The Memorandum of Understanding was signed by various agencies in 2009 and 2010 (DCPFS, Department of the Attorney General, Department of Corrective Services, Department of Education and Training, Department of Health, Department of Housing, Drug and Alcohol Office, Legal Aid WA, Department of Indigenous Affairs and the Disability Services Commission).
74. Western Australia Ombudsman, *Annual Report 2012–2013* (2013) 81.

Police notifies the Ombudsman of suspected family and domestic violence fatalities and the Ombudsman then determines if the relationship between the deceased and the suspected perpetrator is a family and domestic relationship as defined under the *Restraining Orders Act 1997* (WA). If it is determined that such a relationship exists then the death is reviewable and the Ombudsman will conduct its investigation. However, the nature and extent of the investigation will vary depending on the circumstances (in particular, the degree of involvement of public agencies in the lives of the deceased, family members and the suspected perpetrator). Bearing in mind that the purpose of the review function is to improve public administration to prevent family and domestic violence (as distinct from determining a cause of death or apportioning criminal responsibility), the greater the level of involvement of government agencies (or, alternatively, the greater the perceived need for government agencies to have responded to particular circumstances) the more in-depth an investigation will be required.[75] In 2012–2013 there were 20 reviewable fatalities.[76] The 2012–2013 Annual Report notes that the Ombudsman will begin 'a major own motion investigation in relation to family and domestic violence fatalities' in 2013–2014.[77]

Family and Domestic Violence Response Teams

The Family and Domestic Violence Response Team (FDVRT) is a partnership between DCPFS, Western Australia Police, and non-government family and domestic violence services. It represents another facet of the state's overarching approach of providing an integrated response to family and domestic violence.[78] A FDVRT exists in each of the 17 DCPFS districts[79] and in most districts the three FDVRT team members are co-located.[80] The purpose of the FDVRT is to improve the safety of victims 'through a collaborative approach that focuses on timely and early intervention following a police callout to a domestic violence incident'.[81] The FDVRTs undertake a joint triage and assessment of Domestic Violence Incident Reports (DVIRs). The police representative on each FDVRT is sourced from the Western Australia Police Family Protection Units (FPUs) (which operate in each police district).[82] The FPU officer is responsible for providing the other two members of the team with copies of all DVIRs each morning for the purpose of triage and assessment (in some instances, the FPU officer will remove a DVIR from the triage process if there is 'no apparent risk' of family and domestic violence).[83] The documentation is called a DVIR1–9 and this is completed by the attending frontline police officer at the time of the incident. The DVIR1–9 involves nine separate questions including a specific question in relation to risk factors. As far as possible the FDVRT members meet on a daily basis (although this is not always the case). The assessment process identifies that there is either a 'risk' or 'no risk' and DCPFS will undertake its own risk assessment to determine actual risk levels. Referrals to non-government agencies by the FDVRT are generally only possible if the victim and/or perpetrator have provided consent to share information with support services (this is Question 9 on the DVIR1–9).

CONCLUSION

The above discussion demonstrates that there are a number of policy and process initiatives both nationally and in Western Australia that focus on interagency collaboration in order to establish principles, facilitate information exchange and reduce the potential for victims of family and domestic violence to fall between the gaps. The Commission recognises these initiatives and the need for integrated service provision across all agencies, particularly at the state level. In the present context, the Commission focuses on the need for integration, collaboration and information sharing between agencies operating in the state justice system and the proposals contained in this Discussion Paper have been informed by the overall state policy and approach in regard to family and domestic violence.

75. Ibid 84.
76. Ibid.
77. Ibid 89.
78. DCPFS, Western Australia Police & Women's Council for Domestic and Family Violence Services, *Family and Domestic Violence Response Team: Operating Procedures* (July 2013) 4.
79. <http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/FamilyandDomesticViolenceResponseTeam.aspx>. The 17 DCPFS districts are Perth, Joondalup, Midland, Mirrabooka, Cannington, Fremantle, Armadale, Rockingham, East Kimberley, West Kimberley, Pilbara, Murchison, Goldfields, Wheatbelt, Peel, South West and Great Southern.
80. For example, during consultations in Broome the Commission was informed that the Western Australia Police and DCPFS representative are co-located; however, the representative from Anglicare (the relevant NGO) is situated elsewhere.
81. See <http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/FamilyandDomesticViolenceResponseTeam.aspx>. Frontline police may attend a domestic violence incident in response to a call from neighbours, the victim or other family/household members.
82. The Family Protection Coordination Units fall within the jurisdiction of and are directly supervised by each Police District. The Family Violence State Coordination Unit has an overarching role in relation to the development of policies, reviewing cases and participating in interagency groups: Consultation with Family Violence State Coordination Unit, Western Australia Police (29 August 2013).
83. Western Australia Police Family Protection Unit, Operating Guidelines (September 2013) 26–27.

Chapter Two

The Commission's Approach

Contents

Terminology

Before discussing the key themes arising from consultations and the Commission's objectives for reform, a number of essential terms that are used frequently in this Discussion Paper are defined below.

FAMILY AND DOMESTIC VIOLENCE

The Commission's terms of reference refer to the phrase 'family and domestic violence'. The Department for Child Protection and Family Support (DCPFS) defines family and domestic violence in the following way:

> Family and domestic violence is considered to be behaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear. The term is usually used where abuse and violence take place in intimate partner relationships including same sex relationships, between siblings, from adolescents to parents or from family carers to a relative or a relative with a disability. A key characteristic of family and domestic violence is the use of violence or other forms of abuse to control someone with whom the perpetrator has an intimate or family relationship.[1]

It is noted that 'domestic violence' is generally used to refer to abuse against an intimate partner while 'family violence' 'is a broader expression encompassing domestic violence and the abuse of children, the elderly and other family members'.[2]

> Aboriginal and Torres Strait Islander people generally prefer to use the term 'family violence'. This concept describes a matrix of harmful, violent and aggressive behaviours and is considered to be more reflective of an Aboriginal world view of community and family healing. However, the use of this term should not obscure the fact that Aboriginal women and children bear the brunt of family violence.[3]

Some jurisdictions use the term 'domestic violence' or 'domestic abuse' while others use 'family violence'.[4]

In the family law context the term 'family violence' is used and is defined as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful'.[5] The New South Wales Domestic Violence Justice Strategy 2013–2017 notes that 'domestic violence', 'family violence' and 'domestic abuse' 'are all terms to describe behaviour that occurs in an intimate or family relationship and is violent, threatening, coercive or controlling or causes the victim to live in fear'.[6] It is apparent that the presence of coercion and/or fear is a fundamental defining feature and, significantly, that family and domestic violence extends beyond physical abuse.[7] A detailed discussion of the nature and dynamics of family and domestic violence appears in Chapter One of this Paper.

For most purposes in this Paper, the Commission adopts the current legal definition under the *Restraining Orders Act 1997* (WA) because existing police and court processes are determined with reference to that definition. If a different definition or meaning of the term is required, it is expressly noted. Section 6(1) of the *Restraining Orders Act* defines '**an act of family and domestic violence**' as one of the following acts that a person commits against another person with whom he or she is in '**a family and domestic relationship**':[8]

1. Government of Western Australia, *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013* (2009) 6.
2. Ibid.
3. Ibid.
4. For example, the term 'family violence' is used in Victoria (see *Family Violence Protection Act 2008* (Vic) s 5); the term 'domestic abuse' is used in South Australia (see *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8); and the term 'domestic violence' is used in the Northern Territory and Queensland (even though the Acts in those jurisdictions refer to both family and domestic violence: see *Domestic and Family Violence Act* (NT) and *Domestic and Family Violence Protection Act 2012* (Qld)).
5. *Family Court Act 1997* (WA) s 9A(1); *Family Law Act 1975* (Cth) s 4AB.
6. New South Wales Department of the Attorney General and Justice, *New South Wales Domestic Violence Justice Strategy: Improving the NSW criminal justice system's response to domestic violence 2013–2017* (2013) 6.
7. The Australian Law Reform Commission highlighted that 'a central feature [of family violence] is that it involves a person exercising control and power of the victim by inducing fear' and that it can take many forms and involve 'varying degrees of severity': Australian Law Reform Commission and New South Wales Law Reform Commission (ALRC/NSWLRC), *Family Violence – A National Response* (2010) [5.9].
8. Section 4(1) of the *Restraining Orders Act 1997* (WA) defines the term 'family and domestic relationship' as a relationship between two persons 'who are, or were married to each other'; 'who are, or were, in a de facto relationship with each other'; 'who are, or were, related to each other'; 'one of whom is a child who ordinarily resides, or resided, with the other person or regularly resides or stays, or resided or stayed, with the other person'; 'one of whom is, or was, a child of whom

(a) assaulting or causing personal injury to the person;

(b) kidnapping or depriving the person of his or her liberty;

(c) damaging the person's property, including the injury or death of an animal that is the person's property;

(d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person;

(e) pursuing the person or a third person, or causing the person or a third person to be pursued —

(i) with intent to intimidate the person; or

(ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;

(f) threatening to commit any act described in paragraphs (a) to (c) against the person.

This definition is relatively broad; however, it does not necessarily cover all behaviour that may be considered to fall within the concept of family and domestic violence (eg, economic abuse). The appropriateness or otherwise of this definition will be examined later in this Paper.[9]

Victim and perpetrator

When discussing family and domestic violence generally, the term '**victim**' is used in this Paper to refer to the person who has been subjected to family and domestic violence and the term '**perpetrator**' is used to refer to the person who commits the family and domestic violence (irrespective of whether that person has been charged with an offence or held criminally responsible for any behaviour). Therefore, when the Commission refers to 'perpetrator' it means a person in fact responsible for family and domestic violence and the term 'victim' means the person who has actually experienced family and domestic violence. In contrast, the use of the terms 'applicant' and 'respondent' (discussed below) in relation to applications for restraining orders do not carry with them any inference about whether the applicant is a victim or the respondent a perpetrator of family and domestic violence. This is an important distinction and the Commission asks the reader to bear this in mind. For example, when the Commission highlights in its objectives for reform that the safety of victims should be the paramount consideration, it is referring to the safety of persons who have experienced family and domestic violence. Likewise, the objective of increasing perpetrator accountability refers to holding persons responsible for family and domestic violence to account.

RESTRAINING ORDER PROCEEDINGS

Throughout this Discussion Paper, the Commission adopts the terminology currently used under the *Restraining Orders Act* with slight modifications.

Restraining orders

Section 3 of the *Restraining Orders Act* defines a 'restraining order' as a violence restraining order or a misconduct restraining order. In this Paper, the Commission uses the terms 'restraining order', 'violence restraining order' and 'misconduct restraining order' in reference to Western Australian orders and also, more generally, when describing orders of a similar effect in other jurisdictions. It is noted, however, that different terminology is used in other states and territories[10] (eg, the term 'protection order' is used in Queensland[11] and the Australian Capital Territory,[12] 'apprehended violence order' in New South Wales,[13] 'domestic violence order' in the Northern Territory,[14] 'family violence order' in Tasmania,[15] 'intervention order' in South Australia[16] and 'family violence intervention order' in Victoria).[17]

Applications for restraining orders

Under s 3 of the *Restraining Orders Act* the person who applies for a restraining order is referred to as the person seeking to be protected. The term 'applicant' is not specifically defined but is used in various sections of the Act. The 'person seeking to be protected' is defined in s 3 as the person who has applied for a restraining order or, if an application for a restraining order has been made on behalf of another person, the person on behalf of whom the application is made'. In this Paper, for ease of reference, the term '**applicant**' is used to refer to the person seeking to be protected by a restraining

the other person is a guardian'; or 'who have, or had, an intimate personal relationship, or other personal relationship, with each other'.

9. See below Chapter Three, Definitions.

10. In some instances, references to the alternative terms used in other jurisdictions are unavoidable (eg, where there is a direct quote or reference to legislation in another jurisdiction).

11. *Domestic and Family Violence Protection Act 2012* (Qld) s 23. A protection order or temporary protection order is also referred to as a domestic violence order.

12. *Domestic Violence and Protection Orders Act 2008* (ACT) s 3. The term 'protection order' means a domestic violence order or a personal protection order.

13. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3. The terms 'apprehended domestic violence order' and 'apprehended personal violence order' are also used.

14. *Domestic and Family Violence Act* (NT) s 4.

15. *Family Violence Act 2004* (Tas) s 4.

16. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12.

17. *Family Violence Protection Act 2008* (Vic) s 4.

order. The term '**respondent**' is defined in s 3 as the person against whom a restraining order is sought and the Commission adopts this meaning. Therefore, the terms 'applicant' and 'respondent' are used in reference to applications for restraining orders before any such order is actually made. In some instances, these terms are used in reference to an application for a final violence restraining order (even where an interim order or police order has already been made and those persons may also be considered to be a 'person protected' or a 'person bound' by an order (see below). The terms are interchangeable depending on the context (ie, whether the discussion concerns the application for a final order or whether it deals with the effects of an interim or police order already made).

Persons protected by and bound by a restraining order

Under s 3 of the *Restraining Orders Act* a 'person protected' is defined as a person named in an order made under [the] Act as a person for whose benefit the order is made'. A 'person who is bound' means the 'person named in the order on whose lawful activities and behaviour restraints are imposed'. In this Discussion Paper, if there is reference to circumstances once an order has been made (whether it is a police order, an interim restraining order or a final restraining order) the term '**the person protected**' is used to refer to the person on whose behalf the order is made and the term '**the person bound**' is used to refer to the person who is restrained from certain behaviour by and required to comply with the conditions of an order.

OTHER LEGAL PROCEEDINGS

In other types of legal proceedings (eg, criminal proceedings, criminal injuries compensation proceedings) the term '**victim**' is used to refer to the person against whom an offence was committed. The term '**accused**' is used to refer to a person who has been charged, but not yet convicted, of an offence. The term '**offender**' is used when referring to a person who has been convicted of an offence.

Key themes for reform

As discussed in the introduction to this Paper, the Commission has undertaken wide-ranging consultations to inform its approach to this reference. Given the breadth of the Commission's terms of reference, the primary purpose of the consultations was to ensure that the options for reform contemplated in this Paper responded to those aspects of the legal system most in need of improvement from a practical perspective. The Commission's consultations with numerous individuals who are closely involved with family and domestic violence issues on a day-to-day basis have revealed three consistent themes. These themes have underpinned the Commission's approach to reform and are discussed separately below.

LACK OF AWARENESS AND UNDERSTANDING OF FAMILY AND DOMESTIC VIOLENCE

The need for professionals working in the legal system to understand properly the nature and dynamics of family and domestic violence has been repeatedly identified in past inquiries and reports. In 2009 the National Council to Reduce Violence against Women and their Children recognised the importance of 'ensuring education and professional development for judicial officers, police and other professionals working within the legal system' and stated that:

> Ongoing, thorough and consistent training in the areas of domestic and family violence and sexual assault for judicial officers, police and other professionals working within the legal system, is critical to ensuring legal outcomes that are just, and that are perceived to be just.[1]

The Australian and New South Wales Law Reform Commissions' joint report in 2010 dealt extensively with the need for education and training for judicial officers, police officers, lawyers, police prosecutors and victim support officers noting that it was a 'central and critical theme' of the inquiry and that a 'proper appreciation and understanding of the nature and dynamics of family violence, and the overlapping legal frameworks is fundamental in practice to ensuring the safety of victims and their families'.[2]

In 2006 the Victorian Law Reform Commission made various recommendations in relation to education for members of the justice system including police, magistrates and registrars.[3] It also highlighted that there was a 'significant variation in the attitudes and approach of Victorian magistrates to family violence' and this was partly caused by divergent levels of understanding of family violence.[4] The other reason advanced was the lack of legislative guidance about the matters that should be considered when deciding to make an intervention order (equivalent to a restraining order). It was argued that both of these issues caused magistrates to inappropriately make or refuse to make an order. Examples provided included that some magistrates refused to make orders in the absence of evidence of any physical violence; because the applicant was in a refuge and was therefore considered safe; and, in a case where the applicant had been sexually assaulted by her partner, because the parties were separated and, therefore, it was considered unlikely that the respondent would sexually assault her again.[5]

In the Commission's 2007 reference on homicide, various submissions 'asserted that the legal system has a poor understanding of domestic violence'.[6] During that reference the Commission reviewed a number of cases where a victim of domestic violence had been charged with killing her partner. It was observed that, while some lawyers and judges appear to be aware of relevant issues, in 'some cases stereotypical or misconceived assumptions about domestic violence were apparent'.[7]

Inconsistency in decision-making and lack of understanding of the nature of family and domestic violence has again been brought to the forefront during consultations for this reference. A substantial number of the people consulted by the Commission

1. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's plan for Australia to reduce violence against women and their children, 2009–2012* (2009) 19.
2. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [31.1].
3. Victorian Law Reform Commission (VLRC), *Review of Family Violence Law*, Report (2006) [12.19].
4. Ibid [6.21].
5. Ibid.
6. Law Reform Commission of Western Australia (LRCWA), *Review of the Law of Homicide*, Final Report (2007) 275.
7. Ibid 276.

made reference to the wide divergence in approaches by judicial officers, police and lawyers. The main reason put forward for this situation is that there are differing levels of understanding about the nature and dynamics of family and domestic violence among professionals working in the legal system.

In relation to judicial officers there were concerns that, in some instances, inappropriate comments are made with the effect that the victim may be re-traumatised and/or discouraged from accessing legal avenues for protection in the future. During consultations, the Commission was informed of a case where the applicant applied for an interim violence restraining order and gave evidence that she was forced to have sexual intercourse with her partner daily (including three days after having had a hysterectomy). She also gave evidence that she feared that if she refused to have sexual intercourse her partner's behaviour would escalate. The Commission was told that the magistrate made comments to the effect that most people who are unhappy in a relationship just leave and that many people feel obligated to have sex when they don't want to. An interim violence restraining order was granted restraining the respondent from certain behaviour but it did not preclude him from remaining in the family home. As a consequence the applicant decided not to proceed with her application because she did not feel that she was adequately protected to do so.

Another case example provided to the Commission involved a mother who applied for an interim violence restraining order for herself and her children. The applicant gave evidence that she had been subjected to domestic violence in the past including assaults that resulted in hospitalisation on two occasions. The applicant and respondent had been separated for three years at the time of the application and evidence was given that the respondent's behaviour had recently escalated because the applicant was seeking a property settlement in the Family Court. The applicant gave evidence that her children had told her that during their last visit with their father he had choked the six-year-old child and forced food down the throat of the nine-year-old child. Further, there was evidence that the respondent had told the applicant that he was going to kill himself and had told the children that he was going to smash them into a tree in his car. There was also evidence that the respondent had threatened to put a bullet in the applicant's head. According to the legal service representing the applicant, the magistrate commented that it was a 'little bit unusual' for her to be applying for a violence restraining order so long after separation (which, it was argued, failed to recognise that family and domestic violence occurs and often increases post-separation). In addition, the magistrate decided that interim orders would not be made in favour of the children because they were not at risk from actual physical violence (instead, these issues concerning the children were apparently characterised as 'Family Court issues'). On the basis of the evidence of past assaults the magistrate was prepared to issue summonses to the parties for the application to be determined at a later date but the magistrate was not prepared to grant an interim violence restraining order in favour of the applicant.

A victim support worker consulted by the Commission reported that she had watched proceedings where a woman applied for an interim order on the basis that her ex-spouse had come to her house, tried to grab her, threatened to kill her, and took her keys and phone. He had assaulted her in the past. The magistrate reportedly dismissed the application and commented that violence restraining orders are for 'real violence'. In another example, a victim had not attended a final violence restraining order hearing out of fear. She eventually applied for a further violence restraining order and this application was immediately dismissed on the basis that she had not attended court on the previous occasion. No attempt was made by the court to discover the reason for non-attendance.

More generally, the Commission was told that some judicial officers still hold the traditional view that family and domestic violence is not as serious as other forms of violence and that some do not understand the significance of, or the cycle of, abuse. Additionally, the Commission was told that some magistrates believe that when victims cancel violence restraining orders or discontinue their applications this means that they either accept the violence or that the violence never occurred. It was noted that this attitude shows a lack of understanding of the reality of the lives of victims of family and domestic violence, and the various factors that may prevent victims from leaving a violent relationship or cause them to discontinue violence restraining order proceedings. There was also concern expressed that if victims 'fight back' they may be seen as contributing to the violence rather than responding to and managing the violence. Another complaint was that some magistrates inappropriately use the term 'anger management'. The Department for Child Protection and Family Support (DCPFS) has observed that anger management programs are not appropriate for family and domestic violence because they support the view that violent behaviour is caused by a lack of control and may lead to perpetrators seeking to justify their behaviour on the basis that

the victim did something to make the perpetrator angry.[8] A significant number of people consulted also mentioned that there is a lack of appreciation in the system of the detrimental impact on children who are exposed to family and domestic violence.

Inconsistent approaches to granting and determining violence restraining order applications were also highlighted during consultations. For example, it was stated that some magistrates refuse to grant ex parte interim orders at all and invariably require both parties to be summoned to court for a hearing. Similarly, some magistrates are not prepared to determine an interim application on affidavit evidence alone (and therefore always require the applicant to give sworn oral evidence). Others may determine the application on affidavit evidence if that evidence demonstrates grounds for making an interim order.

In contrast, others expressed concern that interim orders are granted too readily (especially by Justices of the Peace) and that there are occasions when interim restraining orders are unfairly or inappropriately made to the detriment of the respondent. Many people consulted (including those concerned that victims are not always protected by the system) acknowledged that the restraining order system is open to abuse. Some people mentioned that violence restraining orders may be sought for the purpose of gaining a forensic advantage in Family Court proceedings, although consultations with members of the judiciary in the Family Court suggest that no direct forensic advantage is gained in practice because the court always assesses for itself the available evidence in relation to the existence of family violence.

During consultations it was also mentioned that there is a lack of understanding about particular issues faced by people with additional vulnerabilities (eg, people from culturally and linguistically diverse (CALD) backgrounds, people with disabilities and Aboriginal people, especially those from remote areas). In regard to victims of family and domestic violence from CALD backgrounds, the Commission was told that there is a lack of understanding about language and cultural differences. For example, if a magistrate asks a victim if she has ever been subjected to 'physical violence' the response from some cultural groups will be 'no' because the victim believes that the phrase 'physical violence' refers to a 'punch' or a 'kick' and do not appreciate that actions such as being pushed or choked also constitute physical violence.

8. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 51.

While there was strong support for members of the Western Australia Police specialist Family Protection Units and the Family Violence State Coordination Unit, complaints about lack of understanding and inconsistent responses were also levelled against the police. A victim discussed her experiences with the Commission highlighting that she had experienced difficulties in getting any response from police in the absence of physical injuries and she attributed this to a lack of appreciation for the damaging effects of ongoing psychological abuse. The Commission was also told of instances where victims of family and domestic violence have attended a police station to report an assault by their partner and have been sent away and told to apply for a restraining order because there is nothing that can be done because it is only 'your word against his'. A major issue in relation to the response by police relates to police orders.[9] The Commission was repeatedly told that police officers attending domestic violence incidents may issue a police order against the victim because that person has alternative accommodation and there is nowhere else for the perpetrator to live. This problem was acknowledged by the Western Australia Police during consultations. Given the potential consequences for breaching a police order this is particularly disturbing.

In addition, some stakeholders commented that lawyers who were inexperienced with family and domestic violence cases may inappropriately suggest to an applicant (who is at risk of harm) that an undertaking,[10] instead of a violence restraining order, would be a suitable outcome. There was also some concern (although to a far lesser extent) in relation to staff who work for victim support agencies. In particular, examples were given where persons protected by violence restraining orders were told by victim advocates that a restraining order is a 'tool' that can be used by them at their discretion. It was argued that this could complicate legal proceedings and that persons protected should be informed that they should respect the order in its entirety and should not contact the person bound at all if contact is prohibited under the order.

Bearing in mind the barriers already faced by victims of family and domestic violence in seeking assistance from the police and the legal system, it is of concern to the Commission that lack of awareness and understanding of family and domestic violence

9. Police orders are restraining orders issued by the police for the immediate but temporary protection of person. They can be issued for up to 72 hours: see further discussion below Chapter Three, Police orders.
10. An undertaking is an informal agreement between the parties and is not enforceable in any way, see further below Chapter Three, Undertakings.

remains so widely reported in Western Australia. However, the problem is not system-wide; there are many professionals working in the legal system with expertise, experience and interest in the area of family and domestic violence. The challenge is to find solutions that will maximise access to the knowledge and understanding that currently exists and to increase the level of knowledge and understanding in the system generally.

INFORMATION GAPS

The Commission received a strong message from those consulted that courts are not always adequately informed of all of the relevant issues before decisions are made in relation to violence restraining order applications. The restraining order system in Western Australia is primarily adversarial with each party responsible for presenting evidence to support their case. This is especially difficult for vulnerable and traumatised victims and also quite confronting for an unrepresented respondent.[11] Importantly, for ex parte violence restraining order applications, information is only presented from the applicant (and it is for this reason that injustice may potentially result for a respondent who is not before the court when an interim order is made).

It was also explained by some lawyers who represent victims that the respondent is not required to disclose the foundation of his or her objection to a final violence restraining order. In comparison, the respondent is aware of the basis of an applicant's case because the respondent has access to the affidavit filed in support of the application and the transcript of the ex parte hearing. Specific examples provided to the Commission included instances where a court has made an interim ex parte violence restraining order against one party without knowing that a violence restraining order had already been made in favour of that party (or vice versa).[12]

More generally, it was explained that decisions in relation to violence restraining order applications (both interim and final hearings) are often made without access to crucial information. This includes access to such information as the criminal records of both parties;[13] records of prior violence restraining orders made between the parties or with other persons;[14] previous police domestic violence incident reports; whether a police order has been issued against one of the parties;[15] whether there are pending family and domestic violence related charges; whether there are current Family Court proceedings and orders; and information about prior involvement between the parties and the DCPFS. While some magistrates make enquiries in relation to criminal records, past or existing violence restraining orders and Family Court orders, this practice is ad hoc and dependent on the attitude of the particular magistrate. It is noted that this issue is less pronounced in regional Magistrates Courts where the local magistrate will often be familiar with the background of the parties, their previous convictions and past violence restraining order history.

Similar comments were made in relation to other aspects of the system (eg, bail and sentencing) where busy court lists mean that prosecutors and accused persons (and/or their lawyers) may not have sufficient time to be fully appraised of and present all relevant information to the court. In relation to sentencing proceedings generally, the Commission was also informed that national criminal records (which may reveal prior convictions for family and domestic violence related offending in other jurisdictions) are not routinely available to, or presented in, the court.

A useful comparison was made by a number of stakeholders with the more proactive and inquisitorial approach adopted for child-related proceedings in the Family Court. A consultant from the Family Court Counselling and Consultancy Service is assigned to each child-related case. The role of the family consultant is to facilitate individual case management by making referrals to other agencies, obtaining information and reporting to the judicial officer allocated to the case.[16] Prior to the first

11. The Commission was told that it is rare for a respondent to be legally represented and this usually only occurs if the respondent has capacity to pay for their own legal fees.
12. It was noted during consultations that in some cases a perpetrator of family and domestic violence may seek an interim violence restraining order against the victim as a pre-emptive response and/or as a further means of controlling the victim.
13. Section 12 of the *Restraining Orders Act 1997* (WA) provides for a process whereby the Commissioner of Police can provide a certificate with information about criminal convictions and other relevant matters but, in practice, it takes between four and six weeks to obtain such a certificate.
14. The Commission was told by a former Family Violence Service worker that he was aware of cases where a respondent had been bound by numerous violence restraining orders in the past but the court was not informed of this information.
15. It is noted that s 62A of the *Restraining Orders Act 1997* (WA) provides that police have an obligation to conduct an investigation where they reasonably suspect that a person is committing or has committed an act of family and domestic violence which is a criminal offence or has put the safety of a person at risk. After conducting such an investigation the officer is required to either make an application for a restraining order, a police order or provide written reasons why neither of those actions was taken (s 62C). The material included in that written report would arguably be useful and relevant information for the court hearing any application for a restraining order in relation to that incident.
16. See <http://www.familycourt.wa.gov.au/C/counselling_and_consultancy_service.aspx?uid=8784-1429-1046-9210>.

court date the family consultant checks the material filed by the parties and, based on the information provided, makes enquiries in relation to current violence restraining orders, criminal history or pending charges[17] and prior involvement of DCPFS with the family.[18] The information obtained from these enquiries forms the basis of recommendations to the court, including orders for further information from police or DCPFS.[19]

The Family Court 'Child-Related Proceedings' brochure explicitly acknowledges the approach to child-related proceedings is, to some extent, inquisitorial.[20] It has been observed that:

> The traditional role of the courts is to *receive* evidence (from the parties), not gather it. But some of the rules and procedures of the family law courts go beyond this and can only be explained by reference to the court seeking to gather some evidence that is important for the child's interests, whether or not the parties seek to put it before the court.[21]

The more inquisitorial approach to child-related proceedings is justified by the requirement under family law that the best interests of the child is paramount. Bearing in mind the risk of harm to children exposed to family and domestic violence, the need to protect the safety of victims, and the practical inability of children to participate fully as parties and present their interests, the Commission believes the adoption of a more proactive approach by courts to obtaining information and evidence for restraining order matters is warranted.

The ALRC/NSWLRC highlighted that 'legal and other responses to family violence are improved if information is provided and of better quality from the outset'[22] and made various recommendations designed to 'improve information flow between critical elements of the family violence system, including courts, relevant government agencies and other people and institutions involved in the family violence, family law and child protection systems'.[23] A key recommendation in this regard was the establishment of a national register of interim, final and police-issued protection orders, child protection orders and Family Court orders, and that this register be available to federal, state and territory police, Family Courts, and state and territory courts that hear matters relating to family violence and child protection, and child protection agencies.[24]

Section 12(1) of the *Restraining Orders Act 1997* (WA) provides that in deciding whether to make a violence restraining order a court is to consider, among other things, the past restraining order history of the parties, any family orders, any current legal proceedings involving either of the parties, the criminal record of the respondent, and any previous similar behaviour of the respondent. In view of this provision, there should be a more effective process for ensuring that this information is available to the court. Access to relevant records already held by public agencies is desirable irrespective of any reforms that may result in a more inquisitorial process. In the absence of such information, one branch of government is acting in ignorance of the investigations and determinations of other branches of government. In the context of violence restraining orders matters arising from family and domestic violence, the Commission considers that this is unsatisfactory. In this Paper the Commission considers means of reducing current information gaps and increasing information sharing between courts.[25]

DUPLICATION

The final key theme emerging from the Commission's consultations and research is the issue of duplication of family and domestic violence related legal proceedings. Duplication may occur in the following circumstances:

- Where victims and perpetrators of family and domestic violence are required to participate and give evidence in criminal proceedings (in either the Children's Court, the Magistrates Court, the District Court or the Supreme Court) in relation

17. The Family Court Counselling and Consultancy Service has access to the Magistrates Court database under cl 2.2 of the *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid WA in Matters Involving Family Violence* (2009).
18. There is a co-located officer from DCPFS who assists with this process.
19. Pursuant to s 69ZW of the *Family Law Act 1975* (Cth) and s 202K of the *Family Court Act 1997* (WA) the 'court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order'. The documents or information requested must be documents or information about 'any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child'; 'any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations'; and 'any reports commissioned by the agency in the course of investigating a notification'.
20. Family Court of Western Australia, *Child-Related Proceedings: A new way of working with parents and others*, Brochure (undated).
21. Chisholm R, *Family Courts Violence Review* (2009) 64.
22. ALRC/NSWLRC, *Family Violence – A National Response* (2010) 61.
23. Ibid [30.2].
24. Ibid, Recommendation 30–18.
25. See below Chapter Three, Evidence and Information.

to a family and domestic violence related offence and, separately, participate and give identical or similar evidence in restraining order proceedings in relation to the same conduct (either the Children's Court or the Magistrates Court).

- Where victims of family and domestic violence apply for a violence restraining order in the Magistrates Court and separately apply for a violence restraining order on behalf of their child in the Children's Court.[26]

- Where victims and perpetrators of family and domestic violence are involved in violence restraining order proceedings in the Magistrates Court and, at the same time, are involved in child-related proceedings in the Family Court.

- Where families are subject to child protection proceedings under the *Children and Community Services Act 2004* (WA) in the Children's Court and victims are separately required to seek a violence restraining order in the Magistrates Court (sometimes at the specific direction of the DCPFS in order to demonstrate that they are a 'protective parent').

- Where families are subject to child protection proceedings in the Children's Court as well as proceedings in the Family Court.

Duplication of legal proceedings causes a number of significant problems:

- The parties are required to appear in different courts and participate in different legal proceedings, which may cause confusion and very likely cause additional stress. A major issue in the context of family and domestic violence is the re-traumatisation of victims because they are required to recount the details of the violence and abuse they have suffered repeatedly to different agencies and judicial officers. The ALRC/NSWLRC report highlighted that victims' experiences of 'negotiating the various legal systems' has been characterised 'as a form of further abuse and victimisation'.[27] The Commission was told during consultations that some victims are so traumatised by their experiences in multiple courts that they eventually withdraw their involvement (eg, fail to attend a final violence restraining order hearing).[28]

- There is significant duplication of resources within the legal system. For example, more than one judicial officer must hear the same or similar evidence (or one judicial officer must hear the same or similar evidence at different times); lawyers are required to deal with the same factual issues in different jurisdictions or more than one lawyer is required to deal with the various legal proceedings; and multiple experts, support services and other agencies are involved with the parties at different times and/or in different jurisdictions.

- There are often delays because one court proceeding may be adjourned to await the outcome of another, related, proceeding. This also adds to the burden on resources because judicial officers, court staff, lawyers and others are required to unnecessarily participate in and manage court proceedings that are adjourned without any outcome.

- There may be inconsistent orders and decisions. For example, the Family Court may make a parenting order that is inconsistent with the terms of a violence restraining order or a violence restraining order may be made in the absence of knowledge of a Family Court order; a magistrate in the Children's Court may refuse to grant a violence restraining order in favour of a child while a magistrate in the Magistrates Court has agreed to grant a violence restraining order in favour of the child's mother in regard to the same behaviour; or the Magistrates Court may refuse to grant a violence restraining order to protect a child while the Children's Court makes a child protection order on the basis that the same child is at risk of harm from family violence.

To address the problems caused by duplication in the system, many of the people consulted by the Commission advocated for a more integrated approach to family and domestic violence related legal issues. The best way to remove duplication is to establish a 'one family–one court' model whereby all legal matters relating to family and domestic violence between members of a family are dealt with by the one court (preferably at the same time).[29] In

26. It is noted that this problem should be resolved with the passing of the *Restraining Orders Amendment Act 2013* (WA) which makes it clear that an application for a violence restraining order to protect a child may be dealt with in the Magistrates Court.
27. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [15.93].
28. A similar message was received by the ALRC/NSWLRC from a women's legal service: ibid [3.4].
29. The Commission notes that the Family Court of New Zealand has jurisdiction to hear various family-related legal matters including protection orders for family and domestic violence, child protection matters, family law matters and criminal proceedings where the accused is a child (it has jurisdiction under 23 different statutes). The Family Court of

theory, this would require either a state or federal court to have jurisdiction to deal with criminal matters, restraining order matters, child protection matters and family law matters. The constitutional,[30] infrastructure and resourcing requirements for such a model are, in reality, almost insurmountable. In practical terms, even if there was a one court model in Western Australia, it would be impossible for all of the related issues to be heard and dealt with at the one time. Some issues would be urgent and require immediate attention (eg, an application for an interim violence restraining order) while others would inevitably be delayed for the provision of expert evidence (eg, waiting for forensic reports for criminal proceedings or waiting for a single expert report for a family law parenting order dispute). Different rules applicable to different types of proceedings would inevitably mean separation of proceedings, albeit within the one court location.

Consequently, the Commission has approached this reference with the view that some level of duplication in the system is unavoidable and has endeavoured to devise solutions that reduce the extent of duplication as far as possible (and in circumstances where the legal rights of parties are not compromised). During consultations many people advocated for aspects of the violence restraining order system to be handled by the Family Court of Western Australia. In addition, it was emphasised by many that the current provisions that enable a court exercising criminal jurisdiction to make a violence restraining order should be utilised more frequently. These are some ways in which duplication can be reduced and they are considered in this Discussion Paper.

New Zealand is established as a division of the District Court under s 4 of the *Family Courts Act 1980* (NZ). It has been observed that because of the breadth of the jurisdiction it is difficult to maintain the 'one judge–one family' approach and, therefore, often cases are dealt with by different judicial officers: Jackson J, *Bridging the Gaps between Family Law and Child Protection: Is a unified family court the key to improving services for children and their families in the family law system?* (2011) 21. In 2011 the New Zealand Government instigated a review of the Family Court because it was 'facing a number of issues that compromise its ongoing sustainability and effectiveness'. Some of the issues identified were cost blowouts without accompanying reductions in time taken to resolve cases; 'complex and uncertain court processes and multiple pathways creating confusion for court users'; 'confusion about the roles and responsibilities of different professionals working in the Family Court'; and insufficient alternative dispute resolution options for private family law disputes: New Zealand Ministry of Justice, *Reviewing the Family Court: A public consultation paper* (2011) 7, 10, 25. While the Commission has not examined the operation and effectiveness of the Family Court of New Zealand in detail, it appears that increased integration of jurisdictions is not without its own problems. It is also noted that criminal proceedings related to family and domestic violence are not dealt with in the Family Court. New Zealand has eight specialist Family Violence Courts within the District Court that deal with criminal matters.

30. The ALRC/NSWLRC noted that all child protection and family violence jurisdictions should ideally be covered under national legislation and supported by national support services and resources; however, it was highlighted that this option would require constitutional change: ALRC/NSWLRC, *Family Violence – A National Response* (2010) [3.38].

Objectives of reform

The Commission has formulated five objectives of reform to ensure that its approach responds to the main areas of concern identified in its consultations and research, and that it aligns, where applicable, with the policy approach to family and domestic violence at a state and national level. These objectives are interrelated because reform options designed to achieve a particular end may, at the same time, achieve other outcomes. For example, measures to improve the management of persons convicted for family and domestic violence related offences may reduce the incidence of family and domestic violence and thereby enhance the safety of victims.

1. Enhance the safety of victims of family and domestic violence (and their children)

In order to ensure that victims of family and domestic violence seek assistance from the legal system by reporting family and domestic violence to police and/or applying for a violence restraining order, it is vital that the system response is effective, respectful and supportive. It is important that victims have confidence in the system otherwise they will be discouraged from seeking protection. The New South Wales Domestic Violence Justice Strategy identifies the need to ensure that victim safety is 'secured immediately and the risk of further violence is reduced' and that 'victims have confidence in the justice system and are empowered to participate' as two important outcomes.[1] Improving the knowledge and understanding of the nature and dynamics of family and domestic violence within the legal system is one way of achieving a more effective response and increasing confidence in the system. Reducing duplication and the resulting re-traumatisation is another way. It is also equally important that the legal response to family and domestic violence related offences (including breaches of violence restraining orders) is effective so that victims are protected from further offending behaviour. Therefore, victim safety must weigh heavily in decision-making in regard to bail conditions and sentencing (including parole). The Commission highlights that victim safety is also maximised by an appropriate response from government and non-government agencies (eg, effective risk assessment, safety planning and provision of services); legal responses alone are not sufficient to ensure victim safety.

Victim safety is at the forefront of many legislative regimes dealing with family and domestic violence. For example, s 4 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that the 'safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount'.[2] The *Restraining Orders Act 1997* (WA) currently provides that the factors of primary importance are to 'ensure that the person seeking to be protected is protected from acts of abuse';[3] to 'prevent behaviour that could reasonably be expected to cause fear that the person seeking to be protected will have committed against him or her an act of abuse'; and to 'ensure that children are not exposed to acts of family and domestic violence'.[4]

The Commission is of the view that the protection of victims (and their children) should be the paramount consideration in any legal response to family and domestic violence. This principle will necessarily affect the approach to violence restraining orders, in particular, the granting of interim ex parte applications. If the protection of victims is paramount then the process for seeking an interim order should be efficient, effective and uncomplicated. Moreover, the decision-making process should be as fully and reliably informed as possible and where there is sufficient evidence to demonstrate that the applicant's safety is at risk there should be no hesitation in granting the order. Having said that, it is also important for the legal system to respect the

1. New South Wales Department of the Attorney General and Justice, *The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System's Response to Domestic Violence 2013–2017* (2013) 3.
2. See also s 7 of the *Domestic Violence and Protection Orders Act 2008* (ACT) which provides that in deciding an application for a domestic violence protection order 'the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence' is the paramount consideration. Section 1 of the *Family Violence Protection Act 2008* (Vic) provides that the purpose of the Act is to 'maximise the safety for children and adults who have experienced family violence'; 'prevent and reduce family violence to the greatest extent possible'; and 'promote the accountability of perpetrators of family violence for their actions'.
3. An act of abuse includes an act of family and domestic violence.
4. See *Restraining Orders Act 1997* (WA) ss 12(1)(a), (b), (ba) & (2).

capacity of victims to make decisions about their own safety and about what legal responses they require.[5] The system needs to be flexible and take into account the specific circumstances of a victim of family and domestic violence and that those circumstances may change.

2. Reduce family and domestic violence by increasing perpetrator accountability and improving the management of offenders

An overarching objective of reform is to reduce family and domestic violence.[6] As asserted by the Department for Child Protection and Family Support (DCPFS), in order to 'keep child and adult victims safe, perpetrators of family and domestic violence must be held accountable for their actions and actively supported to cease their violent behaviour'.[7] Actions to increase perpetrator accountability can be undertaken at a service system level (eg, DCPFS caseworkers engaging with perpetrators). Legal system responses that contribute to perpetrator accountability include violence restraining orders and criminal sanctions (and mandated or voluntary programs within these legal spheres).[8] The Commission does not suggest that participation in perpetrator programs will always result in a reduction or cessation of violent behaviour; however, it appears unlikely that most perpetrators will cease their behaviour in the absence of intervention. Furthermore, engagement of perpetrators in programs also assists in enhancing victim safety because the gains or otherwise made by the participant can be monitored by relevant agencies and taken into account in providing assistance to victims. For the same reasons it is important that sentencing options for family and domestic violence offenders are effective and designed, as far as possible, to reduce reoffending and should be structured to maximise the safety of the victim.

5. See VLRC, *Review of Family Violence Laws*, Report (2006) 37.
6. The New South Wales Domestic Violence Justice Strategy includes in its outcomes the need to hold perpetrators to account and reduce or stop the abusive behaviour: New South Wales Department of the Attorney General and Justice, *The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System's Response to Domestic Violence 2013–2017* (2013) 3.
7. DCPFS, Family and Domestic Violence Unit, *A Resource for Child Protection Workers about Engaging and Responding to Men who Perpetrate Family and Domestic Violence* (2013) 5.
8. Ibid 19.

3. Provide fair and just legal responses to family and domestic violence

The New South Wales Domestic Violence Justice Strategy reinforces that 'it is a fundamental principle of the justice system that the administration of justice is fair'.[9] The Commission noted in the preceding section that the current restraining order system is not without its critics in terms of its overuse or abuse. One person consulted emphasised that if too many violence restraining orders are granted their significance may be reduced. Because an interim violence restraining order can be made on the uncorroborated evidence of the applicant, the potential for abuse is very real. Put simply, not all applicants for restraining orders are victims of family and domestic violence and not all respondents are perpetrators. In fact, anecdotally, it appears that in some instances the person protected by a violence restraining order is the perpetrator and the person bound is the victim. Further, it is important to acknowledge, from the respondent's perspective, the potential consequences of a violence restraining order: exclusion from the family home; prohibition of contact with children; inability to work; and general restrictions on day-to-day activities. Additionally, a respondent is liable to serious consequences under the criminal law for failure to comply with the order (including an interim order). For these reasons, the Commission is of the view that the system must ensure that the legal rights of all parties are respected and, in particular, that respondents to violence restraining order applications have a right to be heard within a reasonable time. Additionally, the importance of ensuring that the legal system responds to family and domestic violence in a fair and just manner supports the provision of better and more reliable information to decision-makers at the outset, thus enabling more accurate and effective decisions to be made.

4. Improve integration and coordination in relation to family and domestic violence in the legal system

In Chapter One the Commission explained that the Western Australian *Strategic Plan for Family and Domestic Violence* focuses on providing 'better integrated service responses to families who find themselves victims of domestic and family violence' and recognises that a multi-agency response is required from state and federal government

9. New South Wales Department of the Attorney General and Justice, *The NSW Domestic Violence Justice Strategy: Improving the NSW Criminal Justice System's Response to Domestic Violence 2013–2017* (2013) 22.

agencies along with non-government organisations and individuals.[10] One of the key initiatives in this regard is the creation of Family and Domestic Violence Response Teams (FDVRTs) through partnership between DCPFS, Western Australia Police and non-government family and domestic violence services. The FDVRTs undertake a joint triage and assessment of Domestic Violence Incident Reports. While a frontline police officer will usually be the first point of contact between a victim and the legal system, the FDVRT will be the first stage of interagency involvement. If matters progress from police attendance at an incident to more formal legal responses (eg, police orders, violence restraining orders and criminal charges) it remains equally important that government and non-government agencies continue to provide an integrated response. Currently, the Family Violence Courts in the metropolitan area and the Barndimalgu Aboriginal Family Violence Court in Geraldton provide examples of interagency collaboration between agencies in the justice context.[11] These courts deal with family and domestic violence offenders and various agencies provide coordinated case management and information to the court in relation to victim safety, compliance with bail and program conditions and sentencing options. Measures to support information sharing are central to the effectiveness of integrated responses.

Integration and coordination are important between courts. As discussed above victims and perpetrators are often required to participate in multiple legal proceedings in relation to family and domestic violence and, for victims in particular, the process of retelling their story is traumatic and discourages access to and involvement in the legal system. The Commission's proposals in this Paper aim to enhance the integrated response to family and domestic violence within the legal system including information sharing and coordination between courts.

5. Increase the knowledge and understanding of family and domestic violence within the legal system

Chapter One identified a number of barriers to accessing the legal system for victims of family and domestic violence. The legal system should not itself become a further barrier to victims seeking help. Given the strong message received by the Commission about the lack of understanding and awareness of family and domestic violence within the legal system and the resulting detrimental impact on victims, it is essential that any proposals for reform address this deficiency. There are a number of ways in which knowledge can be enhanced within the legal system, including legislative direction to courts and agencies to consider the most important facets of family and domestic violence in any decision-making, adequate training and education, and increased use of specialisation.

10. Government of Western Australia, *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013* (2009) 2–3. An integrated response would include police, courts, corrective services, child protection, health professionals, legal professionals, advocacy services, accommodation and support services, counselling services, and education services.
11. The review of restraining orders undertaken by the Auditor General for Western Australia in 2002 stated that the 'most effective model for best practice found during the examination was a coordinated approach by government and non-government services. Integrated programs such as the Joondalup Family Violence Court have been shown to work effectively': Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders,* Report No. 5 (2002) 9.

Chapter Three

Restraining Orders Act 1997 (WA)

Contents

Introduction

This chapter provides an overview of the restraining order scheme in Western Australia, including a discussion of the police response to incidents of family and domestic violence (typically the first point of contact with the justice system). It discusses the various issues identified in the Commission's consultations and research in relation to the restraining order system as a whole, and makes a number of proposals for legislative and procedural reform. In formulating these proposals the Commission has taken care to ensure that they are capable of implementation irrespective of whether separate family and domestic violence legislation is enacted.[1] Whether separate legislation is warranted is considered in the final chapter of this Discussion Paper.

BACKGROUND

Historically the justice system has been slow to intervene in response to family and domestic violence. As the Victorian Law Reform Commission has observed, some 'acts of family violence were not originally considered to be a crime' (eg, rape within marriage was only criminalised in Victoria in the late 1980s).[2] It was also commented that even when the criminal law applied, police were reluctant to respond to what has traditionally been regarded as a 'private matter'.[3] In the mid-1970s domestic violence 'became part of the feminist agenda' and was 'characterised by efforts to move the issue from the private to the public sphere, and particularly to emphasise its criminal nature'.[4] This movement initially focused on the establishment of women's refuges and, ultimately, on the development of 'civil protection orders'. Additionally there has been a substantial shift in the approach to policing family and domestic violence. Nowadays, pro-arrest and pro-charge policies underpin the formal approach by law enforcement agencies in Australia to family and domestic violence.[5]

Protection order or restraining order regimes began to be developed in the states and territories in the 1980s.[6] Civil legislation dealing with family and domestic violence was enacted 'as a response to growing recognition that existing legal mechanisms failed to protect victims'.[7] It has been observed that:

> The development of protection order legislation grew, to some extent, out of frustration with the failure of the criminal justice system. Some of the key obstacles in criminal prosecution and conviction of domestic violence offences are the high standard of proof of 'beyond a reasonable doubt' that is required for the conviction of criminal matters and the fact that many of the standard criminal offences fail to encapsulate certain violent behaviours.[8]

The civil response to family and domestic violence

An act of family and domestic violence may constitute a criminal offence. If so, the alleged perpetrator can be arrested and charged. If released on bail, the accused may be required to comply with specific conditions designed to protect the safety of the victim (and other members of the community). The criminal justice response requires a court to be satisfied beyond a reasonable doubt of the guilt of the accused before any sanction for the behaviour can be imposed.[9] Significantly, not all acts of family

1. The only aspect of the restraining order system that is not discussed in this chapter concerns the power of court to make violence restraining order during other proceedings. This is discussed in the following two chapters of this Paper.
2. VLRC, *Review of Family Violence Law*, Report (2006) [3.19]. The *Criminal Code* (WA) originally provided that the offence of rape did not apply to a husband who raped his wife. The relevant provision was amended by the *Acts Amendment (Sexual Assaults) Act 1985* (WA). Section 9 of that Act repealed s 325 of the *Criminal Code* (WA) and introduced a new section creating the offence of sexual penetration without consent (applicable to all persons).
3. Ibid [3.20].
4. Laing L, *Progress, Trends and Challenges in Australian Response to Domestic Violence*, Issues Paper No. 1 (Australian Domestic and Family Violence Clearinghouse, 2000) 2–3.
5. Rollings K & Taylor N, 'Measuring Police Performance in Domestic and Family Violence' (2008) 367 *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice*, 2.
6. Hunter R, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733, 737.
7. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [4.6].
8. Douglas H, 'The Criminal Law's Response to Domestic Violence: What's going on?' (2008) 30 *Sydney Law Review* 439, 444.
9. The Commission examines the criminal justice response to family and domestic violence in Chapter Four below.

and domestic violence are contrary to the criminal law[10] and, therefore, such acts are not liable to intervention by the state under criminal law. This fact, coupled with the higher standard of proof applicable in criminal proceedings, means that in many instances a perpetrator of family and domestic violence may remain unpunished. And, in the absence of a violence restraining order, the victim may be unprotected.[11]

The restraining order system under the civil law provides a different legal avenue for victims of family and domestic violence. In contrast to the criminal law, the civil law requires a lesser standard of proof – the balance of probabilities. If a court is satisfied that the criteria for a violence restraining order is established to the required standard, a violence restraining order can be made imposing legal restraints upon the person's activities and behaviour. In theory, at least, the protection of the victim is achieved by encouraging the person bound to comply with the conditions of the order because failure to comply will result in consequences under the criminal law.[12] While in some cases, recourse to the restraining order system will be the only effective and practical option,[13] there are many cases where both criminal and civil law options can be utilised.

Restraining orders were first introduced in Western Australia under the *Justices Act 1902* (WA) in 1982. A review of the restraining order system in 1995 resulted in the *Restraining Orders Act 1997* (WA) which established a dual system: violence restraining orders to respond to personal violence and misconduct restraining orders to respond to 'non-violent forms of public nuisance'. It was intended that this distinction would 'give greater priority to violence restraining orders'.[14] The *Restraining Orders Act* has been subject to significant amendments since its inception. The most substantial reform occurred with the passing of the *Acts Amendment (Family and Domestic Violence) Act 2004* (WA) on 9 November 2004. In 2008 a further review of the *Restraining Orders Act* was undertaken by the Department of the Attorney General.[15] Following this review a series of amendments to the *Restraining Orders Act* were passed in 2011 with a final change being effected in October 2013.

10. For example, an act of family and domestic violence under s 6 of the *Restraining Orders Act 1997* (WA) includes 'behaving in an ongoing manner that is intimidating, offensive or emotionally abusive'.
11. While the underlying purposes of the criminal law are not directed specifically to the protection of a victim of an offence, many of the purposes of sentencing may provide a victim with protection from future harm. For example, if an offender can be rehabilitated the victim will be protected because there will be no further offending behaviour. If the offender is imprisoned the victim may be temporarily protected from future acts of family and domestic violence. If specific conditions are included in any community-based sentencing disposition (eg, requiring the offender to reside in a particular location) these conditions may serve to provide some protection to the victim.
12. See Douglas H, 'The Criminal Law's Response to Domestic Violence: What's going on?' (2008) 30 *Sydney Law Review* 439, 444.
13. For example, where the behaviour constituting family and domestic violence does not amount to a crime or where the victim does not wish to give evidence in criminal proceedings and there is no corroborating evidence.
14. Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders,* Report No. 5 (2002) 5.
15. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008).

Police response to family and domestic violence

While victims of family and domestic violence may access the restraining order system independently of the Western Australia Police, police will frequently be the first point of contact with the justice system for victims (and perpetrators). This contact typically occurs when police respond to a family and domestic violence incident (either as a consequence of a direct report from a victim or indirectly through a report by another person).

The number of family and domestic violence incidents (referred to by the Western Australia Police as Domestic Violence Incidents (DVIs) has increased substantially over the past eight years. At the time of the 2004 reforms to the *Restraining Orders Act 1997* (WA), the former Attorney General stated in Parliament that the police 'prepare approximately 12,000 family violence incident reports every year'.[1] Indicative data[2] provided to the Commission by the Western Australia Police shows that the total number of DVIs in 2012 was 44,947 (with 26,697 being categorised as 'general' and 18,250 as 'crimes').[3] The number of DVIs is now more than one-and-a-half times the number in 2004. Based on the data provided by the Western Australia Police, the following table shows the number of DVIs from 2004 to 2012.

In this section, the Commission examines the police response to DVIs including the investigative process; the decision to arrest and charge alleged perpetrators; the legislative powers of police; and police training issues. The processes and approach to the making of police orders is not considered in detail in this section but is included in the following section dealing with the restraining order system as a whole.

Year	Domestic Violence Incidents		
	General	Crimes	Total
2004	7,357	9,250	16,607
2005	10,654	11,726	22,380
2006	13,858	13,849	27,707
2007	16,728	13,362	30,090
2008	18,902	12,914	31,816
2009	20,730	13,117	33,847
2010	20,111	12,203	32,314
2011	24,139	15,186	39,325
2012	26,697	18,250	44,947

INVESTIGATION OF FAMILY AND DOMESTIC VIOLENCE

The Western Australia Police *Family and Domestic Violence Strategy 2009–2011*[4] recognises that, in the past, criticism has been levelled at the police in relation to their response to family and domestic violence, and that it is necessary to increase the knowledge and understanding of family and domestic violence within the police service as well as the general community.[5]

Inadequacies in the police response to family and domestic violence were revealed in the coronial inquest of Andrea Pickett held in June 2012.[6] This inquest dealt with a 39-year-old woman's violent death at the hands of her estranged partner who was on parole for an offence of threat to kill and subject to a violence restraining order taken out by the victim. The State Coroner found that the police investigation of reported incidents of family and domestic violence (including alleged violence restraining order breaches) was lacking. There was evidence of delay in assigning investigating officers, failure to speak to potential witnesses and investigations being inappropriately closed by police. The Western Australia Police provided a response to

1. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 3304 (Hon Jim McGinty).
2. The material provided to the Commission in October 2013 explains that the statistics 'must be used as an indication only and not classified as verified. Verified statistics are those matters that are reported to the police within the relevant time period that have not been determined to be falsely or mistakenly reported.' The material advises that verified statistics are not available: Western Australia Police, *Statistics for Law Reform Commission of Western Australia* (undated).
3. As explained in the introduction to this chapter, not all acts of family and domestic violence constitute a criminal offence.
4. It was confirmed to the Commission during consultations that this policy document remains current: Western Australia Police Family Violence State Coordination Unit, consultation (29 August 2013).
5. Western Australia Police, *Family and Domestic Violence Strategy 2009–2011*(2009) 2, 4.
6. Concerns were also raised in relation to the response of other government departments.

the State Coroner following its internal review of the death by the Family Violence State Coordination Unit. The police response outlined a number of changes and improvements made including policy changes requiring that family and domestic violence complaints are not to be withdrawn without seeking advice from the District Family Protection Unit officer; the implementation of the Western Australia Police Investigation Doctrine to improve investigative practices in respect of family and domestic violence; the requirement for an 'immediate response and local level ownership' of family and domestic violence investigations; the development of the *Family and Domestic Violence Strategy* in 2009;[7] and the implementation of a co-located interagency response to family and domestic violence by the Department for Child Protection and Family Support (DCPFS) and Western Australia Police.[8] The State Coroner explained that the effectiveness or otherwise of these changes had not been examined in the inquest; however, it was noted that the CEO of the Women's Council for Domestic and Family Services (Angela Hartwig) stated in her evidence that 'on the ground a number of police officers were still not taking domestic violence allegations seriously enough'.[9] This view was reiterated to the Commission by a number of the stakeholders consulted.

The *Family and Domestic Violence Strategy* contains nine priority areas including the need to ensure that investigations 'are commenced and completed in a timely manner with efforts made to apprehend offenders at the time of the incident', and that police are to 'respond to family and domestic violence incidents in the same manner as any other serious crime, and to collect sufficient evidence to enable a successful outcome'.[10] The policy of the Western Australia Police indicates a proactive approach to charging perpetrators of family and domestic violence, and emphasises that restraining orders should not be used as an alternative to criminal prosecution. It is provided that:

> The policy of the Western Australian Police Service in respect to intervention at family and domestic incidents is one of pro-charge, pro-arrest and pro-prosecution; where evidence exists that a criminal offence has been committed. Violence restraint orders and Police Orders are to be seen as additional safeguards and not as an alternative to the laying of appropriate charges.[11]

Obligation to investigate

The *Restraining Orders Act* creates an obligation to investigate family and domestic violence; however, this obligation is not absolute. Section 62A provides that a 'police officer is to investigate whether an act of family and domestic violence is being, or has been committed, or whether an act of family and domestic violence is likely to be committed, if the police officer reasonably suspects that a person is committing, or has committed, an act of family and domestic violence which –

(a) is a criminal offence; or
(b) has put the safety of a person at risk.

This provision is reinforced by the Western Australia Police policy on family and domestic violence.[12] In the 2008 review of the *Restraining Orders Act* it was noted that the provision of a mandatory requirement to investigate acts of family and domestic violence was welcomed by many stakeholders. However, a number of magistrates consulted for that review commented that:

> [A]pplicants for violence restraining orders were still telling them that they have reported to police what is an allegation of a criminal offence only to be told words to the effect 'there is nothing we can do, go and get yourself a violence restraining order from the court'.[13]

This message was reiterated to the Commission during consultations with lawyers and victim support workers. Concern was also expressed that if an investigation is not conducted the person reporting the family and domestic violence will not be given any record of the complaint (which may assist in subsequent legal proceedings). The Commission addresses the appropriate recording of reports of family and domestic violence immediately below. Additionally, the Commission's proposal in relation to training for police officers may also assist in

7. Ms Pickett's death occurred on 12 January 2009 before the development of the *Family and Domestic Violence Strategy*.
8. State Coroner, *Inquest into the death of Andrea Louise Pickett* (28 June 2012) 56–61. The co-location model between DCPFS and the Western Australia Police has since been expanded to include NGOs. These co-located teams are now known as Family and Domestic Violence Response Teams (FDVRTs).
9. State Coroner, Inquest into the death of Andrea Louise Pickett, (28 June 2012) 62.
10. Western Australia Police, *Family and Domestic Violence Strategy 2009–2011* (2009) 5–6.
11. *Commissioner's Operations and Procedures* (COPS) Manual, DV 1.1.2.
12. Ibid DV 1.1.4. It is provided that where 'a member receives a complaint/report which causes them to reasonably suspect that an act of family and domestic violence is or has been committed or is likely to be committed, that involves a criminal offence or has put the safety of a person at risk, the member must investigate the complaint/report'. It is also provided that police must attend 'the incident location of all complaints/reports' unless there are exceptional circumstances (eg, victim has left the scene and attended a police station).
13. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 21.

ensuring an appropriate response to reported family and domestic violence.

Domestic violence incident reports

The response to a reported family and domestic violence incident usually begins with attendance at the relevant location by frontline police. As explained in Chapter One, the attending officer is required to complete a Domestic Violence Incident Report 1–9 (DVIR1–9).[14] The information required to be completed includes a description of the relationship between the parties; any prior DVIRs between the parties; whether the parties are subject to recidivist[15] or red file[16] case management; details of any children present during the incident and/or children who usually reside with the parties; full details of the incident including action taken and offences charged; information about specified risk factors;[17] and information about patterns of behaviour (eg, jealousy, possessiveness, stalking, harassment). The information recorded on the DVIR1–9 is used by the co-located interagency Family and Domestic Violence Response Team to triage cases and provide an appropriate response to the assessed risk.

The recording of a family and domestic violence incident via the DVIR1–9 may be relevant for future legal proceedings. The Commission understands that references to DVIRs are made in a number of different contexts. For example, past DVIRs are referred to in bail risk assessment reports that are prepared by the Family Violence Service (Department of the Attorney General) for the Family Violence Courts to assess risk in relation to applications to relax protective bail conditions. Information about past DVIRs may also be used by Family Violence Courts when assessing whether a particular offender is suitable for the court program. The Commission was also told that pre-sentence reports prepared by the Department for Corrective Services may include information about past DVIRs.

An applicant for a violence restraining order might refer to a DVIR. While the absence of a prior report to police clearly does not mean that there have not been any past occasions of violence, the existence of a record of a prior report may well be a useful piece of evidence for violence restraining order applicants. In this regard it is noted that s 12(1)(i) of the *Restraining Orders Act* provides that 'any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise' is a relevant factor to be considered by a court when deciding whether to make a violence restraining order. Furthermore, ss 12(4) and (5) provide that the Commissioner of Police is to provide, where practicable, information about such past behaviour and this information is to be provided in the form of a certificate.[18]

As noted earlier, the Commission was told during consultations that some acts of family and domestic violence reported to police are not recorded and victims are, therefore, not provided with a DVIR number for subsequent verification. It was stated that police or reception staff have told persons reporting acts of family and domestic violence that there is nothing they can do in the absence of corroborating evidence, and advised the victim to apply for a violence restraining order (with the suggestion that if that order is breached, the police will then be in a position to act). The Commission was informed by a community corrections officer that when in contact with victims, she advises them to seek a report number from the police when reporting a family and domestic violence incident so that they have a formal record of attendance and also to encourage some form of action in response to the complaint. It is the Commission's understanding that in every case where a police officer is dispatched to an incident, a DVIR1–9 will be completed; however, if a person

14. The DVIR must be submitted at the end of the attending police officer's shift for the purpose of the triage assessment process undertaken by the FDVRTs: COPS Manual, DV 1.1.4.3.
15. Recidivist case file management is a system for case managing families classified as 'at risk' because of repeat or serious family and domestic violence. The District Family Protection Coordinator identifies these families using the following criteria: where there has been six or more prior family and domestic violence incidents within previous three-year period; where a violent personal offence as defined under s 63A of the *Restraining Orders Act 1997* (WA) has been committed; where there has been an escalation in the violence and the Family Protection Coordinator considers that recidivist case management is warranted; where there are concerns for children in the family; and any case where the Family Protection Coordinator considers is appropriate for recidivist case management: COPS Manual, DV 1.1.9.
16. A Recidivist Case File may be elevated to a Red File if there are indications of 'extreme risk' (eg, threats to kill or harm made by perpetrators 'resolute in carrying out the threat' or incidents involving serious/extreme violence including harm to animals): ibid.
17. The specified risk factors are whether the victim is frightened; the victim's perception of risk; whether there are any substance abuse, mental health or other vulnerability issues; whether the parties are separated and, if so, for how long; whether the victim has previously attempted to leave the relationship; whether the victim is isolated from family and friends or living remotely; whether the victim is pregnant; whether the parties have had a baby in the last 18 months; whether the frequency and severity of violence has increased; whether there has been previous physical violence towards the victim, children and/or pets; whether there has been previous sexual assault, abuse, insults; presence of and access to weapons; any cultural and religious factors; and whether there are any financial issues and/or child contact issues.
18. The provision of certificates under s 12(5) of the *Restraining Orders Act 1997* (WA) is discussed later in this chapter.

attends a police station to report an act of family and domestic violence and no formal statement is taken from that person, it is possible that there would be no record of the attendance. While it is acknowledged that this approach is not supported by the formal policy of the Western Australia Police,[19] it is important that every complaint of family and domestic violence is recorded. The Commission is of the view that if a person reports an act of family and domestic violence the Western Australia Police should be required to record that the report was made, irrespective of whether any further investigation is undertaken. This will provide the person reporting the act of family and domestic violence with independent verification that the report was made and encourage police to respond appropriately and effectively.

PROPOSAL 1

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person reports an act of family and domestic violence to a member of the Western Australia Police (or a person employed by the Western Australia Police) the person who receives the report is required to formally record the report and provide the person reporting the act of family and domestic violence with a report number.

Collection of evidence

A representative of one community service organisation (who has significant experience in the area of family and domestic violence) advocated for an approach to investigating and prosecuting family and domestic violence without victim participation. The foundation for this view is that victims are already traumatised by their experience of family and domestic violence and successful prosecutions can be achieved without relying so heavily upon the evidence of the victim. Furthermore, some victims are reluctant witnesses and any chance of holding the perpetrator to account may be stifled if the state relies solely upon the victim's evidence. The Victorian Law Reform Commission (VLRC) observed that the successful prosecution of family and domestic violence related offences requires the collection of alternative forms of evidence, especially if the victim fails to testify in court.[20]

The current Western Australia Police policy provides that when attending family and domestic violence incidents police are to 'pay particular attention to the early collection of evidence including (but not limited to):

- Comprehensive notes;
- A signed medical release;
- Statements – complainant, witnesses including children and any evidence of early complaint;
- Photographs – complainant's injuries, scene;
- Physical evidence – clothing, weapons, damaged property;
- '000' recordings'.[21]

The Commission did not receive any other complaints or comments in regard to the manner in which police collect evidence at the scene of an investigation. However, as mentioned above, the coronial inquest into the death of Andrea Pickett noted the failure on the part of police to interview relevant witnesses in response to complaints of family and domestic violence. The Commission is, therefore, interested to receive submissions on whether any systemic issues in regard to the approach of police in proactively seeking corroborating evidence remain.

QUESTION 1

Are there any problems with the current practice of the Western Australia Police in regard to seeking corroborating evidence in relation to an alleged incident of family and domestic violence? If so, please provide examples.

While not directly related to the collection of evidence at the *scene* of an incident of family and domestic violence, a related issue concerns the collection of evidence for court in relation to allegations of breaching a violence restraining order by contact through social media or other electronic means. The increasing use of technology means that these types of cases are becoming far more common.[22] The

19. The COPS Manual, DV 1.1.4.3 'Incident Management System' section provides that all 'incidents attended/ reported where the persons involved are in a family and domestic relationship (FDR) are subject to the submission of an Incident Report (IR). Member's IR must indicate the existence of the family and domestic relationship by checking the FDR field on the initial attendance screen (Y/N)'.

20. VLRC, *Review of Family Violence Law*, Report (2006) [5.25].

21. COPS Manual, DV 1.1.4.1

22. In a recent article it was reported that 'intimate photos are the latest weapon being used by abusive partners to control victims and prevent them from leaving relationships' and that lawyers and victim support groups have found that 'more men are using technology to track victims through

Commission was informed by one police prosecutor that when an accused is charged with breaching a violence restraining order on the basis of sending text messages to the person protected by the order, the police brief only includes details of the content of those text messages in approximately 50 per cent of cases. It was also noted by lawyers that contact by electronic means in breach of a violence restraining order may be deleted by the perpetrator before evidence can be obtained. A victim spoken to by the Commission explained that she has had difficulties in obtaining a response from police in regard to text messages and emails because of the difficulty in proving that the messages were sent by the person bound by the violence restraining order. Additionally, many violence restraining orders contain exceptions that enable the person bound to contact the person protected via text message or email for the purpose of arranging contact with children. The Commission was informed of instances where messages regarding child contact arrangements have included comments that may be considered intimidating or offensive by the person protected. There are clearly a range of complex issues arising from the use of technology in the context of family and domestic violence.

Another issue mentioned on a number of occasions during consultations is that breaches by way of text or email messaging may be regarded as 'technical breaches' or less serious. While this may well be the case in some instances, it is vital that courts are properly informed of the content of any electronic communication so an assessment of the seriousness of the alleged breach can be undertaken for the purposes of deciding whether the accused should be released on bail (and on what conditions) and also for the purpose of sentencing (in the event that the accused is convicted).

PROPOSAL 2

That where an accused is charged with breaching a violence restraining order by making contact with the person protected by the order via electronic means, the Western Australia Police ensure that sufficient information to demonstrate the content of that communication is included in the police brief for prosecution as early as possible.

things such as apps on their partner's phones and tablets, prompting calls for current laws to be changed to reflect its prevalence in domestic violence cases': Moulton E, 'Domestic Abusers Go Hi-tech', *The Sunday Times* (17 November 2013) 14. The Commission discusses this issue in relation to the legislative definition of family and domestic violence later in this chapter and in the context of the offence of stalking in Chapter Four.

Pro-arrest policy

As noted above, the Western Australia Police have a pro-arrest policy in relation to family and domestic violence. It provides:

> Generally speaking, after the decision to charge has been made, the power of arrest should be the preferred option when dealing with offenders who have committed a family and domestic violence related offence. The decision to arrest always remains at the officer's discretion and should be made in consideration with legislative powers, victim safety and ensuring the perpetrator is held accountable for their actions.[23]

Division 2 of the *Criminal Investigation Act 2006* (WA) deals with the power to arrest without a warrant. The relevant provisions do not prevent an accused being charged with an offence without first being arrested.[24] Generally, a police officer may arrest without warrant if the officer reasonably suspects that the person has committed, is committing, or is just about to commit an offence and that if the person is not arrested it will be impossible to verify that person's identity; the person will continue or repeat the offence, or commit another offence; the person will endanger his or her own, or another person's, safety or property; the person will interfere with witnesses or obstruct the course of justice; or the person will conceal or disturb something that is relevant to the offence.[25] In contrast, if the offence is classified as a 'serious offence' a police officer may arrest without warrant solely on the basis that the officer 'reasonably suspects that the person has committed, is committing, or is just about to commit, the offence'.[26] 'Serious offence' is defined to include an offence of breaching a violence restraining order or a police order and an offence that involves an act of family and domestic violence as defined under ss 6(1)(a)–(c) and (f) of the *Restraining Orders Act.*[27] The inclusion in this definition of offences relating to breaching orders and family and domestic violence related offences occurred in 2011 in response to the recommendation of the review of the *Restraining Orders Act* in 2008.[28]

23. COPS Manual, DV 1.1.4.1.
24. *Criminal Investigation Act 2006* (WA) s 126.
25. *Criminal Investigation Act 2006* (WA) s 28(3).
26. *Criminal Investigation Act 2006* (WA) s 28(2).
27. *Criminal Investigation Act 2006* (WA) s 28(1). Sections 6(1)(a)–(c) and (f) of the *Restraining Orders Act 1997* (WA) cover assaulting or causing personal injury; kidnapping or depriving a person of his or her liberty; damaging a person's property; or threatening to do any of these acts.
28. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) Recommendation 3. Section 128 of the *Criminal Investigation Act 2006* (WA) was amended by the *Restraining Orders Amendment Act 2011* (WA).

Submissions to that review had noted a 'growing trend of police proceeding by summons instead of arrest for family and domestic violence breaches'.[29] It was argued that summoning accused in such cases 'undermines the safety of victims' and their confidence in the restraining order system. Additionally it was submitted that issuing a summons rather than making an arrest may 'send the message to offenders that breaches are not serious'.[30] It was anticipated that the use of the arrest process would increase by adding breach offences and other family and domestic violence related offences to the definition of a serious offence.

The Commission was informed by the Western Australia Police Family Violence State Coordination Unit that accused are usually arrested for breaching violence restraining orders and police orders; however, there are occasions where accused are summonsed for these offences (eg, where a breach is considered minor). One magistrate suggested to the Commission that every person charged with a family and domestic violence related offence should be arrested and charged, and then either bailed or kept in custody depending on the circumstances. It was argued that this would ensure that the matter reaches court more quickly and provides a message to both parties that the matter is being treated seriously by the justice system. The Commission has obtained data from the Department of the Attorney General in relation to the number of breach offences dealt with by way of summons in comparison to arrest.[31] This data indicates that for the past five years (2008–2012) the proportion of charges for breach of violence restraining order that have been initiated by summons rather than arrest has fluctuated between 23% and 35%. In 2012 the number of breach of violence restraining order charges brought by summons was 986 in contrast to 2,471 by arrest (28%). In relation to charges of breaching a police order, the proportion of accused summonsed is much lower (between 8% and 10% for 2008–2012). Given that the decision to summons or arrest is made by police in both instances, it is plausible that the discrepancy is a result of a provision of the *Bail Act 1982* (WA) that prevents police from releasing an arrested person on bail for a charge of breaching a violence restraining order.

Section 16A(3) of the *Bail Act* provides that police do not have jurisdiction to grant bail to an accused who has been arrested and charged with breaching a violence restraining order in an urban area (currently the metropolitan area only).[32] In such cases, the accused must be brought before a court for bail to be considered by a magistrate. Without in any way undermining the seriousness of the offence of breaching a violence restraining order, this provision is an anomaly because police do have the power to grant bail for a number of very serious family and domestic violence related offences (eg, sexual penetration without consent and serious offences of violence). It was suggested to the Commission during consultations that the impact of this provision is one reason why police elect to summons some accused for breaching a violence restraining order, especially if they consider the circumstances of the offence are at the lower end of the scale of seriousness. The Commission addresses this provision in Chapter Four and proposes that it should be repealed.[33]

The Commission is of the view that if s 16A(3) of the *Bail Act* is repealed it is likely that the number of accused summonsed for breaching a violence restraining order will decline. At this stage, the Commission does not consider that any other relevant proposals for reform (such as a mandatory requirement for arrest in cases of family and domestic violence) are warranted. There are potential disadvantages to a mandatory arrest policy. Primarily, it removes any discretion from the officer who at that point in time has the best evidence concerning risk of harm and the removal of discretion may result in unjust outcomes. As one example, according to the VLRC, mandatory arrest policies in the United States have led to more women being arrested for family and domestic violence because of their defensive actions.[34] It concluded that a 'pro-arrest policy accompanied by sufficient training and supervision of police officers is the appropriate strategy to achieve a more consistent response'.[35] The Commission's preliminary view is that the current pro-arrest policy of the Western Australia Police coupled with its proposal to provide police with jurisdiction to grant bail for charges of breaching a violence restraining order (in the metropolitan area) is sufficient to discourage inappropriate summonsing of accused in these circumstances. Nonetheless, the Commission seeks to hear from stakeholders about the extent of this problem in practice and whether any changes to

29. Department of the Attorney General, ibid 23.
30. Ibid 24.
31. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (19 November 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.
32. Currently, an urban area is defined as the 'metropolitan region as in the *Planning and Development Act 2005* (WA) and any prescribed area that adjoins that region' (s 16A(4) of the *Bail Act 1982* (WA). It also includes any other 'prescribed area' of the state but no such areas have been prescribed.
33. See below Chapter Four, Proposal 32.
34. VLRC, *Review of Family Violence Law*, Report (2006) [5.20].
35. Ibid [5.23].

policy or legislation (including mandatory arrest) are necessary or desirable to encourage more frequent arrest for family and domestic violence related offences including breaching a violence restraining order.

QUESTION 2

Are any changes to legislation and/or policy required to ensure that, for the most part, accused charged with an offence that includes an act of family and domestic violence as defined under the *Restraining Orders Act 1997* (WA), or an offence of breaching a violence restraining order or a police order, are arrested rather than summonsed? For example, should there be a legislative presumption that when an accused has been charged with an offence that includes an act of family and domestic violence or an offence of breaching a violence restraining order or a police order the accused must be arrested for the offence unless there are exceptional circumstances?

POLICE POWERS

The *Restraining Orders Act* provides for the power for police to enter and search premises where family and domestic violence is suspected. Section 62B(1) provides:

> If a police officer reasonably suspects that a person is committing an act of family and domestic violence, or that such an act was committed before the officer's arrival, on any premises, the officer may without a warrant enter those premises and may remain in those premises for as long as the officer considers necessary —
>
> (a) to investigate whether or not an act of family and domestic violence has been committed;
>
> (b) to ensure that, in the officer's opinion, there is no imminent danger of a person committing an act of family and domestic violence on the premises; and
>
> (c) to give or arrange for such assistance as is reasonable in the circumstances.

However, generally, a police officer is not entitled to exercise the powers under s 62B(1) unless he or she has a senior officer's[36] approval. The officer can exercise the power to enter and remain on premises without approval from a senior officer only if the officer believes on reasonable grounds that the powers should be exercised urgently *and* the officer cannot use remote communication to apply for the senior officer's approval.[37]

The Western Australia Police raised two concerns in regard to this power. First, it was submitted that, in the current context, the specification that a senior officer must be an officer of or above the rank of inspector is unwarranted. The abovementioned provision dealing with obtaining a senior officer's approval to enter and remain on premises is the only occasion where the definition of 'a senior officer' is relevant under the *Restraining Orders Act*. The Commission notes that under s 38A of the *Criminal Investigation Act 2006* (WA) a senior officer is defined as an officer of or above the rank of sergeant for the purpose of obtaining authorisation to enter a place or vehicle where there is a reasonable suspicion that an 'out-of-control gathering' is taking place. The Commission agrees that the rank of inspector is unnecessarily high for the purpose of obtaining approval under s 62D of the *Restraining Orders Act* and, accordingly, proposes that the definition of senior officer should be amended.

However, in exercising the power to enter premises the officer is authorised to remain on the premises for as long as the officer considers necessary to investigate whether an act of family and domestic violence has been committed, to ensure that there is no imminent danger and to provide assistance. There is no time limit on the duration of this power. The Commission is concerned that entry into premises without a warrant for a significant period of time should be authorised by an officer who is more senior than the rank of sergeant. Accordingly, the Commission seeks submissions about whether further approval should be required in the event that it is necessary to remain on the premises for an extended period.

PROPOSAL 3

That the definition of a senior officer under s 62D(8) of the *Restraining Orders Act 1997* (WA) be amended to provide that a senior officer is a police officer who is senior in rank to the officer making the application and is of or above the rank of sergeant.

36. A senior officer is defined in s 62D(8) of the *Restraining Orders Act 1997* (WA) as a police officer who is 'senior in rank to the officer making the application' and 'is of or above the rank of inspector'.

37. *Restraining Orders Act 1997* (WA) s 62B(1a). If police enter premises without a senior officer's approval, the reason for the entry and what occurred at the premises must be reported to a senior officer as soon as practicable: s 62B(1b).

QUESTION 3

Should authorisation from a police officer of or above the rank of Inspector be required if it is considered necessary to remain on the premises for an extended period and, if so, what period should be specified for this purpose?

Second, the Western Australia Police contended that the current wording of s 62D(3) of the *Restraining Orders Act* means that, in practice, the police are not able to obtain the necessary approval to enter the premises if the 'person of interest' is no longer on the premises. They expressed concern that this means they may not be able to enter the premises to check on the safety or welfare of other people.[38] Section 62D(3) of the *Restraining Orders Act* provides that:

> A police officer making the application for approval to a senior officer must –
>
> (a) give the address, or describe the premises, to which it relates, and, if known, the person to whom it relates; and
>
> (b) state the grounds on which the police officer suspects that –
>
> (i) a person is on the premises; and
>
> (ii) the person has committed, or is committing, an act of family and domestic violence against another person.

The Western Australia Police argued that s 62D(3)(b) means that the police officer making the application must have grounds to suspect that the person of interest is on the premises. However, the person of interest may have left the premises or be outside the premises in a vehicle and drive away as soon as the police arrive. For this reason, it was suggested that s 62D(3)(b) should be amended to make it clear that approval can be granted without establishing that the person of interest remains on the premises at the time approval is sought. The Commission agrees that this is a sensible approach and can be achieved simply by changing the word 'the' in s 62D(3)(b)(ii) to the word 'a'.

PROPOSAL 4

That s 62D(3) of the *Restraining Orders Act 1997* (WA) be amended to provide that:

> A police officer making the application for approval to a senior officer must –
>
> (a) give the address, or describe the premises, to which it relates, and, if known, the person to whom it relates; and
>
> (b) state the grounds on which the police officer suspects that –
>
> (i) a person is on the premises; and
>
> (ii) a person has committed, or is committing, an act of family and domestic violence against another person.

ACTION FOLLOWING AN INVESTIGATION

After a police officer has conducted an investigation under s 62A or after entering or searching premises under s 62B of the *Restraining Orders Act*, the officer is required by s 62C to either make an application for a violence restraining order (by telephone or to a court) or make a police order. If neither of these actions is undertaken, the officer must record the reasons for non-action in writing.[39] The COPs Manual provides that reasons justifying non-action include that an arrest has been made and bail has either been refused or protective bail conditions have been imposed; or that 'no criminal offence has been committed and the safety of involved persons is not at risk'.[40]

When seeking to assess the effectiveness of this process, the Commission was informed by the Western Australia Police that the provision of reliable data in relation to the outcomes under s 62C of the *Restraining Orders Act* (ie, whether a violence restraining order was applied for, whether a police order was made or whether no action was taken) is not possible.[41] However, police stressed that compliance with s 62C is enforced through internal

38. Western Australia Police Family Violence State Coordination Unit, consultation (29 August 2013). It is noted that s 36 of the *Criminal Investigation Act 2006* (WA) provides that a police officer may enter a place or a vehicle if the officer reasonably suspects that 'a person who has died or who is so ill or injured as to be likely to die or suffer permanent injury to his or her health unless the officer enters the place of vehicle'.

39. The Commission was advised that this information is usually 'recorded at point 6 of the DVIR1–9 or within the running sheets of the incident report if the investigation is drawn out depending on the circumstances': Eric Smith, Detective Inspector, Sex Crimes Division, Western Australia Police, correspondence (18 November 2013).

40. COPS Manual, DV-1.1.6.

41. Western Australia Police Family Violence State Coordination Unit, consultation (29 August 2013).

quality assurance processes including supervisor review of DVIRs (using a checklist that requires positive identification of compliance with the section) and regular district audits.[42] Police noted that any 'lack of positive actions [in response to incidents of family and domestic violence] are addressed by supervisors in a timely fashion'.[43]

TRAINING

As discussed in Chapter Two of this Paper, there were significant concerns raised during consultations about the consistency of the Western Australia Police's response to family and domestic violence.[44] These concerns include that the response of frontline police to incidents of family and domestic violence may not always be appropriate. Further, the Commission was told by a number of different stakeholders that, at times, police have issued a police order against the victim instead of the perpetrator.[45] It was suggested that the police may issue an order against the victim when it is easier for the victim to find alternative accommodation.[46] In addition, in cases involving persons from culturally and linguistically diverse backgrounds, the Commission was informed that the police may misread the situation because of language and cultural barriers and incorrectly perceive that the victim is in fact the person responsible for the violence. Furthermore, it was said that assumptions may be made if one party appears calm and responds rationally during police inquiries in contrast to the other party who appears hysterical or may, for whatever reason, be unable to properly explain what has occurred.[47]

Criticism of the police response to family and domestic violence is not new. In an investigation into the response by police to assault in the family home in 2003 it was observed that victim support agencies felt that there was a 'considerable disparity between current police policy' and the manner in which individual incidents are dealt with, and further that there was a view that some police officers 'allow their personal preconceptions to influence the way in which they interact with victims and the level of assistance they provide'.[48] Additionally, in the review of the *Restraining Orders Act* it was stated that, notwithstanding an increase in the level of training received at the Police Academy in relation to family and domestic violence, 'concern was raised during the review that police still lacked adequate understanding of the complexity of domestic violence and the appropriateness of certain responses'.[49]

During consultations it was emphasised that it is vital that police officers understand the nature and dynamics of family and domestic violence and respond effectively because inappropriate responses are highly likely to discourage victims from seeking assistance from police in the future. The Commission was told by the Family Violence State Coordination Unit that police recruits undertake four days of family and domestic violence training and this training is presented by experts from a range of agencies.[50] Police from the State Coordination Unit also deliver ongoing training when police officers reach a particular promotional level (eg, after five years and after nine years) and refresher courses at other times. Nonetheless, it was acknowledged by the police that increased training in family and domestic violence across the board is warranted.

The Commission makes a number of proposals in this Paper that are designed to improve the level of understanding of family and domestic violence by all professionals working in the justice system. For example, clearer legislative principles and objectives will assist in ensuring that relevant factors are known and properly considered by decision-makers at all stages of the legal process.[51] Having said that, the Commission believes that more frequent[52] training for police would also be beneficial in order

42. Eric Smith, Detective Inspector, Sex Crimes Division, Western Australia Police, correspondence (18 November 2013).
43. Ibid.
44. See above Chapter Two, Lack of awareness and understanding of family and domestic violence.
45. In a report by the New South Wales Ombudsman it was noted that there was 'evidence to suggest that police officers struggle in some instances to identify the primary aggressor in a domestic violence situations' and 'failure to identify the primary aggressor can result in a lack of action, or inappropriate action, on the part of the police': New South Wales Ombudsman, *Domestic Violence: Improving police practice* (2006) 64.
46. The COPS Manual provides that subject to an assessment of risk, it is 'preferable that victims and children remain in the premises and perpetrators are removed': COPS Manual, DV-1.1.4.
47. The COPS Manual explains that 'victims may not display obvious signs of fear' and may find it difficult to assert themselves at the scene': COPS Manual, DV-1.1.4. Police orders are discussed in detail in the next section of this chapter.
48. Ombudsman of Western Australia, *An Investigation into the Police Response to Assault in the Family Home* (2003) 17, 20.
49. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 21.
50. Western Australia Police Family Violence State Coordination Unit, consultation (29 August 2013). The Family Violence Service of the Department of the Attorney General provides approximately half a day of this training module: Family Violence Service Perth, consultation (5 September 2013).
51. See Proposals 6 & 7.
52. The New South Wales Ombudsman recommended that police working in identified high-risk locations should receive training in family and domestic violence on an annual basis: New South Wales Ombudsman, *Domestic Violence: Improving police practice* (2006) 65.

to ensure that frontline police attending family and domestic violence incidents are fully apprised of contemporary[53] and expert knowledge of the nature and dynamics of family and domestic violence, including specific training in relation to vulnerable groups (such as Aboriginal people, people from culturally and linguistically diverse communities, and people with disabilities).[54] Importantly, if proposals for reform in this Paper are implemented in the future, training will need to address the various changes to legislation and process.

PROPOSAL 5

That the Western Australia Police provide more regular training to all police officers in relation to family and domestic violence and that this training be delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities.

53. For example, as noted earlier in this chapter, there is an increasing occurrence of perpetrators of family and domestic violence using social media and other electronic means to coerce, intimidate, harass or threaten their victims.

54. The applicable family and domestic violence policy contains a specific section on the abuse of older people (Commissioner's Operations and Procedures (COPS) Manual DV-1.3); however, there is nothing specific included in relation to Aboriginal people, people from culturally and linguistically diverse backgrounds and people with disability. It is also noted that other inquiries have referred to the need for specific training in relation to people in same-sex relationships: VRLC, *Review of Family Violence Law*, Report (2006) Recommendation 27. The Commission was not informed of specific issues in relation to people in same-sex relationships during its consultations for this reference.

Restraining orders

INTRODUCTION

When the *Restraining Orders Act 1997* (WA) was first enacted it did not contain any reference to family or domestic violence. It provided for two types of restraining orders: violence restraining orders and misconduct restraining orders. The grounds for a violence restraining order were linked to the likelihood of the respondent committing a violent personal offence.[1] The grounds for a misconduct restraining order were broader, encompassing a likelihood of behaving in an intimidatory or offensive manner, causing damage or breaching the peace.[2] As noted in the introduction to this chapter, major reform of the *Restraining Orders Act* occurred in 2004. These reforms provided for a clear distinction between violence in a family or domestic setting and other forms of violence in recognition of how family and domestic violence often recurs and escalates in seriousness over time.[3] The purpose of the reforms was to provide greater protection to victims of family and domestic violence and 'recognise the devastating effects that such violence can have on children'.[4]

The *Restraining Orders Act* continues to distinguish between violence restraining orders and misconduct restraining orders; however, misconduct restraining orders are restricted solely to parties who are not in a family and domestic relationship. In contrast, violence restraining orders may be imposed where the parties are in a family and domestic relationship and also where there is no such relationship (eg, strangers, friends, acquaintances, work colleagues).

Statistics provided to the Commission by the Department of the Attorney General show that the number of applications for violence restraining orders has steadily increased since 2004. In 2004 there were a total of 9,809 applications lodged in the lower courts; by 2012 the total number of applications lodged had increased to 14,145. Of these, 8,656 were interim violence restraining orders (61% of total applications lodged) and 1,551 were final orders (10% of total applications). Clearly, interim violence restraining orders are made far more readily than final orders.

Bearing in mind that violence restraining orders may be issued for cases involving a non-family and domestic relationship, the Commission requested statistics in relation to the number of violence restraining orders made where the parties were in a family and domestic relationship. This information was provided with the explanation that the classification of a violence restraining order as family and domestic violence or non-family and domestic violence is based on the information provided by the applicant in the application form.[5] Bearing in mind that proviso,[6] of the 1,551 final violence restraining orders issued in 2012 there were 914 that involved family and domestic violence (59%).[7] Similarly, 58% of the 8,656 interim violence restraining orders issued in 2012 were family and domestic violence related (5,075).

Based on the indicative data provided by the Western Australia Police (and referred to earlier in this chapter) there were 44,947 Domestic Violence Incidents (including general and criminal) in 2012 and,

1. A violent personal offence was defined in s 4 of the *Restraining Orders Act 1997* (WA) as an offence under Part V of the *Criminal Code* (WA) other than Chapters XXXIV and XXXV. Offences in Part V include assaults, offences endangering life such as grievous bodily harm, homicide and sexual assaults. The offences excluded under Chapters XXXXIV and XXXV were offences relating to parental rights and duties and criminal defamation.
2. See *Restraining Orders Act 1997* (WA) ss 11 & 34, as originally enacted.
3. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 3304 (Mr Jim A McGinty).
4. Ibid. It was noted that in the each of the two years prior to the introduction of the bill, there were approximately 12,000 applications for restraining orders lodged and 7,500 orders granted (3303).
5. The application form contains four alternative boxes to be ticked by the applicant: 'Married', 'De facto', 'Related' and 'Other-Please specify'. The Commission was informed that if the applicant ticks 'Other' but does not specify the nature of the relationship the matter is recorded as being non-family and domestic violence. Also if the relationship is unknown it will be classified as non-family and domestic violence: Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission.
6. It is noted that more accurate data could be obtained about the proportion of violence restraining orders involving family and domestic violence if violence restraining orders were separated into two differently named orders to reflect whether the parties were in a family and domestic relationship: see further below Chapter Six, Proposal 53.
7. The proportion of final violence restraining orders involving family and domestic violence has consistently been between 53% and 59% from 2005 onwards.

therefore, it appears that applications for violence restraining orders are made in approximately 31% of reported cases of family and domestic violence (14,145 applications made).

The Department of the Attorney General provided data in relation to the gender and age of persons protected by violence restraining orders. In 2012 females accounted for 73% of protected persons. In the same year, approximately 13% of persons protected were under the age of 18 years; 81% were between the age of 18 and 59 years; and 6% were 60 years or over. Data was also obtained in relation to court locations where violence restraining orders were issued. In 2012, approximately 68% of violence restraining orders were issued by metropolitan courts[8] with the remaining 32% of orders being issued by regional courts. The Commission sought data in relation to Aboriginal status and whether the protected person was from a culturally and linguistically diverse (CALD) background. The department indicated that available data in relation to Aboriginality is unreliable and no record is kept of CALD status.

OBJECTS AND PRINCIPLES

The *Restraining Orders Act* does not currently include any objects or overarching principles in relation to family and domestic violence.[9] This is in contrast to a number of other Australian jurisdictions, which do feature such principles.[10] It has been observed that legislative objects and principles may 'provide guidance to those involved in interpreting and administering' legislation (eg, judicial officers, police, lawyers and members of the community) and encourage consistency in interpretation.[11] As explained in Chapter Two of this Paper, a considerable number of people consulted during this reference mentioned inconsistency in decision-making on the part of judicial officers, police officers and lawyers, and argued that this inconsistency is caused by differing levels of understanding about the nature and dynamics of family and domestic violence.[12]

While improved understanding of the nature and dynamics of family and domestic violence might arguably be achieved solely by the provision of better and more regular education and training, the Commission agrees with the view expressed by the Australian and New South Wales Law Reform Commissions (ALRC/NSWLRC) that education and training are 'subject to limitations—including the receptiveness of the audience and the persistence of social and cultural norms'.[13] The ALRC/NSWLRC contended that the 'adoption of guiding principles across family violence legislation will serve an educative function, and aid in the interpretation of legislation'.[14] A recent review of Family Violence Intervention and Safety Notices in Victoria observed that there has been a 'cultural shift in response to family violence among key criminal justice institutions, particularly the courts and police' as a result of legislative and procedural reforms including the introduction of the *Family Violence Protection Act 2008* (Vic) which includes clear objects and principles.[15] The inclusion of objects and principles in legislation also facilitates consistency between and across agencies, and ultimately the courts.

During consultations the Commission received strong support from a range of agencies for the inclusion of objects and principles in legislation dealing with family and domestic violence. The Commission is of the view that the inclusion of legislative objects and principles in relation to family and domestic violence will assist in providing clearer direction about the relevant issues and lessen the chance that personal views will impact upon the decision-making process. The proposed content of the objects clause and principles are discussed below.

8. The metropolitan courts include Perth, Armadale, Fremantle, Joondalup, Mandurah, Midland and Rockingham.
9. Although it is noted that s 12 of the *Restraining Orders Act 1997* (WA) lists the relevant factors that must be taken into account when deciding to make a violence restraining order and these factors include the 'need to ensure that children are not exposed to acts of family and domestic violence'. All of the other listed factors apply to both an act of family and domestic violence and an act of personal violence.
10. It is noted that four Australian jurisdictions (Victoria, Queensland, Tasmania and the Northern Territory) have specific family and domestic violence related legislation.
11. Queensland, *Parliamentary Debates*, Legislative Assembly, 6 September 2011, 2776 (Hon KL Struthers).
12. See Chapter Two, Lack of awareness and understanding of family and domestic violence'.
13. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [31.10].
14. Ibid [7.20]. The ALRC/NSWLRC recommended a common definition of family violence for state and territory family violence legislation: see Recommendation 5-1. The Commission discusses the definition of family and domestic violence below.
15. Victorian Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for contravention*, Monitoring Report (September 2013) [5.6]–[5.7].

Objects clause

The Commission has examined relevant legislation in each Australian jurisdiction. Where objects clauses exist they focus on three key purposes: the protection of victims and their children; the reduction of family and domestic violence; and promotion of perpetrator accountability.[16] This approach is consistent with the recommendation of the ALRC/NSWLRC that state and territory family violence legislation should include the following core purposes:

> (a) to ensure or maximise the safety and protection of persons who fear or experience family violence;
>
> (b) to prevent or reduce family violence and the exposure of children to family violence; and
>
> (c) to ensure that persons who use family violence are made accountable for their conduct.[17]

These core purposes are reflected in the Victorian provision which states that the purpose of the Act is to 'maximise safety for children and adults who have experienced family violence'; 'prevent and reduce family violence to the greatest extent possible'; and 'promote the accountability of perpetrators of family violence for their actions'. It is also provided in s 2 of the *Family Violence Protection Act 2008* (Vic) that these purposes are to be achieved by 'providing an effective and accessible system of family violence intervention orders and safety notices' and creating offences for breaching such orders and notices. The Commission notes that these core legislative purposes are consistent with its first two objectives for reform as set out in Chapter Two of this Paper.[18] The Commission is of the view that the *Restraining Orders Act* (or any new family and domestic violence legislation dealing with violence restraining orders) should include an objects clause modelled on the Victorian provision. The wording of the Victorian provision is supported because it uses phrases such as 'maximise safety' and 'promote accountability'. This terminology reflects the reality that legislation alone cannot guarantee these outcomes.

PROPOSAL 6

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include an objects clause in relation to family and domestic violence restraining orders providing that the objects of the relevant part of the *Restraining Orders Act 1997* (WA) (or of any legislation) are:

a. to maximise safety for children and adults who have experienced family violence;

b. to prevent and reduce family violence to the greatest extent possible; and

c. to promote the accountability of perpetrators of family violence for their actions.

Principles

The ALRC/NSWLRC specifically recommended that 'state and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework, drawing upon applicable international conventions' and it was suggested that the Victorian legislation is a useful model for this purpose.[19] It was further recommended that:

> State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the

16. See *Family Violence Protection Act 2008* (Vic) s 1; *Domestic and Family Violence Act* (NT) s 3(1); *Domestic and Family Violence Protection Act 2012* (Qld) s 3 (although this provision includes that one object of the Act is 'to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and *to minimise disruption to their lives*'. The inclusion of 'minimal disruption as a core purpose' was rejected by the ALRC/NSWLRC because of concern that it may be interpreted to mean 'minimal action' and because in some cases it will be safer for victims to leave the family home: ALRC/NSWLRC, *Family Violence – A National Response* (2010) [7.83]); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1) which sets out the objects of the Act in relation to domestic violence and provides that those objects are: 'to ensure the safety and protection of all persons, including children, who experience or witness domestic violence'; 'to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons'; 'to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women'; 'to enact provisions that are consistent with the United Nations Convention on the Rights of the Child'.

17. ALRC/NSWLRC, *Family Violence – A National Response* (2010) Recommendation 7–4. The ALRC/NSWLRC also specifically stated that the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause [7.87].

18. That is to 'enhance the safety of victims of family and domestic violence (and their children)' and to 'reduce family and domestic violence by increasing perpetrator accountability and improving the management of offenders'.

19. ALRC/NSWLRC, *Family Violence – A National Response* (2010) Recommendation 7-1.

gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.[20]

In some jurisdictions, relevant principles appear in the preamble of the relevant legislation. For example, the preamble to the *Family Violence Protection Act 2008* (Vic) provides that:

> In enacting this Act, the Parliament recognises the following principles—
>
> (a) that non-violence is a fundamental social value that must be promoted;
>
> (b) that family violence is a fundamental violation of human rights and is unacceptable in any form;
>
> (c) that family violence is not acceptable in any community or culture;
>
> (d) that, in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.
>
> In enacting this Act, the Parliament also recognises the following features of family violence—
>
> (a) that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons;
>
> (b) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing;
>
> (c) that family violence—
>
> (i) affects the entire community; and
>
> (ii) occurs in all areas of society, regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion;
>
> (d) that family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse;
>
> (e) that family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time.[21]

The preamble to the *Domestic and Family Violence Protection Act 2012* (Qld) expressly mentions that Australia is a party to the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of Violence Against Women, the United Nations Convention on the Rights of the Child and the United Nations Principles for Older Persons and further recognises that:

> 2. Living free from violence is a human right and fundamental social value.
>
> 3. Domestic violence is a violation of human rights that is not acceptable in any community or culture and traditional or cultural practices cannot be relied upon to minimise or excuse domestic violence.
>
> 4. Domestic violence is often an overt or subtle expression of a power imbalance, resulting in one person living in fear of another, and usually involves an ongoing pattern of abuse over a period of time
>
> 5. Domestic violence can have serious impacts on people who experience it, including physical, emotional and psychological harm, and can result in death.
>
> 6. Perpetrators of domestic violence are solely responsible for their use of violence and its impacts on other people.
>
> 7. Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children; however, anyone can be a victim or perpetrator of domestic violence.
>
> 8. Domestic violence is a leading cause of homelessness for women and children.
>
> 9. Children who are exposed to domestic violence can experience serious physical, psychological and emotional harm.
>
> 10. Behaviour that constitutes domestic violence can also constitute a criminal offence.[22]

In addition to the abovementioned issues, s 4 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides for the following principles:

> (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

20. Ibid, Recommendation 7-2.
21. It is noted that these principles operate in conjunction with a broad definition of family violence.
22. During parliamentary debates it was stated that the Domestic and Family Violence Protection Bill 2011 contains a preamble which 'provides the opportunity for us, as the Queensland parliament, to make a clear statement that domestic and family violence is not acceptable in Queensland communities. The preamble also enables us as the parliament to recognise domestic and family violence in the context of relevant international obligations, contemporary social values and human rights. The preamble identifies some of the features and impacts of domestic and family violence and recognises civil response should operate with, not instead of, the criminal law': Queensland, *Parliamentary Debates*, Legislative Assembly, 6 September 2011, 2776 (Hon KL Struthers).

(2) Subject to subsection (1), this Act is also to be administered under the following principles—

(a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives minimised;

(b) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;

(c) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;

Examples of people who may be particularly vulnerable to domestic violence—

- women
- children
- Aboriginal people and Torres Strait Islanders
- people from a culturally or linguistically diverse background
- people with a disability
- people who are lesbian, gay, bisexual, transgender or intersex
- elderly people

(d) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified;

(e) a civil response under this Act should operate in conjunction with, not instead of, the criminal law.

New South Wales also contains a comprehensive list of relevant principles.[23] In contrast, the legislation in Tasmania,[24] the Australian Capital Territory[25] and South Australia[26] is fairly limited in respect to the inclusion of guiding principles. Section 12(2) of the *Restraining Orders Act* provides that when determining whether to make a violence restraining order (and when determining the terms of any violence restraining order) the court is to regard the following factors as being of primary importance:

- the need to ensure that the person seeking to be protected is protected from acts of abuse;
- the need to prevent behaviour that could reasonably be expected to cause fear that the person seeking to be protected will have committed against him or her an act of abuse;
- the need to ensure that children are not exposed to acts of family and domestic violence; and
- the wellbeing of children who are likely to be affected by the respondent's behaviour of the operation of the proposed order.

Apart from ensuring that children are not exposed to family and domestic violence, these principles are not specific to family and domestic violence and do not provide any useful guidance about the nature and dynamics of family and domestic violence. The Commission is of the view that the *Restraining Orders Act* should be amended to provide a list of guiding principles that are to be applied in decision-making under the legislation in relation to acts of family and domestic violence. In its proposal below the Commission lists, in general terms, the areas that should be included in any guiding principles and the Commission is keen to hear from interested stakeholders about the appropriateness of these principles and any other areas that should be included.

23. See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3) which recognises that domestic violence is unacceptable; that domestic violence is primarily committed by men against women and children; that domestic violence occurs in all sectors of the community; that 'domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years'; that 'domestic violence occurs in traditional and non-traditional settings'; that the particular vulnerability of children who are exposed to domestic violence and the detrimental impact of exposure to domestic violence for children; and that a 'coordinated legal and social response of assistance and prevention of violence' is the best way of addressing domestic violence.

24. The preamble to the *Family Violence Act 2004* (Tas) states that it is an 'Act to provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence'.

25. The *Domestic Violence and Protection Orders Act 2008* (ACT) provides for civil protection orders for domestic violence and other forms of personal violence. In relation to domestic violence s 7(1) provides that the paramount considerations are the need to protect the applicant from domestic violence, and ensure that any child at risk of exposure to domestic violence is protected. Section 7(2) also provides that if a protection order is to be made 'it must be the protection order that is least restrictive of the personal rights and liberties of the respondent as possible that still achieves the objects of the Act and gives effect to subsection (1)'.

26. Section 10 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) lists a number of principles that are required to be taken into account when determining whether to issue an intervention order; however, these principles do not distinguish between domestic and non-domestic abuse.

PROPOSAL 7

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include guiding principles covering the following areas:

a. that the safety of victims of family and domestic violence and children who are exposed to family and domestic violence should be the paramount consideration;

b. that family and domestic violence is a violation of human rights and unacceptable in any community or culture;

c. that while anyone can be a victim of family and domestic violence and family and domestic violence occurs in all sectors of society, family and domestic violence is predominantly committed by men against women and children;

d. that family and domestic violence extends beyond physical and sexual violence and may involve other coercive behaviour including emotional, psychological and economic abuse;

e. that family and domestic violence typically involves power imbalances and may involve ongoing patterns of abuse;

f. that family and domestic violence may escalate in frequency and severity after separation;

g. that family and domestic violence is underreported and that there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;

h. that not all victims of family and domestic violence wish to end their relationships, some simply want the violence to stop;

i. that the impact on children from being exposed to family and domestic violence is very detrimental;

j. that particular vulnerable groups may experience and understand family and domestic violence differently from other groups and may have additional or different barriers to reporting family and domestic violence or seeking assistance. Such vulnerable groups include Aboriginal people; people from culturally and linguistically diverse backgrounds;[27] gay, lesbian, bisexual, transgender and intersex people; elderly persons; and people with disabilities;

k. that perpetrators should be held accountable and encouraged and assisted to change their behaviour;

l. that where both persons in a relationship are committing acts of violence, including for their self-protection, where possible the person who is most in need of protection should be identified; and

m. that victims should be treated with respect by the justice system in order to encourage victims to report acts of family and domestic violence and seek help.

DEFINITIONS

The ambit of any legislative definition of family and domestic violence has important consequences. As the ALRC/NSWLRC noted, if the definition is too narrow there may be gaps in protection because victims are unable to establish the relevant criteria to obtain a restraining order.[28] Conversely, if the definition is too broad the restraining order system may treat conduct that gives rise to a significant risk of injury or death as equivalent to conduct that does not. Further, any definition that is solely dependent on the subjective perception of a person may result in significant restrictions on liberty being placed on another person without a reasonable foundation. Such an approach is open to abuse and may inadvertently, by proliferation, undermine the protection of those victims who are most at risk of injury or death.

Act of abuse

The basis for making a violence restraining order in Western Australia hinges on the existence of a past 'act of abuse' and the likelihood of recurrence or, alternatively, on a reasonable fear that a future act of abuse will occur.[29] An 'act of abuse' is defined as an 'act of family and domestic violence' or 'an act of personal violence'.[30]

27. It has recently been stated that barriers to disclosing family and domestic violence for people from immigrant and refugee backgrounds include fear of authorities, cultural stigma, language barriers, lack of awareness of legal rights in Australia, reliance on the perpetrator for migration or refugee status, lack of access to services and lack of family support: Trijbetz T, 'Domestic and Family Violence and People from Immigrant and Refugee Backgrounds' (2013) *Australian Domestic & Family Violence Clearinghouse*, Fast Facts 11.
28. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.11].
29. *Restraining Orders Act 1997* (WA) s 11A.
30. An act of personal violence is defined in s 6(2) of the *Restraining Orders Act 1997* (WA) and is not as broad

Act of family and domestic violence

An 'act of family and domestic violence' is defined in s 6 of the *Restraining Orders Act* as follows:

> (1) In this Act —
>
> **act of family and domestic violence** means one of the following acts that a person commits against another person with whom he or she is in a family and domestic relationship —
>
> (a) assaulting or causing personal injury to the person;
>
> (b) kidnapping or depriving the person of his or her liberty;
>
> (c) damaging the person's property, including the injury or death of an animal that is the person's property;
>
> (d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person;
>
> (e) pursuing the person or a third person, or causing the person or a third person to be pursued —
>
> (i) with intent to intimidate the person; or
>
> (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;
>
> (f) threatening to commit any act described in paragraphs (a) to (c) against the person.

Apart from s 6(1)(d) all of the above acts constitute a criminal offence in Western Australia. It is this part of the definition that is arguably not sufficiently broad. During consultations it was submitted by a number of people that the Western Australian definition should expressly recognise economic abuse.

The Commission is also of the view that the current definition does not adequately capture key features of family and domestic violence such as the existence of coercion and control. It is these features that may help decision-makers identify cases where victims are at risk of future harm and require immediate protection. The definition of 'family violence'[31] under family law legislation is notable in this regard. Section 9A(1) of the *Family Court Act 1997* (WA)[32] defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. Section 9A(2) provides a non-exhaustive list of examples of behaviour that may constitute family violence:

> (a) an assault; or
>
> (b) a sexual assault or other sexually abusive behaviour; or
>
> (c) stalking; or
>
> (d) repeated derogatory taunts; or
>
> (e) intentionally damaging or destroying property; or
>
> (f) intentionally causing death or injury to an animal; or
>
> (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
>
> (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
>
> (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
>
> (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

This definition was included in family law legislation as a consequence of the recommendations of the ALRC/NSWLRC report in 2010. The ALRC/NSWLRC concluded that the definition of family violence should 'describe the context in which acts take place – rather than merely listing specific incidents of violence or abuse' and that:

> The imperative to provide a contextual background in the definition of family violence is heightened by the recommended broadening of the definition to include non-physical forms of violence, particularly emotional and economic abuse.[33]

It was recommended that the core definition of family violence should provide that family violence is behaviour that 'coerces or controls a family member or causes that family member to be fearful'.[34] The Commissions further explained that by focusing on the presence of coercion, control or fear the definition has the practical advantage of removing behaviour that would not ordinarily be viewed as family and domestic violence. For example, verbal abuse or offensive words during an argument between intimate partners in the absence of any coercion, controlling behaviour or fear is not the type of behaviour intended to be covered by civil protection order schemes. As the ALRC/NSWLRC stated, to 'focus on discrete incidents of violence devoid of context' risks undermining the meaning of

as the definition of an act of family and domestic violence because it does not include damage to property (or animals) nor does it include ongoing intimidating, offensive or emotionally abusive behaviour.

31. The ALRC/NSWLRC used the term 'family violence' in their report and that is the term used under federal family law legislation.
32. The equivalent definition appears in s 4AB of the *Family Law Act 1975* (Cth).
33. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.166].
34. Ibid [5.167].This definition was also recommended by the VLRC: VLRC, *Review of Family Violence Law*, Report (2006) Recommendation 14.

family violence and 'having the definition being co-opted and misused in contexts to which it was never intended to apply'.[35]

As evident from the definition of family violence in family law legislation, the ARLC/NSWLRC supported the inclusion of a non-exhaustive list of behaviours (eg, violence, sexual assault,[36] kidnapping, deprivation of liberty, threatening behaviour, damage, emotional abuse and economic abuse) that may constitute family violence coupled with particular examples that may be more relevant to specific groups (eg, Aboriginal people, people from culturally and linguistically diverse backgrounds, and people with disabilities). Examples provided included:

- threatening to institutionalise a person or withdrawing medication, medical aids or care;
- preventing a person from making or keeping connections to family, friends or culture;
- threatening to disclose a person's sexual orientation;
- threatening to commit suicide; and
- emotional abuse committed via electronic means.[37]

The Commission has considered the definitions of family and domestic violence (or the equivalent terms) in legislation in other Australian jurisdictions. The definitions vary significantly in the manner in which they expand on the various types of behaviour that may constitute family and domestic violence.[38] Victoria and Queensland have the most comprehensive definitions. Section 5(1) of the *Family Violence Protection Act 2008* (Vic) defines 'family violence' as:

> (a) behaviour by a person towards a family member of that person if that behaviour–
>
> (i) is physically or sexually abusive; or
>
> (ii) is emotionally or psychologically abusive; or
>
> (iii) is economically abusive; or
>
> (iv) is threatening; or
>
> (v) is coercive; or
>
> (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
>
> (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).[39]

In addition, s 5(2) lists examples of behaviour that are included within the concept of family violence and the terms 'economic abuse' and 'emotional and psychological abuse' are separately defined and examples of each are provided for in the legislation.[40]

Queensland has the most recently enacted family and domestic violence specific legislation. It has a similar, though not identical, definition to the Victorian model. It also provides examples of behaviour that constitute 'domestic violence' and includes some additional examples that are not contained in the Victorian legislation (eg, threatening to commit suicide or self-harm and unauthorised surveillance of a person).[41] Section 11 of the *Domestic and Family Violence Protection Act 2012* (Qld) defines 'emotional and psychological abuse' and it is an expanded

35. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.168]–[5.169].
36. It is noted that the definition of an act of family and domestic violence under the *Restraining Orders Act 1997* (WA) does not expressly refer to sexual assaults (although the term 'assault' is used).
37. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.188]–[5.190]. A useful example of this is contained in s 8(4) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) which provides that emotional or psychological harm may be comprised of 'communicating with the person, or to others about the person, by way of mail, telephone (including associated technology), fax or the Internet or some other form of electronic communication in a manner that could reasonably be expected to cause emotional or psychological harm to the person'.
38. For example, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) does not define the term 'domestic violence' although 'domestic violence offence' is defined in s 11 as a 'personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship'. Section 8(2) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) defines 'abuse' broadly to include acts that result in or are intended to result in 'physical injury'; 'emotional or psychological harm'; 'an unreasonable and non-consensual denial of financial, social or personal autonomy'; or 'damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person'. The South Australian legislation provides an extensive list of examples of 'emotional or psychological harm' and 'unreasonable and non-consensual denial of financial, social or personal autonomy'. Abuse is categorised as 'domestic abuse' depending on the nature of the relationship between the parties (see s 8(8)). Section 5 of the *Domestic and Family Violence Act* (NT) defines 'domestic violence' as conduct causing harm (examples provided are sexual or other assault, damage to property including the injury or death of an animal, intimidation, stalking, economic abuse or threatening to commit any of this conduct). Intimidation, stalking and economic abuse are separately defined (see ss 6–8).
39. Examples of behaviour that may constitute a child hearing, witnessing or otherwise being exposed to family violence are provided in s 5(1)(b) and include overhearing threats; seeing or hearing an assault; comforting or providing assistance to a family member who has been physically abused; cleaning up a site after intentional damage; or being present when police officers attend an incident.
40. *Family Violence Prevention Act 2008* (Vic) ss 6 & 7.
41. *Domestic and Family Violence Protection Act 2012* (Qld) s 8. 'Unauthorised surveillance' is defined as 'unreasonable monitoring or tracking of the person's movements, activities or interpersonal associations without the person's consent, including, for example, by using technology'.

version of the equivalent Victorian provision. It provides:

> Emotional or psychological abuse means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.
>
> *Examples–*
>
> - following a person when the person is out in public, including by vehicle or on foot
> - remaining outside a person's residence or place of work
> - repeatedly contacting a person by telephone, SMS message, email or social networking site without the person's consent
> - repeated derogatory taunts, including racial taunts
> - threatening to disclose a person's sexual orientation to the person's friends or family without the person's consent
> - threatening to withhold a person's medication
> - preventing a person from making or keeping connections with the person's family, friends or culture, including cultural and spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity.

Economic abuse is defined in s 12 and is again modelled on the equivalent Victorian provision. It provides:

> Economic abuse means behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent—
>
> (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
>
> (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or a child, if the second person or the child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.
>
> Examples—
>
> - coercing a person to relinquish control over assets and income
> - removing or keeping a person's property without the person's consent, or threatening to do so
> - disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse
> - without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses
> - preventing a person from seeking or keeping employment
> - coercing a person to claim social security payments
> - coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person
> - coercing a person to sign a contract for the purchase of goods or services
> - coercing a person to sign a contract for the provision of finance, a loan or credit
> - coercing a person to sign a contract of guarantee
> - coercing a person to sign any legal document for the establishment or operation of a business

For the reasons discussed above, the Commission is attracted to the definitional model proposed by the ALRC/NSWLRC and adopted under family law legislation because if focuses attention on the core elements of coercion, control or fear. The Commission also sees merit in the inclusion of specific types of behaviour that constitute family and domestic violence and non-exhaustive examples to provide guidance to decision-makers. Therefore, the Commission proposes that the definition of an act of family and domestic violence under the *Restraining Orders Act* should be amended and updated. The Commission is also of the view that the current terminology—an *act* of family and domestic violence—should be replaced with 'family and domestic violence' to change the focus from discrete incidents to the context of the behaviour. It seeks submissions about specific types of behaviour that should be included, as well as which examples should be articulated in legislation.

As a related issue, it is noted that the approach to children being exposed to family and domestic violence varies between jurisdictions. As mentioned above, the definition of family violence under s 5 of the *Family Violence Protection Act 2008* (Vic) includes 'behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of' family violence. In contrast, s 53 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that a court may name a child of the applicant in a domestic violence order if 'satisfied that naming the child in the order is necessary or desirable to protect the child from associated domestic violence'[42] or 'being exposed to domestic violence committed by the respondent'. This is similar to the approach in Western Australia where additional criteria are provided for making a violence restraining order for the benefit of a child who has

42. 'Associated domestic violence' is defined in s 9 to include domestic violence towards a child of the applicant.

not been directly subjected to family and domestic violence.

In the ALRC/NSWLRC inquiry there were conflicting views from stakeholders about whether the definition of family violence should include exposing children to violence and the main basis for opposition was that this approach might lead to victims being held 'accountable for not protecting their children from violence'.[43] In order to overcome this, the ALRC/NSWLRC recommended that legislation should provide that family violence may include 'behaviour *by the person using violence* that causes a child to be exposed to the effects' of behaviour that constitutes family violence.[44]

The Commission proposes an expanded definition for this purpose below but also seeks submissions about whether exposing a child to family and domestic violence should be included within the definition of an act of family and domestic violence.

PROPOSAL 8

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining order) be amended to provide for a new expanded definition of 'family and domestic violence'.

QUESTION 4

1. In addition to the current behaviour covered by the existing definition of an 'act of family and domestic violence' under the *Restraining Orders Act 1997* (WA) should the definition expressly include:
   a. psychological abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing;
   b. economic abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing; and/or
   c. any other behaviour that coerces or controls a person and could reasonably be expected to cause that person to fear for his or her safety or wellbeing, and must it be ongoing?
2. Should the legislation provide specific examples of what constitutes family and domestic violence and, if so, should these examples include:
   a. examples of the conduct referred to 1(a)–(c) above and, if so, what;
   b. threatening to commit suicide or self-harm with intent to torment, intimidate or frighten the person; unauthorised surveillance, and, if so, what meaning should the definition attribute to unauthorised surveillance; and/or
   c. any other examples of conduct which is to be included or excluded?
3. Are there any other forms of behaviour that should be included or excluded in the definition of family and domestic violence or included or excluded in a list of examples of family and domestic violence?
4. Should the *Restraining Orders Act 1997* (WA) provide for a separate definition of emotionally abusive conduct and, if so:
   a. what meaning should the definition attribute to such conduct;
   b. must it be ongoing; and
   c. should the definition include a non-exhaustive list of examples of behaviour that may constitute such abuse?
5. Should the definition of family and domestic violence include exposing a child to family and domestic violence?

Family and domestic relationship

Section 4 of the *Restraining Orders Act* defines a 'family and domestic relationship' to mean a relationship between two persons—

(a) who are, or were, married to each other;
(b) who are, or were, in a de facto relationship with each other;
(c) who are, or were, related to each other;
(d) one of whom is a child who —
   (i) ordinarily resides, or resided, with the other person; or
   (ii) regularly resides or stays, or resided or stayed, with the other person;
(e) one of whom is, or was, a child of whom the other person is a guardian; or
(f) who have, or had, an intimate personal relationship, or other personal relationship, with each other.

43. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.205].
44. Ibid, Recommendation 5-1 (emphasis added).

During consultations for this reference it was argued that the definition of a family and domestic relationship should not be changed otherwise it may fail to capture different cultural concepts of family such as Aboriginal kinship groups. It was also discussed that, although family and domestic violence committed between intimate partners or former partners is most commonly associated with high risk, there are cases of serious family and domestic violence committed against elderly relatives, towards or by carers of disabled persons and by adolescents towards their parents. On the other hand, the Western Australia Police explained that for their purposes the definition is too broad because it potentially applies to one-off incidents between two people who happen to be related. The Family Violence State Coordination Unit advised that they are in the process of revising the definition of family and domestic violence for internal purposes but this will not impact upon the quality of the initial response to any incident.[45] The Commission understands that agencies may need to adjust definitions to align with the particular purpose of a policy. For example, during consultations with the Family and Domestic Violence Unit of the Department for Child Protection and Family Support it was acknowledged that the Western Australian *Strategic Plan* focuses on responding to intimate partner violence 'which is characterised by an imbalance of power and a pattern of behaviours which are used consciously by one person to control another'. It was explained that this is deliberate because, in terms of integrated service delivery, the definition of family and domestic violence under the *Restraining Orders Act* is too broad. For example, the co-located Family and Domestic Violence Response Teams need to respond to high-risk cases, and women (and children) experiencing domestic violence at the hands of their partners or ex-partners constitute the cohort most at risk.[46]

A number of people consulted also questioned whether the current definition of family and domestic relationship would apply to an ex-partner of someone's current partner. It was suggested that situations might arise where an ex-partner is behaving in a manner that would constitute family and domestic violence towards their previous partner as well as towards that person's current partner. It is the new partner that is outside the definition of family and domestic relationship. In *Seah v MacIntyre*[47] the applicant for the violence restraining order was a woman's current de facto partner and the respondent was her former de facto partner. It was held that while both the applicant and the respondent were each in a family and domestic relationship with the woman, they were not in a family and domestic relationship with each other.[48] Although the Commission is mindful of further expanding the already broad definition of family and domestic relationship, it can see no reason why this type of relationship should be excluded when other relationships such as a relative of a person's former spouse or former de factor partner are included.[49]

PROPOSAL 9

That the definition of a family and domestic relationship under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be expanded to include the former spouse or former de facto partner of a person's current spouse or current de facto partner.

CRITERIA FOR GRANTING VIOLENCE RESTRAINING ORDERS

In *McKenzie v Picken*[50] (which dealt with the *Restraining Orders Act* before it was amended in 2004) it was stated that:

> It is trite to say that a violence restraining order is not to be made lightly. It stigmatises the respondent as a violent person from whom another person or persons need to be protected by the court; and the restraints that may be imposed can significantly curtail the respondent's ordinary freedoms.[51]

In *Walsh v Baron*[52] it was commented that the Supreme Court had not yet ruled on the effect of the 2004 amendments. Staude DCJ stated that the inclusion of an act of abuse (which in turn includes an act of family and domestic violence) means that 'actual or apprehended violence (in the ordinary sense of the exercise of physical force to cause injury or damage) is no longer a necessary consideration'.[53]

> Even so, a [violence restraining order] brands a person on whom it is imposed as an abusive person from whom another requires the protection of the court and may significantly curtail that

45. Family Violence State Coordination Unit, Western Australia Police, consultation (29 August 2013).
46. Family and Domestic Violence Unit, Department for Child Protection and Family Support, consultation (5 September 2013).
47. [2010] WADC 186.
48. Ibid [7].
49. See definition of 'related' in s 4(2) of the *Restraining Orders Act 1997* (WA).
50. [2002] WASCA 113.
51. Ibid [34] (Anderson J).
52. [2012] WADC 165.
53. Ibid [35].

person's personal freedom. The consequences of breach may be dire. For these reasons it is still the law, in my opinion, that a VRO should not be granted lightly.[54]

Grounds for making a violence restraining order

The grounds for a violence restraining order are set out in s 11A of the *Restraining Orders Act* which provides that a court may make a violence restraining order if it is satisfied (on the balance of probabilities) that –

(a) the respondent has committed an act of abuse against a person seeking to be protected and the respondent is likely again to commit such an act against that person; or

(b) a person seeking to be protected, or a person who has applied for the order on behalf of that person, reasonably fears that the respondent will commit an act of abuse against the person seeking to be protected,

and that making a violence restraining order is appropriate in the circumstances.

In the context of family and domestic violence, this means that there are two alternatives. The first is that the applicant has to establish a past act of family and domestic violence and that an act of family and domestic violence is likely to be repeated. The second is that the applicant reasonably fears that the respondent will commit an act of family and domestic violence in the future. The inclusion of the word 'reasonably' imports an objective assessment of the applicant's fear. In practice this assessment would often be made by reference to evidence of past behaviour.[55] In both instances, there is an overriding criterion – that the making of a violence restraining order is appropriate in the circumstances. If a court is satisfied of either of the abovementioned grounds it may, nevertheless, determine that a violence restraining order is not appropriate in the circumstances. It was suggested during consultations that this proviso allows the personal views of some judicial officers about violence restraining orders and family and domestic violence to negatively impact the decision-making process.[56]

The grounds for making violence restraining orders in other jurisdictions vary; some jurisdictions require satisfaction that there has been past family and domestic violence coupled with a likelihood of future violence.[57] Other jurisdictions require that the applicant reasonably fears future family and domestic violence.[58] Western Australia currently incorporates both tests. The ALRC/NSWLRC discussed the different approaches. Sole reliance on past family and domestic violence was considered inappropriate because victims should not have to wait until family and domestic violence takes place before seeking protection. It was explained that consideration of the likelihood of future violence is important because the function of family violence protection legislation is to provide future protection. Yet, some victims may have difficulty in establishing evidence to support the likelihood of future violence because there may have been a long period since the last incident occurred (eg, where the perpetrator has been in prison or has been complying with a previously imposed restraining order). Additionally, some decision-makers may not appreciate the risk of heightened violence upon separation and consider that because the parties are no longer cohabitating or in contact with each other the risk of future violence is minimised. It was also argued that a test that requires proof of subjective fear on the part of the applicant (even if coupled with an objective assessment of that fear) is inappropriate because some victims of family and domestic violence may not express fear (eg, they may have concerns about

54. Ibid [36].

55. See Wilcox K, 'Recent Innovations in Australian Protection Order Law: A comparative discussion' (2010) *Australian Domestic and Family Violence Clearinghouse,* Topic Paper No. 19, 9–10.

56. It was also suggested in a written submission to the Commission that the grounds for making a violence restraining order should be amended to that the respondent has committed an act of abuse and there are or are likely to be ongoing family law proceedings between the parties: Helen Muhling, submission (26 September 2013). The Commission does not consider that the grounds for making a violence restraining order should be this specific and is of the view that the inclusion of guiding principles in legislation will assist in increasing understanding that separation may be the most dangerous time for victims of family and domestic violence.

57. For example, s 74(1) of the *Family Violence Protection Act 2008* (Vic) provides that the court may make a final order if the court 'is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again'. Section 37 of the *Domestic and Family Violence Protection Act 2012* (Qld) does not explicitly refer to the likelihood of future violence. It provides that a court can make a protection order if satisfied that the respondent has committed domestic violence against the applicant and the protection order 'is necessary or desirable to protect' the applicant from domestic violence.

58. For example, s 18 of the *Domestic and Family Violence Act* (NT) provides that a domestic violence order can only be made if the issuing authority is 'satisfied there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant'. The 'note' to this section explains that because of the objective nature of the test, the authority may be satisfied even if the protected person denies or does not give evidence about fearing the commission of domestic violence. Section 6 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that the grounds for issuing an intervention order are that 'it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person' and 'the issuing of the order is appropriate in the circumstances'.

retaliation[59]) or may be reluctant to admit fear (eg, male victims).[60] The ALRC/NSWLRC concluded that a dual approach is the best option because it 'provides broad coverage for the protection of persons who have experienced or are at risk of family violence'.[61] It was recommended that the grounds for obtaining a protection order under state and territory family violence legislation should be either that the 'person seeking protection has reasonable grounds to fear family violence' or 'the person he or she is seeking protection from has used family violence and is likely to do so again'.

While Western Australia currently adopts a dual approach, the wording of the second limb of s 11A appears to import a subjective and an objective assessment of fear on the part of the applicant. The Commission prefers the wording recommended by the ALRC/NSWLRC and proposes that s 11A be amended accordingly. It is also noted that the grounds recommended by the ALRC/NSWLRC did not include an additional requirement that the decision-maker be satisfied that an order is appropriate in the circumstances. The Commission seeks submissions about whether this condition should be removed from the criteria.

PROPOSAL 10

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that the grounds for making a violence restraining order are:

a. the respondent has committed family and domestic violence against the person seeking to be protected and the respondent is likely to again commit family and domestic violence against the person; or

b. a person seeking to be protected, or a person who has applied for an order on behalf of that person, has reasonable grounds to apprehend that the respondent will commit family and domestic violence against the person seeking to be protected.

59. It was mentioned during consultations that some victims of family and domestic violence are so conditioned to the violence that they may not themselves acknowledge fear.
60. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [7.122]–[7.136].
61. Ibid [7.136], Recommendation 7–5.

QUESTION 5

Should the additional requirement, under s 11A of the *Restraining Orders Act 1997* (WA), that the court is satisfied that a violence restraining order is appropriate in the circumstances be removed from the grounds for making a violence restraining order?

Grounds where children are exposed to family and domestic violence

Section 11B of the *Restraining Orders Act* provides additional grounds for when a violence restraining order may be made for the benefit of a child.

> A violence restraining order may be made for the benefit of a child if the court is satisfied that —
>
> (a) the child has been exposed to an act of family and domestic violence committed by or against a person with whom the child is in a family and domestic relationship and the child is likely again to be exposed to such an act; or
>
> (b) the applicant, the child or a person with whom the child is in a family and domestic relationship reasonably fears that the child will be exposed to an act of family and domestic violence committed by or against a person with whom the child is in a family and domestic relationship,
>
> and that making a violence restraining order is appropriate in the circumstances.

Section 11B was included in the legislation in 2004 in recognition of the devastating impact upon children from being exposed to family and domestic violence.[62] In a recent literature review it was observed that more than one million children in Australia are affected by family and domestic violence and almost one quarter of children surveyed about their experience of family and domestic violence reported 'witnessing physical domestic violence against their mother'.[63] It was also noted that the research demonstrates that 'children who are affected by domestic violence experience significant negative

62. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 3305 (Mr Jim McGinty). It is noted that in the recent statutory review of the *Children and Community Services Act 2004* (WA) it was recommended that exposure to family and domestic violence should be included within the definition of emotional abuse (which is a ground for finding that a child is in need of protection): Western Australia Government, *Report of the Legislative Review of the Children and Community Services Act 2004 (WA)* (2012) Recommendation 6.
63. The Australian Domestic & Family Violence Clearinghouse, University of New South Wales, *The Impact of Domestic Violence on Children: A literature review* (2011) 1, 3.

impacts to their physical, psychological, emotional, social, behavioural, developmental and cognitive well-being and functioning'.[64]

The term 'exposed' in relation to an act of abuse is defined in s 3 of the *Restraining Orders Act* to include seeing or hearing the act of abuse or witnessing physical injuries from the act of abuse. The corresponding definitions in other jurisdictions are broader. For example, under the *Family Court Act 1997* (WA), a child is exposed to family violence 'if the child sees or hears family violence or otherwise experiences the effects of family violence'.[65] Section 9A(4) of that Act provides a non-exhaustive list of examples that may constitute a child being exposed to family violence:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.[66]

During consultations lawyers who represent victims expressed the view that in their experience, when there is evidence of a child having been exposed to family and domestic violence, violence restraining orders are only made in favour of the child in approximately 20% of cases. Further, it was contended that violence restraining orders are typically only made in favour of a child where the child has been directly assaulted or is in very close proximity to the victim (eg, where the victim is holding the child at the time of an assault). The apparent reluctance to impose orders for the protection of children was ascribed to the perceived preference on the part of magistrates for the Family Court of Western Australia to deal with children's issues as well as a lack of understanding about the impact of exposure to family and domestic violence for children.

A violence restraining order can be made to protect a child either in response to an application or pursuant to s 68 of the *Restraining Orders Act* which provides that a court may extend an order to 'operate for the benefit of a person named in the order in addition to the person protected by the order'. The Commission sought data in relation to the number of violence restraining orders extended to other persons as well as a breakdown of the categories of those persons. This data is unavailable because it is not recorded electronically.[67] However, the data provided shows that in 2012 there were 1,145 violence restraining orders granted where the protected person was under the age of 18 years. This constituted 12% of the total orders made.[68] The Commission is not aware of the proportion of these orders that were made on the basis that the child was exposed to family and domestic violence in contrast to being directly subjected to family and domestic violence. The Commission has formed the view that an expanded definition of exposure to family and domestic violence is a sensible way to address any lack of awareness of the effects on children from being exposed to family and domestic violence.

PROPOSAL 11

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that exposure to family and domestic violence means seeing, hearing or otherwise experiencing the effects of family and domestic violence, and a non-exhaustive list of examples that constitute exposure to family and domestic violence be included in the legislation.

64. Ibid 4. See also Boshier P & Wademan J, 'Domestic Violence and the Impact on Children's Lives' (paper presented to the 6th World Congress on Family Law and Children's Rights, Sydney, 18–20 March 2013).
65. *Family Court Act 1997* (WA) s 9A(3); an equivalent provision is found in s 4AB(3) of the *Family Law Act 1975* (Cth).
66. See also s 5(1)(b) of the *Family Violence Protection Act 2008* (Vic) which is in the same terms. Section 10 of the *Domestic and Family Violence Protection Act 2012* (Qld) is also similar but adds further examples (ie, overhearing repeated derogatory taunts, experiencing financial stress from economic abuse and observing bruising or other injuries).
67. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 September 2013).
68. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.

Interim violence restraining orders

Currently in Western Australia, the grounds for making an interim violence restraining order are the same as the grounds for making a final violence restraining order. The primary purpose of an interim order is to provide immediate protection to a victim of family and domestic violence before a final decision can be made in relation to the violence restraining order application. Additionally, by enabling persons to apply for an interim order on an ex parte basis the applicant can be protected before the respondent is provided with notice of the application (at which time the risk to their safety may be significantly heightened). However, the ex parte interim order process is the stage at which the restraining order system is most open to abuse. Based on the untested evidence of the applicant, respondents may be forced to leave their home, be denied contact with their children, and be otherwise restrained from ordinary lawful activities. It is at this stage of the legal process where the greatest tension arises between the need to protect victims from family and domestic violence and the need to ensure that the legal response is fair. Later in this chapter the Commission makes proposals to ensure that more reliable and useful information is available to courts in relation to both interim and final orders. At this stage, it is necessary to consider whether any changes to the grounds for making an interim order are warranted.

In some jurisdictions the grounds for making an interim order are different to the grounds for making a final order. For example, as noted above, in Victoria the grounds for making a final order are that the respondent has committed family violence and is likely to continue to do so or to do so again. In contrast, an interim order may be made if the court is satisfied that pending the determination of the application for a final order an interim order is necessary to 'ensure the safety of the affected family member' or 'preserve any property of the affected family member' or to protect a child who has been subjected to family violence by the respondent. An interim order can also be made if a family violence safety notice[69] has been issued and the court is satisfied that there are 'no circumstances that would justify discontinuing the protection of the person until a final decision about the application'.[70] Likewise, in the Australian Capital Territory an interim order may be made if the court is satisfied that it is necessary to make an interim order to ensure the safety of the applicant or to prevent substantial damage to property of the applicant until the final order is decided.[71] It is questionable whether the grounds for interim orders in these jurisdictions are easier or more difficult to establish than the grounds for a final order.[72]

As evident from the data referred to in the introduction to this section, there are significantly fewer final violence restraining orders made in comparison to interim violence restraining orders in Western Australia. In 2012 interim orders were made in 61% of applications for violence restraining orders whereas final orders were made in only 10% of cases. There are a number of reasons why an interim order may not be converted into a final order: the applicant may decide not to proceed with the application for a final order or not attend the final order hearing; the applicant may agree to withdraw the application upon an undertaking being entered into by the respondent; or the court may dismiss the application because it is not satisfied of the grounds for making a violence restraining order after hearing all of the evidence from both parties. Nonetheless, given the discrepancy between the number of interim orders made in contrast to the number of final orders made, the question arises as to whether interim orders are being made too frequently. On the other hand, the Commission is mindful of its overriding principle that protection of victims of family and domestic violence (and their children) is paramount. Therefore, the Commission seeks submissions about whether the grounds for making an interim violence restraining order should be amended to adopt a different test to that applicable to the making of a final violence restraining order.

69. Family violence safety notices are applied for by police officers responding to an incident involving family violence and can be issued by a police officer of the rank of sergeant or above. While there are a number of preconditions to applying for the issuance of a notice, the main ground for issuing a notice is that the police officer believes on reasonable grounds that the issuing of the notice is necessary to ensure the safety of the affected family member or to preserve any property of the affected family member or to protect a child: see *Family Violence Protection Act 2008* (Vic) s 26.

70. *Family Violence Protection Act 2008* (Vic) s 53.

71. *Domestic Violence and Protection Orders Act 2008* (ACT) s 29.

72. It has been observed that in Victoria 'there is a less onerous test for interim orders, reflecting the greater urgency required in these orders, hence the need for a speedier establishment of the grounds on which the order is based: Wilcox K, 'Recent Innovations in Australian Protection Order Law – A comparative discussion' (2010) *Australian Domestic & Family Violence Clearinghouse,* Topic Paper No. 19, 14. However, given the broad definition of family violence is also arguable that a requirement to establish that an interim order is needed to ensure the safety of a person or to protect property is a stricter test than establishing whether that family violence has occurred and is likely to occur in the future.

QUESTION 6

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) specify different grounds for making an interim violence restraining order than making a final violence restraining order and, if so, what grounds should be specified?

POLICE ORDERS

Police-issued restraining orders ('police orders') were introduced with the 2004 reforms to the *Restraining Orders Act* as an alternative process to telephone applications for the emergency protection of victims of family and domestic violence. Originally, the legislation provided for two types of police orders: a 24-hour order or a 72-hour order. The latter could not be issued without the consent of the person who would be protected by the order.[73]

In the 2008 review of the *Restraining Orders Act* it was observed that police orders are sometimes issued 'as an end in themselves' (ie, to provide immediate and temporary protection) or to provide protection until a victim is able to apply for a violence restraining order in court. It concluded that the provision for police orders should be retained but recommended that the consent of the person to be protected should not be required at all (which in effect would replace the two types of orders with one up-to-72-hour order).[74] Amendments to implement this recommendation became effective in May 2012.[75]

Data provided by the Western Australia Police indicate that since police orders were introduced in 2004 there has been a steady increase in the numbers issued. In 2005 there were a total of 5,394 police orders made and by 2012 this figure had reached 14,923. From 1 January 2013 until 31 October 2013 there have been 15,000 police orders issued. However, since the 2012 amendments discussed above, there has been a considerable shift in the proportion of police orders being issued for 72 hours compared to 24 hours. In 2011, 24-hour police orders represented 82% of the total police orders issued whereas in 2012, 24-hour police orders represented 26% of the total police orders issued. Up to the end of October 2013 only four 24-hour police orders have been issued out of a total of 15,000 police orders.[76]

Criteria for making a police order

A police officer may make a police order if he or she reasonably believes that there are grounds for a violence restraining order and it would not be practical for an application for a violence restraining order to be made in person because of the time or location of the relevant behaviour, because the order should be made urgently, or because there is some other reason to justify making an order urgently without requiring the applicant to appear in person before a court and that a police order is 'necessary to ensure the safety of a person'.[77] However, the power to make a police order is contingent on the existence of grounds that relate to an act of family and domestic violence so they are not imposed outside the context of a family and domestic relationship. As explained above, a police order does not require the consent of the person to be protected.

Section 30B of the *Restraining Orders Act* sets out the factors to be considered by a police officer in considering whether to make a police order and when considering the terms of a police order. Apart from being specific to family and domestic violence, the matters are similar, but not identical, to the matters that are required to be considered by a court in relation to violence restraining orders under s 12.[78] Significantly, unlike s 12(2) (which applies to courts), there is no provision in respect to police orders that requires the police to give primary consideration to the need to protect a person from acts of family and domestic violence; the need to prevent behaviour that could reasonably be expected to cause fear that a person will have committed against him or her an act of family and domestic violence; the need to ensure that children are not exposed to acts of family and domestic violence; and the wellbeing of children likely to be affected by the behaviour of the persons involved or the operation of a proposed order.

The most significant complaint received by the Commission (from lawyers and victim advocates) in relation to police orders concerns the making of police orders against victims of family and domestic

73. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 10–11.
74. Ibid 11–18.
75. *Restraining Orders Amendment Act 2011* (WA).
76. Data provided by the Business Intelligence Office, Strategy and Performance Directorate, Western Australia, correspondence (20 November 2013).
77. *Restraining Orders Act 1997* (WA) s 30A.
78. Factors that are included for courts when considering whether to make a violence restraining order, but are not included for police in relation to police orders, include the existence of Family Orders, the past history of the parties in relation to applications for violence restraining orders, the criminal record of the respondent and any current legal proceedings between the parties.

violence. The Commission was told that victims have been made subject to police orders because, in the particular circumstances, it is easier for the victim to find alternative temporary accommodation. This problem was acknowledged by the Western Australia Police Family Violence State Coordination Unit during consultations. It was explained that some police attending family and domestic violence incidents believe that each and every box on the police order form must be ticked (which includes that the person bound shall not enter or remain on specified premises) and they are endeavouring to re-educate police officers that a police order can be made without necessarily requiring the person bound by the order to leave the premises.

It was also suggested by lawyers and advocates that police orders may be issued against the victim where the parties are from a culturally and linguistically diverse background and the perpetrator has a greater command of the English language than the victim (and therefore the attending officer only hears one version of the incident). It was emphasised that where a woman from a culturally and linguistically diverse background is categorised as the person bound by the police order this has potential implications for immigration status if that woman has claimed that she is a victim of family and domestic violence.

The Commission was also told that police orders may sometimes be too readily issued as a means of controlling a verbal family dispute where no risk to safety is evident. Lawyers in Kununurra mentioned a case where police orders were issued against everyone involved in a dispute and another where a police order was issued against an Aboriginal man who had a verbal dispute with his sister in relation to access to alcohol. There was a general concern by lawyers in the Kimberley that police orders may be being used too readily. It is noted that in 2012 the Kimberley had the highest number of police orders issued compared to any other regional police district. Further, police orders represented 80% of the total violence restraining orders made in the Kimberley which is significantly higher than the proportions for the state as a whole (61% of all violence restraining orders made in 2012 were police orders). There are of course many possible reasons to explain this data – victims of family and domestic violence in the Kimberley may be more reluctant or less able to access the court system to obtain a court-issued violence restraining order. Nonetheless, given the serious consequences of breaching a police order, it is important that they are not issued too frequently and in situations where there is no risk to the safety of any individual.

The Commission notes that the Western Australia Police policy in relation to family and domestic violence does not support the issuance of police orders against the person who is the victim of the violence or where the order is not warranted to ensure the safety of the person protected. The policy requires police to identify 'the predominant aggressor and/or victim', and to endeavour to interview victims separately from perpetrators because 'their presence can intimidate and silence' the victim and because 'victims may not display obvious signs of fear' and they 'may find it difficult to assert themselves at the scene'). It further advises officers that, subject to an assessment of risk (eg, in some cases it will be necessary to relocate a victim to a refuge or other safe place), it is 'preferable that victims and children remain in the premises and perpetrators are removed'; and that if a police order is issued, the person protected by the order is to be 'recorded as the victim' and the incident report 'must detail sufficient grounds for the issuance' of the order.[79]

Nonetheless, police orders are not subject to judicial oversight and have significant potential consequences for the person bound including being required to leave residential premises and being subsequently dealt with under the criminal law for breaching the order. The ALRC/NSWLRC expressed its preference for all restraining orders to be issued by a judicial officer.[80] It recommended that police-issued orders should only be made where it is not reasonable or practicable for the case to be heard immediately before a court or for police to apply to a judicial officer for an order by telephone (or other electronic communication).[81] It also recommended that police-issued orders should 'act as an application to the court for a protection order and a summons for the person against whom the notice is issued to appear before the court within a short specified time'.[82]

This is the position in Victoria where family violence safety notices can be issued by a police officer of or above the rank of sergeant (upon an application by the officer attending an incident) if there are reasonable grounds for believing that, until an application for family violence intervention order can be decided, the notice is necessary to ensure

79. Commissioner's Operations and Procedures (COPS) Manual, DV-1.1.4. The Western Australia Police policy also states that if an officer 'does not require the use of a term or condition contained within the Police Order they are to place a line through that term or condition and initial such change': COPS Manual,, RO-1.3.1.
80. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [9.44].
81. Ibid, Recommendation 9–1.
82. Ibid.

the safety of the victim, preserve any property of the victim or protect a child.[83] The family violence safety notice is taken to be an application by the police officer who applied for it for a family violence intervention order and a summons for the respondent to attend a first mention date for the application.[84] Generally, the first mention date must be within 120 hours after the notice is issued.

However, the ALRC/NSWLRC noted that in Western Australia police orders had been useful in Aboriginal communities and remote areas for victims who needed temporary protection but were not ready or able to leave the relationship.[85] The utility of police orders as a 'cooling off' mechanism could be undermined if the order constituted an application for a violence restraining order and a summons for the person bound to appear in court. The Commission was also told repeatedly in the Kimberley that the majority of respondents seldom appear in court to object to applications for violence restraining orders. If a police order represented a summons for the person bound to appear in court there is a strong likelihood that the person would fail to appear. The failure to appear is not necessarily reflective of an acceptance of the alleged family and domestic violence but rather a lack of understanding of the required processes and consequences of the order. It is noted also that in the review of the *Restraining Orders Act* in 2008 the option of police issued interim orders (that would extend until the final order was determined) was rejected.[86]

The Commission is of the view that the specific issue in relation to police orders being made against a victim because the victim has available alternative accommodation can be rectified by more appropriate and ongoing training as proposed earlier in this chapter. The Commission remains undecided about whether the criteria for police orders should be strengthened or whether police orders could usefully serve as an application for a violence restraining order and therefore seeks submissions about these issues.

QUESTION 7

1. Should any changes be made to the criteria for making a police order under the *Restraining Orders Act 1997* (WA)?
2. Should a police order serve as an application for a violence restraining order and, if so, should the order only serve as an application if the person protected consents?

Explanation of police orders

Section 30E(3) of the *Restraining Orders Act* provides that a police officer is to explain to the person bound by the police order and the person for whose benefit the order is made—

(a) the purpose, duration, terms and effects of the order; and

(b) the consequences that may follow if the person who is bound by the order contravenes the order; and

(c) that counselling and support service may be of assistance, and where appropriate, the police officer is to refer the person to specific services.

Section 30E(4) provides that:

> If a person to whom an explanation is to be given under subsection (3) does not readily understand English, or the police officer is not satisfied that the person understood the explanation, the officer is, as far as practicable, to arrange for someone else to give the explanation to the person in a way that the person can understand.[87]

Lawyers and advocates consulted by the Commission mentioned a lack of use of interpreters when providing this explanation and that there are issues with the level of understanding about the terms and consequences of police orders. In contrast, the Western Australia Family Violence State Coordination Unit advised that it was not aware of any issues in relation to people from culturally and linguistically diverse backgrounds understanding the nature and conditions of a police order.

In addition, a number of lawyers in the Kimberley expressed serious concern about the issuance of police orders to people who are intoxicated and explained that they often see on the police order

83. *Family Violence Protection Act 2008* (Vic) ss 24 & 26. There are other ancillary preconditions to issuing the notice that are not relevant to the present discussion.
84. *Family Violence Protection Act 2008* (Vic) s 31.
85. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [9.29].
86. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 31.
87. This provision is replicated in the Western Australia Police restraining order policy: COPS Manual, RO-1.3.1.

documentation the notation 'RTS' which means 'refused to sign'. There was general concern about the level of understanding of what a police order means and there was a view that few people appreciate that a breach of a police order may expose the person bound to 'third-strike' sentencing laws in relation to breaching restraining orders.

The Commission is of the view that it is imperative that police orders are properly explained to both parties, in particular the person bound who is liable to criminal sanctions for failing to comply with the order. Where the person bound does not understand English sufficiently, a trained interpreter should be used wherever possible. The current provision makes no reference to the use of interpreters and only requires 'that someone else' provides the explanation. This provision supports the reliance on family members and friends providing the explanation which is not, in the Commission's view, the ideal option. In its report on the coronial system the Commission observed that the Commonwealth Ombudsman has recommended against using family members or friends as interpreters because:

> [T]hey may lack the specialist terminology required to accurately interpret what is being said or be too emotionally involved to interpret impartially. There is also a risk that they may deliberately or inadvertently block out parts of the message to the client or change the client's message.[88]

The use of family or friends is especially concerning in the context of family and domestic violence because the family member who has been asked to provide the explanation may fear retaliation and/or family and domestic violence. While the Commission appreciates that trained interpreters may not always be available, it believes that the legislation should stipulate that a trained interpreter should be used wherever practicable.[89]

PROPOSAL 12

That s 30E(4) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person to whom an explanation is to be given in relation to a police order does not readily understand English, or the police officer is not satisfied that the person understood the explanation, the officer is, as far as practicable, to arrange for a trained interpreter to provide the explanation.[90] If, after reasonable inquiries have been made by the police officer, a trained interpreter is not available another person may give the explanation to the person in a way that the person can understand.

Duration of police orders

Police orders remain in force for up to 72 hours after they have been served.[91] A police officer can specify a period shorter than 72 hours if in the opinion of the officer a shorter period would be sufficient to enable an application for a violence restraining order to be made to a court.[92] A police order will lapse if it is not served within 24 hours of it being made.[93]

During consultations a number of complaints were made about the duration of police orders, in particular that there were too many orders being made for 24 hours (and, in some instances, it was stated that police orders have been made for even shorter periods such as 12 hours). It was argued by victim advocates that a period of 24 hours or less is not a sufficient period of time to enable a victim to access support services and lodge an application for a violence restraining order. However, the data received from the Western Australia Police indicates that the frequency in which 24-hour police orders are made has declined substantially since 2012 and for 2013 the numbers of 24-hour orders are insignificant. In the absence of further evidence that there continues to be a problem in relation to the duration of police orders, the Commission does not make any proposal in this regard.

Service of police orders

During consultations, the Western Australia Police Family Violence State Coordination Unit referred the Commission specifically to s 30E(1) of the *Restraining Orders Act,* which provides that a police

88. Commonwealth Ombudsman, *Use of Interpreters* (March 2009) 16. The Kimberley Interpreting Service also warns against using family or friends as interpreters in Aboriginal language because untrained interpreters can make mistakes: see further discussion LRCWA, *Review of Coronial Practice in Western Australia*, Final Report, Project No 100 (2012) 118.

89. The Western Australian Language Services Policy provides that professional interpreters should be used in any situation where people are being informed of their legal right or obligations: Office of Multicultural Interests, *Western Australian Language Services Policy* (2008) 9.

90. It is suggested that telephone interpreting services can be utilised for this purpose.

91. *Restraining Orders Act 1997* (WA) s 30F(1).

92. *Restraining Orders Act 1997* (WA) s 30F(2).

93. *Restraining Orders Act 1997* (WA) s 30F(1).

officer who makes a police order is 'to prepare and serve the order'. It is their view that this provision means that the same officer who makes the order must serve the order. Because the time permitted to serve a police order is limited to 24 hours this provision causes practical problems because, if the person bound by the order is not present at the time the order is made, it is unlikely that the same police officer will remain on duty for long enough to enable service of the order to be effected. The Western Australia Police policy also provides that it is not advisable for a police officer to issue a police order if the person bound by the order cannot be located or served almost immediately because of the limited service period and because the member who prepares the order is the officer who must serve and explain the order.[94] Obviously, if the person bound by the order is present when the order is made it will invariably be the same officer who serves and explains the order; however, the Commission can see no reason why the police officer who makes the order should be the only officer who is permitted to serve and explain the order. There may be circumstances where it is necessary or appropriate for a different officer to serve and explain the order (eg, the person bound has temporarily evaded police or is otherwise unavailable). Therefore, the Commission proposes that s 30E(1) be amended.

PROPOSAL 13

That s 30E(1) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a police officer who makes a police order is to prepare and serve, or arrange for another police officer to serve, the order.

PROCESSES

Telephone applications

Division 2 of the *Restraining Orders Act* provides for applications for violence restraining orders to be made to a magistrate[95] by telephone.[96] The purpose of this Division is to enable violence restraining orders to be obtained in urgent cases where access to a court is not possible.[97] A telephone application for a violence restraining order can only be made by a police officer[98] on behalf of the person seeking to be protected or by the person seeking to be protected[99] if that person is first introduced to the magistrate by a police officer.

A police officer is only permitted to make a telephone application or introduce a person to an authorised magistrate if that officer reasonably believes that the grounds for a telephone application are satisfied. Those grounds are contained in ss 20(1)(a) and (b) and provide that the authorised magistrate must be satisfied that it would not be practical for the application to be heard in person because of 'the time when, or the location at which, the behaviour complained of occurred, is occurring or is likely to occur'; or 'the urgency with which the order is required'. Alternatively, the magistrate may hear the application if satisfied that 'there is some other factor that justifies the making of a violence restraining order as a matter of urgency and without requiring the applicant to appear in person before a court'. If the authorised magistrate is not satisfied of the abovementioned criteria the application is to be dismissed but this does not prevent an application for a violence restraining order being made in person in relation to the same facts.[100] Upon hearing a telephone application the authorised magistrate is to make a telephone order, dismiss the application or adjourn the matter to a mention hearing. If a telephone order is made that is for longer than 72 hours it is classified as an interim violence restraining order.[101]

Police orders were introduced in 2004 to overcome practical issues encountered in relation to telephone applications and because of their underuse. During parliamentary debates it was observed that telephone applications are 'time consuming and unwieldy' and that:

> The telephone system requires police at the scene to contact police operations at Midland. A senior officer from Midland then has to contact a

94. COPS Manual, RO-1.2.
95. Telephone applications can only be heard by magistrates authorised to do so by the Chief Magistrate: *Restraining Orders Act 1997* (WA) s 17.
96. Section 21(1) of the *Restraining Orders Act 1997* (WA) stipulates that a telephone application may be 'conducted by telephone, fax, radio, video conference, electronic mail or another similar method, or any combination of such methods, as the authorised magistrate considers appropriate'.
97. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 10.
98. Section 18 of the *Restraining Orders Act 1997* (WA) provides that a telephone application can be made by an authorised person and an authorised person is defined in s 1 of the *Restraining Orders Act 1997* as a 'police officer or a person who is, or who is in a class of persons that is, prescribed for the purpose of this definition'. There are no prescribed persons for the purposes of this provision.
99. Or a parent or guardian of a child or a child welfare officer on behalf of a child; or a guardian under the *Guardianship and Administration Act 1990* (WA) on behalf of a person if the person making the application is first introduced to an authorised magistrate by a police officer.
100. *Restraining Orders Act 1997* (WA) s 20.
101. *Restraining Orders Act 1997* (WA) s 23.

magistrate to try to arrange the temporary order. This can take hours and, not surprisingly, police and victims of crime struggle to see the value of this process.[102]

Data provided by the Western Australia Police indicate that in 2004 a total of nine telephone restraining orders were made and since 2008 no more than two such orders have been made per year.[103] This data correlates closely to the data provided by the Department of the Attorney General which also shows that only one to two telephone orders are made each year. While the provisions in relation to telephone applications have clearly been superseded by the police order regime, it appears that they continue to be utilised on extremely rare occasions. Additionally, the Commission was informed that in regional locations it would be useful if victims could apply to a magistrate for a violence restraining order remotely to overcome transport difficulties and to avoid potentially coming into close contact with the respondent and/or family members in small town communities. For these reasons the Commission considers that the provisions dealing with telephone applications should remain in the legislation. However, it is arguable that the requirement for a police officer to first introduce the applicant to an authorised magistrate may be an unnecessary prerequisite to the use of the power. The current provisions envisage that this introduction could be facilitated by an authorised person but no persons have been authorised other than police. The Commission seeks submissions about whether it is desirable to include victim support workers (such as those who are employed by the Family Violence Service or Victims Support Service of the Department of the Attorney General as well as workers employed by particular non-government agencies) as authorised persons for the purpose of facilitating telephone applications for restraining orders.

QUESTION 8

Should additional persons such as victims support workers (eg, persons who are employed by the Family Violence Service or Victims Support Service of the Department of the Attorney General and workers employed by non-government agencies) be prescribed as authorised persons for the purpose of telephone applications under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders)?

102. Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 June 2004, 3305 (Hon Jim McGinty).

103. Data provided by the Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, correspondence (20 November 2013).

Application in person for a violence restraining order

Section 25(3) of the *Restraining Orders Act* provides that an in-person application for a violence restraining order is to be made in the prescribed form to:

(a) if the respondent is a child, the Children's Court; or

(b) if the respondent is not a child and the person seeking to be protected is a child, the Children's Court or the Magistrates Court; or

(c) otherwise, the Magistrates Court.

This section was amended in October 2013 as a consequence of the *Restraining Orders Amendment Act 2013* (WA). Previously, s 25(3) provided that if the respondent or the person seeking to be protected is a child the application must be lodged in the Children's Court. This provision created difficulties for victims of family and domestic violence who were often required to apply for a violence restraining order for themselves in the Magistrates Court and then, separately, apply for a violence restraining order for their children in the Children's Court.[104] The new provision enables an application to be filed in either the Magistrates Court or the Children's Court where the person seeking to be protected is a child (if a parent of the child is also applying for a violence restraining order, it is less traumatising and clearly

104. Although the Magistrates Court has the power to extend a violence restraining order in favour of another person (eg, a child of the person protected by the order) under s 68 of the *Restraining Orders Act 1997* (WA), the Commission was told that some magistrates held the view that because of the former wording of s 25(3) they could not do so in relation to a child because the matter must be heard by the Children's Court. During parliamentary debates it was stated that 'the government has become aware of a practice having developed among some magistrates of not utilising section 68, requiring a parent to make a separate application to the Children's Court of Western Australia for a violence restraining order to protect their children. Consequently, distressed parents need to attend two separate courts in order to gain protection for themselves and their children'. This was never intended by the legislation and is plainly an onerous and unnecessary burden for a parent already suffering from violent abuse: Western Australia, *Parliamentary Debates*, Legislative Council, 19 June 2013, 1727–1728 (Michael Mischin). The Commission was also informed by judicial officers in the Children's Court that prior to the October 2013 amendments, the practice of many registries in the Magistrates Court when faced with a parent who was seeking to file an application for a violence restraining order for his or her children was to advise the parent that the children's applications had to be filed in the Children's Court. Despite the amendments coming into effect on 4 October 2013 the Children's Court are still seeing separate applications. The Commission was advised that the Children's Court is endeavouring to liaise with the Magistrates Court to work out appropriate systems to ensure that all Magistrates Courts accept applications made on behalf of children where a parent is also applying for a violence restraining order.

more efficient if both applications can be heard at the same time).

The Commission has been informed that the general practice of most Magistrates Courts is to require separate application forms for parents and children. Section 68(1) of the *Restraining Orders Act* provides that when making a violence restraining order a 'court may extend the order to operate for the benefit of a person named in the order in addition to the person protected by the order'. This provision ostensibly does not require the second person to have lodged an application for a violence restraining order. While the recent amendments discussed above will serve to enable the Magistrates Court to make an order to protect a child, it remains questionable whether the court will continue to administratively require separate applications to be lodged before extending protection to a child. Lawyers who represent applicants advised that the completion of separate applications for each child can be onerous and time consuming. Although it is understood that separate applications may be desirable for statistical recording purposes, the Commission is of the view that s 68 of the *Restraining Orders Act* should make it clear that the power to extend an order to the benefit of a second named person is not contingent upon an application in the prescribed form being lodged. This will reduce unnecessary delays and administrative requirements. It is also important that accurate records of the frequency in which s 68 is used and the categories of persons who are covered by this provision are maintained so changes to current recording processes may be required.

PROPOSAL 14

That s 68(1) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when making a restraining order a court may extend the order to operate for the benefit of a person named in the order in addition to the person protected by the order and, further, that the power to extend the order for the benefit of a named person can be exercised without the named person having first lodged an application to the court in the prescribed form.

Who may apply for a violence restraining order

Pursuant to s 25(1) of the *Restraining Orders Act,* an application for a restraining order may be made by the person seeking to be protected or by a police officer on behalf of that person. Additionally, s 25(2) provides that, if the person seeking to be protected is a child, an application may *also* be made by a parent or guardian of the child or by a child welfare officer on behalf of the child. Likewise, if the person seeking to be protected is a person for whom a guardian has been appointed under the *Guardianship and Administration Act 1990* (WA), an application may be made by the guardian on behalf of that person.

Some confusion appears to exist among those consulted in relation to whether children are permitted to make an application for a violence restraining order. Some people consulted contended that children are not able to apply themselves and this can create problems in particular situations (eg, where a child aged 16 or 17 is experiencing family and domestic violence at the hands of a partner and that child's parents decline to apply for an order on behalf of the child). In contrast, others (including judicial officers from the Children's Court) contended that the legislation is clear and provides that a person seeking to be protected may apply for a violence restraining order irrespective of whether that person is an adult or a child. The Commission agrees with this interpretation because the provision for a parent or guardian or child welfare officer to apply on a child's behalf is in addition to the right for the person seeking to be protected to apply in their own right.

The Department for the Attorney General provided statistics in relation to the categories of persons who lodged applications for violence restraining orders. In 2012 there were a total of 14,145 applications lodged and of these 12,220 were lodged by the person seeking to be protected (86%); 1,667 applications were lodged by a parent or guardian of a child; 120 applications were lodged by a legal guardian; 75 applications were lodged by a police officer; 50 applications were lodged by a child welfare officer; and 23 applications were lodged by an unknown person.[105] Over the past five years the breakdown of the categories has been in similar proportions. It is noted that the number of applications made by a police officer peaked in 2005 (278) representing 2.5% of all applications compared to 75 applications in 2012 (0.5%). What is clear is that the vast majority of applications are lodged by the person seeking to be protected (with the next largest category being parents or guardians). Very few applications are made by police officers or child welfare officers.

105. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.

It is noted that the Western Australia Police policy provides in this regard that, if the police officer is satisfied that there has been or will be an act of family and domestic violence that constitutes a criminal offence or puts the safety of the person at risk, 'it will be incumbent on the member to make the violence restraining order application'.[106] The policy envisages that the police officer will either obtain a statement from the person seeking to be protected or, alternatively, an affidavit that can be filed in support of the application if the person seeking to be protected is unable to attend court due to illness, isolation or safety issues.[107]

In addition, s 62G of the *Restraining Orders Act* provides that a police officer is authorised to conduct proceedings on behalf of an applicant if requested to do so. This provision was inserted to remove doubt that existed about whether police prosecutors were authorised to conduct restraining order proceedings on behalf of non-police applicants.[108] Thus the potential role of police is twofold: a police officer may lodge a restraining order application on behalf of person seeking to be protected or a police officer may represent an applicant during the proceedings. Police do not undertake either of these roles frequently. It has been observed that police-assisted applications have a number of benefits including increasing the prospect that the applicant will continue with the application through to its completion; lessening the burden on the applicant (including preventing blame being levelled at the victim for initiating proceedings); and ensuring that all relevant evidence is before the court including information held by the police.[109]

The extent of involvement by police in the restraining order court process varies in other jurisdictions. It has been commented that in South Australia police assist in approximately 90% of restraining order applications.[110] As explained earlier in this section, the Victorian legislation provides for the issuance of a family violence safety notice which serves as an application for a family violence intervention order by the police officer. Additionally, in the absence of a family violence safety notice, a police officer may apply for a family violence intervention order on behalf of the person seeking to be protected.[111] Likewise, under the *Domestic and Family Violence Protection Act 2012* (Qld) a police officer may apply for a protection order or may issue a police protection notice (s 100). Pursuant to s 112 a 'police protection notice is taken to be an application for a protection order made by a police officer'.

During consultations with the Western Australia Police it was explained that applications for violence restraining orders are occasionally made by police but essentially applications are infrequent because of resourcing issues. It was further stated that victim support services are available to assist victims with their applications.[112] Additionally, not all applicants for violence restraining orders will be legally represented. The Commission understands that applicants in the Perth Magistrates Court will invariably have legal representation because there is an on-site lawyer from the Domestic Violence Legal Unit of Legal Aid WA. However, the availability of lawyers for applicants will vary across the outer metropolitan and regional courts. A refuge worker in Broome noted that some Aboriginal victims of family and domestic violence will not access legal services and are reluctant to explain their circumstances to non-Aboriginal lawyers. Legal Aid lawyers in Broome noted that it is rare for them to represent violence restraining order applicants and one reason is that there are often conflict of interest issues. Aboriginal Family Law Services will often act for victims. In contrast, Legal Aid Kununurra will frequently represent violence restraining order applicants if resources are available; where this is not possible or where a conflict of interest exists they will refer the person to another service.

Victims of family and domestic violence experience a number of barriers to initiating an application for a violence restraining order; in particular, fear of the process and fear of the repercussions from the perpetrator, as well as lack of understanding of the process. These issues are compounded where there are additional vulnerabilities such as disability, language and cultural barriers, and age. While the Commission is of the view that ideally police officers should be more actively and directly involved in the application process to assist victims of family and domestic violence it is appreciated that this may not be possible from a resourcing perspective. Therefore, there is a case for broadening the range of persons who may apply for a restraining order on behalf of a person seeking to be protected.

Section 45 of the *Family Violence Protection Act 2008* (Vic) provides that an application for a family

106. COPS Manual, RO-1.5.
107. Ibid.
108. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 27.
109. Ibid.
110. Ibid 30–31.
111. *Family Violence Protection Act 2008* (Vic) s 45.
112. Although Victim Support Service workers may not always be available. During the Commission's visit to Kununurra it was told that there had not been a victim support worker in the East Kimberley for some time although a new worker had recently been appointed and was undergoing training.

violence intervention order may be made by a person with the written consent of the person seeking to be protected (or if the person seeking to be protected is a child, with the written consent of a parent or guardian of the child). Under s 25(1) of the *Domestic and Family Violence Protection Act 2012* (Qld) an application for a protection order may be made by the 'person aggrieved', an authorised person for an aggrieved person or a police officer. An authorised person is defined generally as an 'adult authorised in writing by the aggrieved to appear on behalf of the aggrieved': s 25(2).

PROPOSAL 15

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that 'authorised persons' be permitted to make an application for a violence restraining order on behalf of a person seeking to be protected.

QUESTION 9

Should 'an authorised person' be defined as a person who has the written consent of the person seeking to be protected or should a range of persons be prescribed for this purpose (eg, Family Violence Service staff, Victim Support Service staff, victim advocates from non-government agencies)?

Service of violence restraining orders

Pursuant to s 55(1) of the *Restraining Orders Act* a restraining order is to be served personally on the respondent unless the registrar has authorised oral service.[113] The registrar is permitted to authorise oral service if satisfied that 'reasonable efforts' have been made to serve the order personally. Section 60 also enables a court to authorise a substituted service if satisfied that the respondent is deliberately evading service. The Western Australia Police policy provides that the 'highest priority' must be given to the service of restraining orders and that a court-issued order must be served immediately. It also provides that if service is not achieved within five days the court should be contacted.[114] In addition, if there is evidence that the respondent is deliberately evading service, an application for substituted service should be made immediately.

The Western Australia Police provided data on the number of unserved violence restraining orders in response to a request from the Commission. In 2012 there were a total of 9,470 court-issued violence restraining orders and 282 of these remained unserved (approximately 3%).[115] The proportion of unserved police orders is less (approximately 0.06%). However, this data refers only to the number of orders that remain unserved as distinct to the time taken to effect service.

Prompt service of a violence restraining order is vital because the person bound is not liable to any consequences for failure to comply with the order until it is served.[116] During consultations the Commission was frequently told that there are delays in service. Family Violence Service workers explained that there have been examples where violence restraining orders have not been served for a number of months. Lawyers informed the Commission that they have had a number of clients concerned that an order has not been served but when contact is made with a member of the Western Australia Police Family Protection Unit every effort is made to ensure that local police serve the order as a matter of priority. Reports of delays in service were also repeated in consultations in the Kimberley.

There is nothing in the *Restraining Orders Act* that requires a violence restraining order to be served within a particular period of time (or for efforts to be made to serve a restraining order within a particular period of time). Further, the provision enabling alternative service requires a police officer to seek authorisation from the court or registrar for oral service. It was suggested during consultations that it may be preferable for the magistrate who makes the order to specify a period of time in the order after which oral service will be sufficient (eg, an order that if it has not been possible to serve the respondent personally within 24 or 48 hours because the respondent has not been located, the order may be served orally by mobile phone). This would require the applicant to produce the respondent's mobile phone number at time of application. However, in the Commission's opinion, personal service should remain the preferred method in order that the person's understanding of the nature and conditions of the order is maximised. There is a risk that, if the legislation provides for alternative service before any

113. Section 55(3) authorises alternative service by post in particular circumstances (eg, a final order, an order made by consent or an order made during other legal proceedings where the respondent was present).
114. COPS Manual, RO-1.8.
115. Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, correspondence (20 November 2013).
116. Unless the conduct in breach of the violence restraining order constitutes a criminal offence.

attempt to serve the order has been made, it may encourage less effort on the part of police to locate the respondent in person. Therefore, the Commission seeks submissions about the best way to increase the timeliness in which violence restraining orders are served and whether any alternative process is required.

It was also argued that the person protected by the order should be informed immediately when the violence restraining order has been served and currently this does not always occur. It was reported that persons protected have been required to contact police to find out if their violence restraining order has been served. The Commission agrees that there should be a legislative requirement on the part of police to immediately notify the person protected once a violence restraining order has been served on the person bound by the order.

PROPOSAL 16

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that the Western Australia Police are required to notify the person protected by the order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the violence restraining order has been served.

QUESTION 10

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that at the time of making a violence restraining order the court is to specify a period of time after which oral service is authorised?
2. Should the legislation provide that oral service is only authorised after the specified period of time if police have been unable to locate the respondent in person within that period?

Court process

Ex parte hearings for an interim violence restraining order are permitted at the election of the applicant under s 26 of the *Restraining Orders Act*. These hearings are conducted in closed court. Unless the applicant has filed an affidavit, if the applicant does not attend the ex parte hearing the application will be dismissed (if the applicant was notified of the hearing) or adjourned. If the applicant does not attend but has filed an affidavit, the court is to determine the application on the affidavit evidence.[117] Section 28 of the *Restraining Orders Act* permits evidence in support of the application to be provided by way of affidavit. The use of affidavit evidence is beneficial for victims of family and domestic violence because it avoids the trauma of testifying orally, especially where the matters raised in support of the application are particularly sensitive. Further, if affidavit evidence is used where the applicant is not the person seeking to be protected (eg, a police officer or a child welfare officer), then the presence of the person seeking to be protected in court is not necessary.

It seems that there are varying approaches adopted in relation to affidavit evidence. The Commission was told that in the Perth Magistrates Court oral testimony is usually required and the volume of violence restraining order applications is so enormous that there is insufficient time for judicial officers to read affidavits and decide the application on that basis. In contrast, some magistrates in outer metropolitan courts and regional courts will invariably determine ex parte applications on affidavit evidence alone (especially if the content of the affidavit reveals sufficient grounds for making a violence restraining order). Other judicial officers will require oral testimony to supplement the material in the affidavit irrespective of how comprehensive that material is. Some magistrates expressed support for greater use of affidavits in ex parte applications but emphasised that where an applicant is unrepresented by a lawyer it is important that the applicant has support in completing the affidavit from a victim support worker. In some regional and remote locations this will be difficult. It was also suggested by lawyers in Broome that affidavit forms could be revised to prompt the applicant to cover all relevant issues.

Apart from various personal details of the parties, the current form of affidavit on the Magistrates Court website has boxes for a description of the incident, whether the applicant suffered any injuries, whether the applicant received medical attention, whether the incident was reported to police, and whether a weapon was involved in the incident. The details required to be completed on the application form again include personal details along with tick-a-box options for the grounds for a violence restraining order and a blank space to record a description of the respondent's behaviour. The questions are weighted heavily towards a one-off physical incident and in the Commission's opinion need revision

117. *Restraining Orders Act 1997* (WA) s 27.

(especially if the definition of family and domestic violence is amended as proposed in this Paper). For unrepresented and unsupported applicants it is important that the forms clearly disclose the types of conduct that may be relevant to the application and form the basis of satisfying the grounds for a violence restraining order. While there may be concern that including a broader range of questions may inappropriately encourage the applicant to include matters that he or she may otherwise have neglected to raise, it must be remembered that if the applicant has an experienced lawyer or support worker these questions would be asked in any event. The Commission also encourages the greater use of affidavits across the board and suggests that judicial training should include a discussion about the benefits of enabling victims of family and domestic violence to present their evidence by way of affidavit instead of oral testimony in appropriate cases.[118]

PROPOSAL 17

That the application form and form of affidavit for applications for violence restraining orders be revised to incorporate a broader range of questions or headings based upon any new definition of family and domestic violence as proposed by Proposal 8.

The respondent has 21 days after being served with an interim violence restraining order to complete the endorsement copy of the order and return it to the registrar of the court. If the respondent indicates that he or she does not object to a final order being made or fails to return the endorsement copy, the interim order becomes a final order on the same terms and conditions.[119] If the respondent objects to the final order being made, the registrar is to fix a hearing date and notify all parties.[120] This hearing is categorised as a 'final order hearing'. If the interim order included a condition restraining the respondent from remaining or being on premises where he or she usually lives or works, having contact with his or her children, or being in possession of a firearm that is reasonably needed in order to carry out his or her usual occupation, the registrar must ensure that the date fixed for the hearing is as soon as practicable after the endorsement copy is returned.[121]

At a final order hearing, if the respondent does not attend the hearing and the court is satisfied that the respondent was notified of the hearing a final violence restraining order will be made.[122] There is provision for the respondent to apply for a final order made in these circumstances to be set aside.[123] During consultations with judicial officers it was revealed that different practices have developed in relation to the 'final order hearing'. In the Perth Magistrates Court the final order hearing is usually listed within a few weeks. Some lawyers expressed concern that final order hearings were being listed too quickly and that there was not sufficient time in these circumstances to obtain a grant of legal aid for the applicant. Further, it was stated that some magistrates will not adjourn this final order hearing because the legislation requires the application to be heard as soon as practicable.

In contrast, in metropolitan Magistrates Courts the time to hearing is much longer (it was suggested that sometimes it may be more than six months). As a consequence, practices have developed in some metropolitan and regional courts where the 'final order hearing' is treated as a call-over date in order to determine the likelihood of the matter proceeding to a contested hearing and to try to resolve matters without the need for a contested hearing. There is some doubt that this process is authorised under the legislation.[124]

The Commission appreciates the need for the applicant to obtain legal aid and prepare for the hearing but is also concerned that significant delay may constitute an unfair burden on a respondent who is being restrained under an interim order. The Commission has sought submissions about whether the grounds for making an interim order should be amended with a view to ensuring that interim orders are not made too lightly given the potential consequences for a respondent. However, where

118. It is noted that s 55(1) of the *Family Violence Intervention Act 2008* (Vic) provides that a court must not make an interim order unless, among other things, the application is supported by oral evidence or an affidavit and s 55(2) provides that an applicant is not obliged to give evidence before an interim order is made. Also, s 145(3) of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that to 'remove any doubt, it is declared that the court need not have the personal evidence of the aggrieved before making a domestic violence order'.
119. *Restraining Orders Act 1997* (WA) ss 31 & 32. If an interim order becomes a final order because the respondent fails to return the endorsement copy of the order within the required period the respondent has a right to apply to have the final order set aside: see s 32.
120. *Restraining Orders Act 1997* (WA) s 33(1).
121. *Restraining Orders Act 1997* (WA) s 33 (2). Section 59 of the *Family Violence Intervention Act 2008* (Vic) provides that if 'the court makes an interim order, the court must ensure the hearing is listed for a decision about the final order as soon as practicable'.
122. *Restraining Orders Act 1997* (WA) s 42.
123. *Restraining Orders Act 1997* (WA) s 43A.
124. See *Kickett v Starr* [2013] WADC 52, [7] where Derrick DCJ commented that while 'I can appreciate the pragmatism of this approach, I doubt that it is authorised by the relevant provisions of the Act'.

the safety of the applicant demands immediate protection an interim order must be made and it is then important to ensure that the respondent has an opportunity to be heard as soon as possible. For this reason, the Commission is attracted to an early mention date in all cases where the respondent has objected to the making of a final order. As discussed later in this section, the Commission proposes that effective information about the restraining order process should be provided to the respondent on this date and this may assist the respondent in determining his or her options. Furthermore, an early mention date may enable the respondent to apply for a variation of the interim violence restraining order if there is a particular condition or conditions that are causing hardship.[125] The Commission notes that the forms provided to the respondent do not currently advise that the respondent may apply to a court for a variation of the order.[126] This is rectified in the proposal below. The final order hearing should be set after the mention date.

PROPOSAL 18

1. That s 33 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that as soon as the registrar receives the respondent's endorsed copy of an interim violence restraining order indicating that the respondent objects to the final order, the registrar is to fix a mention date that is within seven days of receipt of the endorsement copy of the order.
2. That the forms required to be given to the person bound by an interim violence restraining order include that the person bound may apply to a court for variation of the order.

Priority listing

It was also discussed during consultations that in some court locations, applicants are required to wait in the court precincts for long periods of time for their ex parte application to be heard. This can cause additional stress and exacerbate fear for victims of family and domestic violence. It was suggested by some that a specified time that fits in with other court commitments would be the best way to minimise this waiting period (eg, applicant informed that the application will be heard not before 11:00 am or 2:15 pm). Others advocated for priority for ex parte violence restraining order hearings (eg, 9:00 am). As will be discussed in more detail in the following chapter, the Commission supports a more specialised approach to family and domestic violence matters and is proposing a pilot court program that deals exclusively with family and domestic violence restraining order matters and family and domestic violence related criminal offences. A specialised and dedicated court for these matters will enable ex parte applications to more readily be dealt with at a particular scheduled time. Nevertheless, the Commission sees merit in proposing that ex parte violence restraining order applications should be given priority wherever possible in order to reduce the trauma on victims of family and domestic violence.

PROPOSAL 19

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that, as far as is practicable and just, ex parte applications for violence restraining orders be heard first in the morning before other court proceedings are commenced and otherwise, as far as is practicable, be given priority in the court list.

EVIDENCE AND INFORMATION

As emphasised in Chapter Two, a considerable number of people consulted referred to information gaps in relation to family and domestic violence restraining order matters and submitted that improved processes are required to ensure that decision-makers are better informed. In particular, because of the complexities of family and domestic violence and the difficulties faced by victims during the court process, it was suggested that a more inquisitorial approach should be adopted by the courts to ensure that all relevant and available information is before the decision-maker.

Section 12 (1) of the *Restraining Orders Act* lists a number of factors that a court must take into account when considering whether to make a violence

125. See below, 'Variation and Cancellation of Violence Restraining Orders'.
126. Form 2 (Part B) contains the information which is required to be included on the copy of the violence restraining order given to the person who is bound by the order: *Restraining Orders Regulations 1997* (WA) sch 1. The information in relation to interim orders does not state that the person bound may apply to a court for a variation of the order. The information in relation to final orders states that the order will 'remain in force until it expires or is varied or cancelled by a court'. It does not state that the person bound is entitled to make an application for a variation or cancellation.

restraining order (and when considering the terms of the order). Included in this list are:

- the past history of the respondent and the person seeking to be protected with respect to applications under this Act, whether in relation to the same act or persons as are before the court or not;[127]
- any family orders;
- other current legal proceedings involving the respondent or the person seeking to be protected;
- any criminal record of the respondent;
- any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and
- other matters the court considers relevant.

Section 12(4) provides that Western Australia Police are to provide information in their possession in relation to the criminal record of the respondent and any past similar behaviour of the respondent (concerning the applicant or any other person) if practicable. This information is to be provided in the form of a certificate signed by a police officer of or above the rank of inspector.[128] The certificate is prima facie evidence of the matters specified within it, without proof of the signature of the person purporting to have signed it or proof that the person who signed it was a police officer of or above the rank of inspector.[129] The information that would be covered by this provision is the criminal record of the respondent and any Domestic Violence Incident Reports involving the respondent.

Prior to the 2004 reform of the *Restraining Orders Act* the legislation did not accommodate the provision of the respondent's criminal record or previous similar behaviour unless that information was provided directly to the court by the applicant.[130] Unrepresented applicants would be highly unlikely to initiate action to ensure this information was before the court. During the 2008 review of the *Restraining Orders Act* it was stated that the police seldom provided this information unless arrangements were in place between the Western Australia Police and the courts at the local level. It was also noted that Western Australia Police were developing an 'information technology solution' so that the Magistrates Court would have access to this information through a web browser. Additionally, it was observed that even if this information were provided to the court by police, some magistrates would not admit the information into evidence.[131] The recommended solution was to permit a certificate signed by a police officer to act as prima facie evidence of the respondent's criminal record and history of similar behaviour.[132] This was enacted by the insertion of ss 12(5) and (6) into the *Restraining Orders Act* in May 2012.[133]

Currently, a request for a certificate is made to the Information Release Centre of the Western Australia Police.[134] The Commission was told that it takes between four and six weeks for a certificate to be issued and, because of this timeframe, the certificates are rarely able to be produced at the time of an interim application. Indicative data[135] provided by the Western Australia Police shows that 35 certificates were issued under s 12(5) in 2012 and, for 2013 (up to approximately the end of September 2013) a total of 60 certificates had been provided.[136] Bearing in mind that in 2012 there were 14,145 applications for violence restraining orders,[137] it is clear that s 12(5) certificates are seriously underutilised. It is not surprising, therefore, that some magistrates reported to the Commission that they had never seen a s 12(5) certificate from the Commissioner of Police.

Information about existing family orders and other legal proceedings (including other violence restraining orders proceedings) is dependent in practice on two things: whether the parties to a restraining order application disclose the existence of any orders or proceedings, and the existence of arrangements or protocols between different courts in relation to the exchange of information. For example, there is a protocol between the Family Court of Western Australia, the Magistrates Court of Western Australia and Legal Aid WA (and others) to facilitate information sharing where one court believes that a party to proceedings in its court has

127. Section 12(3) of the *Restraining Orders Act 1997* (WA) provides that 'past history of applications under this Act is not to be regarded in itself as sufficient to give rise to any presumption as to the merits of the application'.
128. *Restraining Orders Act 1997* (WA) s 12(5).
129. *Restraining Orders Act 1997* (WA) s 12(6).
130. An applicant could subpoena the Commissioner of Police to provide this information to the court.
131. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 34.
132. Ibid.
133. See *Restraining Orders Amendment Act 2011* (WA) s 4.
134. These certificates include the criminal record of the respondent and a list of DVIRs, but no details are included about the nature of the incidents.
135. It was stated that the data provided is indicative only and has not been verified.
136. Deputy Commissioner C Dawson, Western Australia Police, correspondence (7 October 2013) enclosing 'Statistics for the Law Reform Commission of Western Australia'.
137. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.

matters occurring in the other court.[138] However, the Magistrates Court does not have access to the Family Court's records to enable it to proactively check the existence of concurrent or past relevant proceedings.

As recognised in the 2008 review of the legislation, and repeated during consultations for this reference, there are occasions where violence restraining orders are granted against the victim of family and domestic violence and, therefore, it is important that the court is informed of the past criminal record and history of similar behaviour of the applicant as well as the respondent.[139] Additionally, bearing in mind the potential for the interim ex parte stage of the process to be abused, it is important that relevant information about both parties is provided to the court. However, caution was expressed about any process for obtaining information that might delay interim ex parte proceedings because of the need to ensure the immediate protection of applicants for interim orders.

The Commission is of the view that for family and domestic violence matters, processes should be developed to enable immediate access to a minimum level of information for ex parte interim applications. This information should be available to the court without any obligation or requirement on the part of the applicant to present the evidence. For the interim stage, access to the criminal history of both the applicant and the respondent, and access to past violence restraining order applications and violence restraining orders involving either party should be obtained as a matter of course by the court administrative staff before the matter is listed before a judicial officer. This will require an appropriate IT system to be in place between the Western Australia Police and the Magistrates Court of Western Australia along with information exchange protocols. Section 44A of the *Restraining Orders Act* already enables a court to 'inform itself on any matter in such manner as it considers appropriate' and, therefore, this proposal should not require any legislative change. It really represents a practical mechanism to achieve the outcomes intended by the introduction of s 12(5) certificates.

The Commission also considers that it is in the interests of justice and efficiency for the Magistrates Court to be able to undertake a database check to find out whether there are any existing Family Court orders in place between the applicant and the respondent before making an interim order and considering the terms of the order. Again, this requires the development of an appropriate IT system.

PROPOSAL 20

1. That the Western Australia Police and the Department of the Attorney General develop a system that enables a court, where an application for a violence restraining order has been lodged, to provide the judicial officer hearing an ex parte application with a copy of or access to the criminal history of the applicant and the respondent and any record of past applications for violence restraining orders or violence restraining orders made involving either or both of the parties.
2. That the Department of the Attorney General develop an IT process enabling the Magistrates Court and the Family Court of Western Australia to have access to each other's records to determine if named parties are subject to orders in the other jurisdiction.
3. Any information provided or obtained under 1 and 2 above must be disclosed to all parties to the proceedings.

The position in relation to final order hearings is more complicated. A wider range of information could be provided to the court by relevant agencies for a final order hearing. This is where a process similar to s 12(5) could be utilised to obtain information from various agencies or other courts. In other words, the legislation could provide that the court may request a prescribed agency to file a certificate containing specified information by a particular date and that this certificate can be admitted into evidence without the need to call an officer of that agency to give evidence. As is the case now in relation to s 12(5), the certificate could be considered prima facie evidence of the matters included in it without the need to call the person signing the certificate.

While the *Restraining Orders Act* maintains the rules of evidence in relation to final order hearings, the position is different in other jurisdictions. Section 65(1) of the *Family Violence Protection Act 2008* (Vic) provides that in a proceeding for a family violence intervention order the court may inform itself in any way it thinks fit, despite any rules of

138. *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009).
139. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 35.

evidence to the contrary'.[140] Section 65(3) provides that the court may refuse to admit, or may limit the use to be made of, evidence if the court is satisfied:

(a) it is just and equitable to do so; or

(b) the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.

Section 145 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that:

(1) In a proceeding under this Act, a court—

(a) is not bound by the rules of evidence, or any practices or procedures applying to courts of record; and

(b) may inform itself in any way it considers appropriate.

(2) If the court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities.

(3) To remove any doubt, it is declared that the court need not have the personal evidence of the aggrieved before making a domestic violence order.

Section 116 of the *Domestic and Family Violence Act* (NT) provides that in making, confirming, varying or revoking a domestic violence order the court 'may admit and act on hearsay evidence'.

Given the range of agencies that would be impacted by such a proposal, the Commission seeks specific submissions from all interested parties about whether the *Restraining Orders Act* should contain a provision that enables a court to request information from various agencies and that places an obligation on those agencies to provide that information to the court in the form of a certificate (or report) within a stipulated period of time. It is noted that this type of information is routinely provided to Family Violence Courts in the form of a bail risk assessment report. These reports are prepared after significant information is obtained from various agencies and this process works effectively because of the strong coordinated approach between agencies working in these specialist courts.[141]

140. This provision does not apply to proceedings for an offence under the Act.

141. See further discussion below Chapter Four, Bail.

QUESTION 11

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that the court has the power to request from relevant agencies the following information to be provided in the form of a certificate:
   a. The criminal record for both the applicant and the respondent.
   b. Existing and past violence restraining orders made against or in favour of each party or the person seeking to be protected.[142]
   c. Whether a police order has been made against either party and, if so, the terms of the police order.
   d. Any current charges for both the applicant and the respondent.
   e. Whether the Department for Child Protection and Family Support has had previous involvement with the applicant or respondent in relation to child protection concerns arising out of family and domestic violence.[143]
   f. Existing Family Court orders and current proceedings in the Family Court.
   g. The details of any Western Australia Police Domestic Violence Incident Reports concerning either the applicant or the respondent.
2. Are any modifications to the rules of evidence required to facilitate the provision and use of the information set out above in 1?

DURATION

Section 16(5) of the *Restraining Orders Act* provides that a final violence restraining order that is made at a final order hearing remains in force for the period specified in the order *or*, if no period is specified, two years. In practice, the usual duration of a violence restraining order is two years. The Commission was told by one magistrate that there is a misconception

142. The person seeking to be protected includes a person on who behalf an application has been made: *Restraining Orders Act 1997* (WA) s 3.

143. This could be facilitated by the co-location of a DCPFS officer in the Magistrates Court to have responsibility for providing information to the court (as occurs now in the Family Court).

among some members of the judiciary that violence restraining orders cannot be imposed for longer than two years.[144] Lawyers indicated that they may, in particular circumstances (eg, where the person bound by the order will be serving a prison sentence for all or most of the two-year period), request a longer period. There is no restriction under the *Restraining Orders Act* in regard to the duration of a violence restraining order and an order can be made for any period up to life. It was suggested that longer periods are beneficial for victims because it avoids the need to apply for an extension of an order or a new order if the existing order has lapsed.

In other jurisdictions there is equally no limit on the duration of orders; however, the approach to setting a default position and the general criteria for determining duration varies. In Victoria, s 97 of the *Family Violence Intervention Act 2008* (Vic) provides that the court can specify any period and in determining that period the court must take into account the safety of the protected person and the views of the protected person about the level and duration of risk from the person bound by the order. The court may also take into account matters that are relevant to the duration of the order that are bought to the court's attention by the respondent. Section 19 of the *Family Violence Act 2004* (Tas) provides that a final order remains in force 'for such period as the court considers necessary to ensure the safety and interests of the person for whose benefit the order is made'.[145] In Queensland any period may be specified; however, the default period is two years and it is provided that a final order may be made for longer than two years where there are special reasons for doing so.[146] In New South Wales it is stated that the period specified is to 'be as long as is necessary, in the opinion of the court, to ensure the safety and protection of the protected person'. A default period of 12 months is set if no period is specified by the court.[147]

The Commission appreciates that it may be stressful and traumatic for a victim of family and domestic violence to have to apply for an extension of a violence restraining order. If the original order has lapsed it may be difficult to establish the grounds for a new violence restraining order in the absence of any 'new' behaviour but depending on the circumstances the person protected may continue to fear future family and domestic violence. Providing for a longer default period is problematic because if a court fails to set a period it may not always be appropriate for the order to be in force for longer than the current default period of two years. The Commission has weighed up the arguments and is of the view that the Queensland approach is optimal because it provides for a default period while also making it clear that an order can be imposed for longer than that period if required.

PROPOSAL 21

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a final violence restraining order remains in force for the period specified in the order or, if no period is specified, for two years.

2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a violence restraining order may be made for a period of more than two years if the court is satisfied that there are reasons for doing so.

CONDITIONS

Section 12(1) of the *Restraining Orders Act* lists the factors that a court is to have regard to when considering whether to make a violence restraining order and, also, when considering the terms of the order. Section 13 provides a non-exhaustive list of restraints that may be imposed. Overall, it appears from views expressed during consultations that most violence restraining orders contain similar standard conditions. A pro forma order lists various conditions with a tick-a-box option and this is used by some courts. This template was developed by a working group that monitors the Information Sharing Protocols between the Family Court and the Magistrates Court in order to assist courts in setting appropriate conditions. However, the Commission was told by some lawyers that this form encourages judicial officers to tick all boxes rather than tailor conditions to the specific circumstances of the case. It was also acknowledged that lawyers tend to accept standard non-contact conditions in regard to the applicant and the respondent and focus on negotiations about contact arrangements with children.

144. Unless it is an automatic lifetime violence restraining order imposed under s 63A of the *Restraining Orders Act 1997* (WA).
145. There is also no default period in the Northern Territory: see *Domestic and Family Violence Act* (NT) s 27.
146. *Domestic and Family Violence Protection Act* (Qld) s 97.
147. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79.

One of the major issues encountered in practice is the reality that, in many cases, victims and perpetrators continue to live together or remain in contact. This was especially evident during the consultations in Geraldton and the Kimberley, and in relation to Aboriginal people from those communities. For example, of the 16 cases observed in Barndimalgu Aboriginal Family Violence Court by the Commission on one morning[148] there were 14 cases where the offender and victim were in or had been in an intimate relationship. In eight of these 14 cases the victim and offender remained in a relationship and in two other cases the parties had only just separated a matter of days before the court hearing. It has been observed that there is an 'assumption that women want to and can end abuse' and this 'underpins most domestic violence policies and service provision'.[149] It was explained that for many women ending the relationship is unviable because of emotional reasons (eg, love for their partner, shame or low self-esteem) or social constraints (eg, limited financial resources, lack of available housing or fear of losing children).[150] Specifically, it was commented that many Aboriginal women 'have a strong resistance to using the police to intervene, due to distrust of the criminal justice system'.[151]

Bearing in mind that victims and perpetrators remain living together (and the problems this causes in relation to potential breaches of violence restraining orders), it is arguable that one of the relevant factors to be considered when determining the conditions of the order is whether the applicant and the respondent intend to continue to cohabitate or maintain contact. A violence restraining order can be imposed that permits contact between the person protected and the person bound but stipulates that the person bound is not to behave in a manner that is intimidatory, offensive or emotionally abusive. While such orders (known as non-molestation orders) are sometimes made, it is arguable that their potential use is undervalued. While violence restraining orders containing full non-contact conditions are obviously more likely to protect a victim from future harm, it must be acknowledged that there are a number of victims who won't seek a violence restraining order because they remain in contact with the perpetrator and there are many parties to violence restraining orders who continue to have contact despite the existence of the order. It was also suggested during consultations that specific additional conditions designed to provide further protections (such as not to consume alcohol or attend specified premises if under the influence of alcohol[152]) should be more readily used.

In order to encourage more targeted conditions it is proposed that s 12 of the *Restraining Orders Act* should be amended to include that, when considering the restraints to be imposed, the court is to have regard to the likely living arrangements and the status of the relationship between the parties. While not all people consulted were in favour of non-molestation orders, a considerable number of stakeholders from a range of agencies supported their greater use in appropriate cases.

In Queensland, s 56 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that a domestic violence order must include standard conditions to the effect that the person bound must be of good behaviour to the person protected and must not commit domestic violence against the person protected. Pursuant to s 57 the court may impose any other condition that it considers necessary in the circumstances and desirable in the interests of the person protected or the person bound. The overriding principle, however, is that the safety, protection and wellbeing of the person protected and any children is paramount. There is value in providing for standard conditions as the starting point and then ensuring by legislative direction that the court considers what other conditions are necessary or desirable in the circumstances. The Commission also considers that a condition that the person bound by a violence restraining order must not commit family and domestic violence would be beneficial given that it is proposed to expand the definition of family and domestic violence in this Paper. Because the proposed definition of family and domestic violence extends beyond physical and sexual abuse or threatening behaviour, the person protected can contact police in the event of any alleged behaviour that constitutes family and domestic violence even where that behaviour does not amount to a criminal offence. It therefore provides greater protection and greater recourse to police intervention than relying on the commission of a criminal offence alone.

148. These cases all involved family and domestic violence related offences where the offender had pleaded guilty.
149. Marcus, G, 'Supporting Women Who Remain in Violent Relationships' (2012) 5 *Australian Domestic & Family Violence Clearinghouse,* Thematic Review 1.
150. Ibid 2.
151. Ibid 7–8.
152. It is acknowledged that conditions such as not to consume alcohol may be difficult to enforce but it is noted that conditions of prohibitive behaviour orders include conditions such as not to be noticeably impaired by alcohol in public and not to consume or be under the influence of alcohol: see <http://www.pbo.wa.gov.au/PBOWebSite/Home/Index>.

PROPOSAL 22

1. That s 12 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when considering the conditions to be imposed by a violence restraining order the court is to have regard to the circumstances of the relationship between the applicant and the respondent (including whether the parties intend to remain living together or remain in contact).
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide, in addition to the current provisions in relation to the conditions that may be imposed, that every family and domestic related violence restraining order is to include the following conditions:
   a. That the person bound is not to commit family and domestic violence against the person protected by the order; and
   b. That the person bound is not to expose a child to family and domestic violence.

It is also noted that the *Restraining Orders Act* permits restraints to be imposed preventing the person bound from remaining or entering premises even where the person bound has a legal right to be on the premises.[153] During consultations a small number of people referred to tenancy agreements where both parties are recorded in the agreement as tenants (including public tenancies). It was suggested that it may be necessary to expressly provide that a court has the power to remove the name of the person bound from the tenancy agreement as occurs in some jurisdictions.[154] Given the breadth of the issues considered in this Paper and bearing in mind that the *Restraining Orders Act* currently enables a violence restraining order to prevent the person bound from being on premises irrespective of whether that person is a legal tenant, the Commission does not see any urgent need for reform. However, this issue was not discussed comprehensively during consultations so the Commission invites submissions about whether any reform is required.

153. *Restraining Orders Act 1997* (WA) s 13(4).
154. For example, Part 6 of the *Residential Tenancies Act 1997* (Vic) provides that a person protected by a final family violence intervention order, that includes a condition excluding the person bound from a residence, may apply under that Act for an existing tenancy agreement to be terminated and a new tenancy agreement to be entered into with the landlord.

QUESTION 12

Is any reform required to enable a court (and, if so, which court) to remove the name of a person bound by a family and domestic violence restraining order from a tenancy agreement?

VARIATION AND CANCELLATION OF VIOLENCE RESTRAINING ORDERS

An application to vary or cancel a violence restraining order may be made by the same categories of persons who are permitted to apply for a violence restraining order, as well as the person bound by the order.[155] However, if the person bound by the order applies to vary or cancel the order, leave of the court must be obtained to continue with the application.[156] The hearing to determine whether leave will be granted is dealt with in the absence of the person protected by the order. Under s 46(4)(a) the court must grant leave to the person bound by the order to continue with the application to vary or cancel the order if satisfied that:

(i) there is evidence to support a claim that a person protected by the order has persistently invited or encouraged the applicant to breach the order, or by his or her actions has persistently attempted to cause the applicant to breach the order;

(ii) there has been a substantial change in the relevant circumstances since the order was made; or

(iii) in respect of an application to vary an interim order, there is evidence to support a claim that the restraints imposed by the order are causing the applicant serious and unnecessary hardship and that it is appropriate that the application is heard as a matter of urgency;

If leave is granted, a second hearing will be set and the person protected by the order will be summonsed to appear. Apart from the grounds to satisfy the requirement for leave for the person bound by the order, the legislation contains no criteria or grounds for the variation or cancellation of a violence restraining order.

155. *Restraining Orders Act 1997* (WA) s 45.
156. *Restraining Orders Act 1997* (WA) s 46(1).

Application by person bound

If a person bound by a final violence restraining order is aggrieved there are two potential options available. The first applies in circumstances where the person bound did not attend the final order hearing. The person bound may apply to the court for the violence restraining order to be set aside within 21 days of the order being served if the person can establish a reasonable cause for non-attendance. If the final order is set aside, the matter will be re-determined at a later date.[157]

The second is an application to vary or cancel the order under s 46 (discussed above). In *Kickett v Starr*[158] it was held that leave can only be granted to *cancel* a final violence restraining order if the magistrate is satisfied of the grounds in ss 46(4)(a)(i) or (ii) (as each of these grounds apply to either the variation or cancellation of a final order). Section 46(4)(a)(iii) only applies to an application to vary a final order and, therefore, there is no avenue to seek cancellation of a final violence restraining order on the basis that the order is causing 'serious and unnecessary hardship'. In that case the person bound by the order argued that the final order was causing her hardship because she was prevented from attending family gatherings where the person protected may be present. The person bound by the order was the current partner of the protected person's ex-husband. Because she produced no evidence to satisfy the grounds for cancelling an order, the final order remained in place. It was suggested to the Commission that there is no reason why the grounds for cancelling a violence restraining order should not include that the order is causing serious and unnecessary hardship. However, it is also noted that in the above case, the person bound could have argued for a variation of the final order to enable contact to occur between the parties (and, if appropriate, the violence restraining order could have been varied to permit contact on certain occasions but to prevent the person bound from behaving in an intimidatory or offensive manner). At this stage the Commission does not consider that any reform is required.

Application by person protected

There is also provision for the person protected to apply for an application for a violence restraining order to be cancelled or to be heard in the absence of the person bound by the order.[159] Information received during consultations suggests that it is relatively common for a person protected by a violence restraining order to apply to have the order cancelled a matter of days or weeks after the order was made. In the Kimberley, the Commission was told that there are often cases where the person protected by a violence restraining order applies for a violence restraining order and then subsequently applies for the order to be cancelled repeatedly – and that in one case this cycle was repeated on nine occasions. This is a very difficult situation because the person protected by the order may well be applying for the order to be cancelled as a result of serious threats to safety or fear of repercussions. However, the person may also be applying because the relationship has resumed or circumstances have changed. The Commission was told during consultations that, where a person protected applies to cancel a violence restraining order, some magistrates will adjourn the application for a couple of weeks as a 'cooling off period' (out of concern for the victim's safety). However, if the parties have genuinely reunited this adjournment is likely to result in breaches of the order occurring (and possible charges) during this period. There is a clear tension in this area between ensuring victim safety and enabling victims to make decisions about their own lives. Nevertheless, it is important to bear in mind that a violence restraining order is an order of the court – it is not the protected person's order.

Section 92 of the *Domestic and Family Violence Protection Act 2012* (Qld) is instructive in this regard. It provides that if a court considers that a variation[160] of a domestic violence order may adversely affect the safety, protection and wellbeing of the person protected by the order it must consider the following matters:

- any expressed wishes of the person protected by the order;
- any current contact between the person protected by the order and the person bound by the order; and
- whether any pressure has been applied or threat made to the person protected.

Section 92(3) provides that the court 'may only vary the order if the court considers the safety, protection or wellbeing' of the person protected by the order 'would not be adversely affected by the variation'.[161]

157. *Restraining Orders Act 1997* (WA) s 43A.
158. [2013] WADC 52.
159. *Restraining Orders Act 1997* (WA) s 48A.
160. A variation of an order may relate to a condition of the order, the duration of the order or the persons named in the order: see *Domestic and Family Violence Protection Act 2012* (Qld) s 86(3).
161. Also s 100 of the *Family Violence Protection Act 2008* (Vic) provides that in deciding whether to revoke or vary a family violence intervention order the court must consider all the circumstances of the case, in particular 'the applicant's reasons for seeking the variation or revocation'; the 'safety

The Commission considers that if a person protected applies for a violence restraining order to be cancelled on the basis that the parties have resumed their relationship and/or the person protected no longer has any concerns in relation to family and domestic violence, then it may be appropriate for the court to consider a variation of the order until further information about victim safety can be obtained. For example, the order could be varied to enable contact to occur but continue with a non-molestation condition and other appropriate restraints. Having said that, the Commission recognises that in the absence of additional information it may be difficult to conclude that a variation does not place the victim's safety at risk. Nevertheless, before cancelling a violence restraining order the court should endeavour to obtain up-dated information from the Western Australia Police, Family Violence Services (or Victim Support Services) and the Department of Child Protection and Family Support. At the very least, the court should ensure that the person protected has met with a victim support worker to discuss safety issues and safety planning before the order is cancelled.

PROPOSAL 23

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that if the person protected applies for a violence restraining order to be cancelled, the court is not to cancel the order immediately unless satisfied that there is no substantial risk to the safety of person protected.
2. Upon hearing an application to cancel a violence restraining order by the person protected by the order the court is to obtain from Western Australia Police, Family Violence Services and the Department for Child Protection and Family Support information relevant to the application since the violence restraining order was made.
3. Before a violence restraining order is cancelled or varied, the court is to ensure that the person protected has spoken with a victim support worker from the Family Violence Service, the Victim Support Service or a prescribed non-government agency.

of the protected person'; 'the protected person's views about the variation or revocation'; 'whether or not the protected person is legally represented'; and 'if the protected person has a guardian, the guardian's views'.

QUESTION 13

Should the legislation provide that if the hearing has to be adjourned to enable this information to be obtained, the court is to consider varying the conditions of the violence restraining order and the order should only be varied if the court is satisfied that to do so would not cause substantial risk to the safety of the person protected by the order?

Variation or cancellation of violence restraining orders on the court's own initiative

Section 61B(4) of the *Restraining Orders Act* provides that where a court is sentencing a person bound by a restraining order for a breach of an order, the court may, if it is satisfied that the protected person aided the breach, on its own initiative exercise the powers to vary or cancel the order as if it were hearing an application for variation or cancellation. The Commission is of the view that this power should be extended generally because of the apparent high number of incidences where persons protected by violence restraining orders initiate or encourage continued contact between the parties. The Commission was provided with many examples during consultations where the protected person had initiated contact (eg, telephoning the person bound by the order and inviting him or her to a family gathering, asking the person bound by the order to help look after children, or attending at the person bound's residential premises without prior invitation).

If a court has sufficient information before it to justify a variation or cancellation of a violence restraining order it should be able to do so without first requiring the person bound by the order or the person protected by the order to lodge an application in the registry. The most likely scenario where this may be appropriate is where a court is considering the relaxation of protective bail conditions and has obtained a bail risk assessment for this purpose from the Family Violence Service. This assessment contains information about risk to safety and is collated with interagency input. It would be expedient in these instances for the court hearing the bail variation application to also vary or cancel any existing violence restraining order between the parties at the same time as amending or revoking bail conditions. In any such case, the violence restraining order should only be varied or cancelled if the person protected by the order has been provided with an opportunity to be heard.

PROPOSAL 24

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a court may vary or cancel a violence restraining order on its own initiative.

2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a court may only vary or cancel a violence restraining order on its own initiative if the person protected by the order has been given an opportunity to be heard.

TREATMENT INTERVENTION FOR RESPONDENTS

While treatment programs for perpetrators of family and domestic violence are available (to some extent) in the criminal justice process,[162] the restraining order system does not directly accommodate treatment options for perpetrators.[163] As explained in Chapter Two, one of the Commission's objectives for reform is to reduce family and domestic violence by increasing perpetrator accountability and improving the management of offenders. One way to achieve this is to provide opportunities for perpetrators to accept responsibility for their behaviour and engage in appropriate treatment programs to facilitate change. In its report on family violence in 2006 the VLRC commented that men's behaviour change programs[164] were usually available as criminal sentencing options but rarely as a condition to a civil restraining order.[165] Given conflicting submissions and available evidence in regard to men's behaviour change programs the VLRC expressed the view that such programs should continue to be monitored.[166] While acknowledging the divergence in opinions about the efficacy of perpetrator programs,[167] the ALRC/NSWLRC stated that:

> Rehabilitation programs are an essential measure for treating the causes rather than the symptoms of family violence. While protection order conditions prohibiting or restricting a respondent's contact with the victim may assist in reducing or preventing violence against that victim in the short term, successful participation by a respondent in appropriate and relevant rehabilitation and counselling programs has the advantage of targeting the long-term reduction or prevention of family violence— including as against persons other than the victim the subject of the protection order.[168]

It was recommended that state and territory family violence legislation should provide for discretion to impose treatment conditions as part of a restraining order where the respondent is suitable and eligible to participate and that a respondent who fails to attend or complete a treatment program should not be liable to imprisonment.[169]

A number of Australian states and territories legislatively provide for treatment for persons bound by restraining orders. For example, Division 6 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides for 'voluntary intervention orders' which require the respondent to attend an approved intervention program or counselling program provided by an 'approved provider'. The order can only be made with the consent of the respondent and there is no sanction for non-compliance. However, if the respondent contravenes the voluntary intervention order the approved provider must inform the court and the police of the nature and date of the contravention. Conversely, if the respondent completes the program, notice of completion must be given to the court and the police. Pursuant to s 37 of that Act, in deciding whether a protection order is necessary or desirable to protect a person from domestic violence the court may consider whether a voluntary intervention order has previously been made against the respondent and whether the respondent has complied with the order. Further, s 91 provides that before varying a protection order the court must consider, among other things, 'whether a voluntary intervention order has previously been made against the respondent

162. See further below Chapter Four, Family Violence Courts.
163. Although s 8(1)(i) of the *Restraining Orders Act 1997* provides that when a court makes a restraining order it is to explain, among other things, 'that counselling and support services may be of assistance, and where appropriate, the court is to refer the person to specific services'. The same requirement applies to a police officer explaining a police order under s 30E(3).
164. These programs were described as programs that are designed to 'assist violent men to take responsibility for their actions and to develop skills to stop using violence': VLRC, *Review of Family Violence Law*, Report (2006) [10.80].
165. Ibid.
166. Ibid [10.88]–[10.89].
167. A study in 2010 concluded that 'further evaluation is required to establish a more accurate assessment of the value of intervention programs for male perpetrators in reducing rates of domestic violence': Gray A, et al, 'Integrated Response to Domestic Violence: Legally mandated intervention programs for male perpetrators' (2010) 404 *Australian Institute of Criminology Trends and Issues*, 7.
168. ALRC/NSWLRC, Family Violence – A National Response (2010) [11.284].
169. Ibid, Recommendation 11-11.

and whether the respondent has complied with the order'.

Section 13 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that an intervention order may require the respondent to undertake an intervention program and, if so, the respondent must comply with the requirements of the program and a failure to comply constitutes a contravention of the intervention order. The penalty for a contravention where the breach involves failure to comply with the requirements of an intervention program is a fine only, whereas imprisonment for two years is the penalty for any other form of contravention.[170] Part 5 of the *Family Violence Protection Act 2008* (Vic) provides for counselling orders and the stated objects of this part are to increase the respondent's accountability for the behaviour and to encourage change. Failing to attend an interview for an assessment or failing to attend counselling is an offence with a stipulated penalty of a fine only. Only a 'relevant court' is empowered to make these orders.[171]

A recent literature review on family and domestic violence perpetrators found that 'overall, there is mixed evidence regarding the effectiveness of domestic and sexual violence perpetrator intervention programs' but also that few evaluations have been undertaken in Australia and further research is required.[172] At this stage, the Commission has not been granted access to the evaluation report. These courts operate a 20-week perpetrator program for family and domestic violence offenders. The Commission requested access to the evaluation report but at the time of writing the reports had not been made available. Likewise, the Commission has not been provided with any formal outcomes in relation to the Barndimalgu Aboriginal Family Violence Court in Geraldton. However, from the Commission's visit to this court and extensive consultations with various agencies involved in the court program, anecdotally it appears that the court is achieving very promising results. Although participation in group-counselling family and domestic violence programs is always conditional upon providing 'consent', the consensus from those consulted is that providing a legal incentive for participation is an effective means of initially encouraging entry to the program. In other words, if participation eventually leads to positive outcomes, it doesn't matter if the initial motivation to agree to participate in a perpetrator program is a desire to avoid imprisonment. While the Commission does not consider that persons bound by a violence restraining order should ever be forced to participate in a treatment program, there is an argument for providing a mechanism where consensual participation may be rewarded (eg, attendance at and compliance with a program as part of the conditions of an interim order could be taken into account at a final order hearing or could be considered during an application to vary or cancel a violence restraining order). Given that the Commission is not aware of the success or otherwise of the only existing perpetrator programs that operate within the Western Australian court system, it is not in a position to make a proposal at this stage. Subject to further research and submissions received, the Commission will consider whether the *Restraining Orders Act* should include provisions about treatment programs for persons bound by family and domestic violence related restraining orders.

QUESTION 14

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include provisions that enable a court to include a condition that a person bound by a violence restraining order attend a treatment program, and if so, in what circumstances should this occur?

BREACH OF VIOLENCE RESTRAINING ORDERS AND POLICE ORDERS

A frequent complaint received by the Commission during consultations is that offenders who breach violence restraining orders and police orders are dealt with too leniently. It was contended that this undermines the restraining order system and does not provide adequate protection for victims of family and domestic violence. This sentiment echoes concerns raised publicly leading up to the Commission's reference. In particular, there is significant disquiet that the 'third-strike' sentencing laws that were introduced in May 2012 to provide for a presumptive sentence of imprisonment for repeat offenders have not been effective.[173]

170. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31.
171. Section s 126 of the *Family Violence Protection Act 2008* (Vic) provides that a relevant court is the Family Violence Court Division or a Magistrates Court sitting at a specified venue (as published in the government gazette).
172. Urbis, *Literature Review on Domestic Violence Perpetrators* (undated) ii.
173. See Moulton E, 'Domestic Violence Victims Let Down', *Perth Now*, 28 October 2012; Moulton E, 'WA Domestic Violence Laws Set for Revamp Following Comprehensive Review', *Perth Now*, 18 July 2013.

Generally, the maximum penalty for breaching a violence restraining order or a police order is a fine of $6,000 or two years' imprisonment (or both).[174] However, s 61A of the *Restraining Orders Act* stipulates a presumptive penalty of imprisonment where the offender has been convicted of at least two offences of breaching a violence restraining order or a police order within two years. However, s 61(6) provides that:

> (6) A court may decide not to impose a penalty on the person that is or includes imprisonment or detention, as the case requires, if —
>
> (a) imprisonment or detention would be clearly unjust given the circumstances of the offence and the person; and
>
> (b) the person is unlikely to be a threat to the safety of a person protected or the community generally.

A court must provide written reasons to explain why a penalty that is or includes imprisonment (or detention in the case of a young offender) was not given.

There is some uncertainty as to what constitutes a repeat offender for this purpose – does the offender have to have been convicted by the court for one offence and then subsequently commit another relevant offence or are two offences committed at any time within the two years sufficient to establish repeat offender status (even if they were both dealt with by a court at the same time)?

Section 61A(2) provides the presumptive sentence of imprisonment applies if the person:

> (a) is convicted of an offence under section 61(1) or (2a) (the relevant offence); and
>
> (b) has committed, and been convicted of, at least 2 offences under section 61(1) or (2a) within the period of 2 years before the person's conviction of the relevant offence.[175]

In *D'Costa v Roe*[176] the appellant argued that his two relevant offences (3 July 2012 and 11 July 2012) should have been treated as a single conviction for the purpose of s 61A because he was convicted and sentenced for both offences on the same day (13 July 2012). It was held that s 61A did not apply to this case 'because the appellant had been convicted on only one prior occasion and had not committed a second offence after being convicted of a first'.[177] In support of this interpretation Hall J explained that where legislation provides a hierarchy of penalties for first, second or subsequent offences, the 'assumption is that the hierarchy has been constructed not only to more harshly punish repeated offending but offending that persists in the face of convictions in court and the warnings attendant thereon'.[178] The decision has been appealed and, at the time of writing, the decision of the Court of Appeal has been reserved.

The decision in *D'Costa v Roe*[179] raises the concern that offenders may accumulate a very high number of charges and, by having these dealt with by a court on the same day, avoid the third strike laws. On the other hand, the Commission understands the court's reasoning: an offender who has been dealt with by a court on two separate occasions for breaching a violence restraining order and commits a subsequent relevant offence would generally be regarded as more serious than an offender who comes to court for three offences at one time having never been dealt with by a court for breaching a violence restraining order. Of course, the seriousness of the offending will depend on the nature and circumstances of the breach. Continued offending in the face of a prior court conviction is just one factor that impacts on the seriousness of an offence.

Statistics provided by the Department of the Attorney General show that, on the basis of the Supreme Court interpretation discussed above,[180] there have been a total of 180 offenders liable to the 'third strike' presumptive sentencing laws since those laws commenced operation. In 27% of these cases the 'third strike' was a breach of a police order. One-third of offenders received immediate imprisonment with a further 4% being sentenced to suspended imprisonment. In contrast, if the prior two convictions were counted irrespective of when they occurred during the prior two-year period a total of 339 offenders would be liable to the third-strike laws. Of this total, 79 offenders (23%) received immediate imprisonment and 59 (16%) received suspended imprisonment. Overall, the proportion of offenders being sentenced to the presumptive sentence (which is either imprisonment or suspended imprisonment) is approximately the same in each situation (37%

174. *Restraining Orders Act 1997* (WA) ss 61(1) & 61(2a). In contrast, the penalty for breaching a misconduct restraining order is a maximum fine of $1,000: s 61(2).
175. The wording of s 61A is different to the s 400(3) of the *Criminal Code* which defines 'repeat offender' for the purpose of the three strikes sentencing laws for home burglary. It provides that a person is a repeat offender if that person 'committed and was convicted of a relevant offence' and 'subsequent to that conviction again committed and was convicted of a relevant offence'.
176. [2013] WASC 99.
177. Ibid [42] Hall J.
178. Ibid [4].
179. Ibid.
180. That is, a third strike is counted as a charge resulting in conviction, where the offender has two prior convictions occurring on separate occasions in the prior two years.

and 39% respectively).[181] Arguably, this percentage is too low given the purpose of the provisions. The Commission appreciates that some people consulted would like to see the existing third-strike sentencing provisions tightened so that more (or even all) repeat offenders are sentenced to imprisonment.

However, an inherent difficultly with mandatory sentencing regimes is that they fail to accommodate differences between individual cases. A breach of a violence restraining order may be particularly serious given that the offender not only breached the conditions of the order but did so in an intentional, threatening and abusive manner. The Commission was told during consultations that if an offender breaches a violence restraining order or police order by committing a violent offence it is highly probable that imprisonment will be imposed even for a first offence.[182] In contrast, a breach may occur because the person protected by the order initiates contact with the person bound in circumstances where there is no threatening or abusive behaviour. It is also vital to remember that the current provisions apply equally to all violence restraining orders irrespective of whether the parties are in a family and domestic relationship and the circumstances giving rise to the violence restraining order involved family and domestic violence.

The Commission was told of one case by a lawyer where the person bound and person protected by a violence restraining order were attending relationship counselling for 12 months and then resumed their relationship and eventually were married. The person bound believed that the person protected had cancelled the violence restraining order but the protected person was unsure of how to have the order cancelled so she simply did nothing about it. There was an argument between the person bound by the order and the daughter of the person protected (the daughter called the police) and on the basis that the parties were found to be living together, the person bound was charged with breaching the order.

During its visit to the Kimberley the Commission was repeatedly told that persons bound by police orders frequently do not understand that breaching a police order carries the same consequences as breaching a violence restraining order. Additionally, it was suggested that many persons served with a police order did not even recall its existence because they were intoxicated at the time that the order was served. A question arises as to whether breaches of police orders (which are imposed without any judicial oversight or mechanism for review) should attract the same penalty and consequences as breaches of a court-imposed violence restraining order.

A lawyer in the Kimberley explained that there are cases where each of the three breaches that gave rise to the third-strike provisions is a breach of a police order. The same lawyer also referred to a case where each of the three breaches of a violence restraining order involved 'consensual' behaviour (and in none of these cases had the protected person called the police). For one strike the police had seen the parties walking along the street together (and this was accepted by the court). On the next occasion, the person protected approached the person bound and sat next to him while he was sitting under a tree (they were no longer in a relationship but had remained friends). The offender eventually moved to a community 100km away so he would not be charged with a breach as a consequence of behaviour initiated by the person protected by the order. As mentioned earlier in this paper, a strong message received by the Commission concerned the frequency in which parties to violence restraining orders continue to cohabitate or contact one another and that this contact is often initiated or encouraged by the person protected by the order.

On the other hand, the Commission appreciates that the seriousness of some breaches may be being minimised by the justice system. Lawyers who act for victims of family and domestic violence explained that where breaches occur as a result of sending a text message, or message via social networking sites such as Facebook, the breach is often regarded by police and courts as a 'technical breach'. It was submitted that this attitude fails to appreciate that stalking behaviour is a strong precursor to physical violence and may indicate a significant risk to the safety of the person protected by the order. In this regard, the Commission has proposed earlier in this chapter that the Western Australia Police ensure that there is sufficient information before courts to demonstrate the nature of any contact made by electronic means.[183] This is to ensure that claims by accused persons that contact was made 'just for the

181. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.

182. In this regard, it has been stated that sentencing outcomes in relation to repeat breaches of orders 'require careful interpretation. Sentence escalation upon repeat contravention will not always be warranted. For example, the nature of the contravention, or any co-occuring offences, may warrant a less severe sentence than that imposed for the first contravention. Conversely, escalation may be warranted if reoffending signifies the offender's contempt for the [restraining order] regime and the law more generally': Victorian Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report* (2013) [5.46].

183. Proposal 2.

purpose of arranging contact between children' or because the protected person initiated contact can be refuted or confirmed and so that the sentencing court has a full understanding of the nature of the contact.

Some people consulted also mentioned that there is a practice of multiple breaches being packaged as one breaching offence in cases involving electronic communication. It was said that there was one case where 30 separate breaches were subject to just one charge. This is concerning where each breach represents separate conduct on the part of the person bound. For example, if a person bound physically turned up to the protected person's residence on three occasions during one day it is highly likely that they would be charged with three separate offences of breaching a violence restraining order. Likewise, if a person bound makes contact with the person protected via text message on three separate occasions during a 24-hour period it may equally be appropriate for three separate charges to be preferred. However, it is more complicated if there is a series of text messages that form part of one continuing conversation over a short period of time.

The Commission's preliminary view is that the current provisions—which enable a court to depart from the presumptive sentence where imprisonment or detention would be 'clearly unjust' and the offender is 'unlikely to be a threat to the safety of a person protected or the community generally'—do not require reform. These provisions reflect the seriousness of breaching a violence restraining order or a police order but still retain judicial discretion to enable individual circumstances to be taken into account. Bearing in mind that there is no defence available to an accused in relation to persistent encouragement or invitation on the part of the person protected by the order, this discretion is especially important. It is also necessary to accommodate the wide range of behaviour that may constitute a breach. Furthermore, any strict mandatory sentencing provisions would be likely to act as a powerful incentive for offenders to plead not guilty to breaching offences and this will only lead to further re-traumatisation for victims in the court process. Finally, it is important to remember that if there has been a particularly lenient penalty imposed for repeatedly breaching a violence restraining order or a police order the Western Australia Police can lodge an appeal to argue for an increased sentence.

Nonetheless, in response to the concern that exists in relation to perceived lenient sentences, the Commission seeks submissions about whether any changes to the third strike provisions are required and, further, queries whether the existing or any reformed provisions should apply to breaching a police order in the same way that they apply to breaching a violence restraining order. This is especially important bearing in mind the reported issuing of police orders against victims of family and domestic violence in some situations.

For those wishing to make submissions in respect of Question 15 (below), it is useful to consider the existing provisions in other Australian jurisdictions. In the Northern Territory, s 120 of the *Domestic and Family Violence Act* (NT) provides for a presumptive penalty of seven days' imprisonment where an offender has previously been convicted of breaching a domestic violence order. However, this sentence does not apply if 'the offence does not result in harm[184] being caused to the protected person' and the court is satisfied that it is not appropriate to record a conviction and sentence the person to imprisonment in the particular circumstances. Moreover, the presumptive sentence does not apply to a police-issued domestic violence order that has not been confirmed by a court. New South Wales includes a similar provision to Western Australia: a person who contravenes an order must be sentenced to imprisonment, unless the court otherwise orders and, if so, the court must give reasons.[185] In Queensland, there is a higher maximum penalty where the offender has previously been convicted of an offence for breaching an order.[186] Similarly, a higher maximum penalty applies in Victoria if the offender intended to cause or knew that the conduct would probably cause 'physical or mental harm to the protected person' or 'apprehension or fear in the protected person for his or her own safety of that of any other person'.[187] Escalated (but not mandatory) penalties are provided for in Tasmania for repeat contravention offences.[188]

QUESTION 15

1. Should s 61A of the *Restraining Orders Act 1997* (WA) be amended?
2. Should s 61A of the *Restraining Orders Act 1997* (WA) continue to apply equally to breaches of police orders and breaches of violence restraining orders?

184. Harm is defined under s 1A of the *Criminal Code* (NT) as 'physical harm or harm to a person's mental health, whether temporary or permanent'.
185. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.
186. See *Domestic and Family Violence Protection Act 2012* (Qld) s 177.
187. *Family Violence Protection Act 2008* (Vic) s 123A.
188. *Family Violence Act 2004* (Tas) s 35.

With regard to contravention of violence restraining orders and police orders occurring as a result of contact being initiated or encouraged by the person protected, it is noted that changes to the legislation in 2011 made it clear that protected persons cannot be charged with an offence for aiding or enabling a person to breach an order.

Furthermore, s 61B(2) provides that:

> In the sentencing of a bound person for an offence under section 61, any aiding of the breach of the order by the protected person is not a mitigating factor for the purposes of the *Sentencing Act 1995* section 8(1).

This provision is in stark contrast to the situation that existed prior to the 2004 reforms to the *Restraining Orders Act* when consent was a defence to a charge of breaching a restraining order.[189] Many lawyers consulted argued that it is inappropriate and unfair to preclude a court from taking into account aiding of the breach by the person protected in mitigation. It was also emphasised by one lawyer that a court sentencing an offender for breaching a protective condition of bail is permitted to take into account as mitigation behaviour of a victim that encouraged or initiated the breach. In such cases, the existence of protective bail conditions means that the offender has been charged with a criminal offence whereas, in the case of a breach of violence restraining order or police order, this may not necessarily be the case.

As mentioned elsewhere in this Paper, examples have been provided where the person protected has invited the person bound to attend a family gathering or attend the family home to visit children and if this is the only behaviour that occurs, it is clearly less serious than cases where the breach is uninvited or involves intimidation, offensive behaviour or abusive conduct. While the Commission supports the continued exclusion of the defence of consent, it considers it appropriate to provide that positive initiation or encouragement on the part of the person bound may be taken into account as mitigation.

189. Section 62 of the *Restraining Orders Act 1997* (WA) then provided that it was a defence for the person bound by the order to satisfy the court that the person acted with the consent (as defined under s 319(2)(a) of the *Criminal Code*) of the person protected by the order. It is noted that no Australian jurisdiction provides for a defence of consent.

PROPOSAL 25

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to enable circumstances where the person protected by a violence restraining order or police order has actively invited or encouraged the person bound to breach the order to be considered a mitigating factor in sentencing (but only where there is no other conduct on the part of the person bound by the order that would amount to family and domestic violence).

Defences

Section 62 of the *Restraining Orders Act* provides that it is a defence to a charge of breaching a restraining order for the person bound to satisfy the court that in carrying out the act that constituted the offence, the person was–

(a) using a process of family dispute resolution, as defined in the *Family Court Act 1997*;

(b) instructing, or acting through, a legal practitioner or a person acting under section 48 of the *Aboriginal Affairs Planning Authority Act 1972*, or using conciliation, mediation or another form of consensual dispute resolution provided by a legal practitioner;

(c) acting in accordance with an action taken by a person or authority under a child welfare law, within the meaning of section 50B(4); or

(d) acting as the result of such an emergency that an ordinary person in similar circumstances would have acted in the same or a similar way.

It was suggested to the Commission that s 62 is arguably deficient because it does not cover contravention of the order when the person bound and the person protected attend court (eg, for Family Court proceedings or for violence restraining order proceedings). For example, a violence restraining order may prohibit the person bound from being within 20 metres of the person protected by the order. While the Commission understands that most violence restraining orders would contain a condition to the effect that such behaviour does not constitute a breach of the order, it would be sensible to include this in the legislation for completeness.

PROPOSAL 26

That s 62 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that any contact between the person bound and the person protected by an order that occurs by reason of a person complying with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a restraining order.

LEGAL REPRESENTATION AND ADVICE

There is general consensus that legal representation for victims of domestic and family violence seeking restraining orders is likely to increase safety and protection. The Domestic Violence Legal Unit of Legal Aid, Aboriginal Family Law Services in regional locations and the Women's Law Centre (along with other community legal services) provide an avenue for representation for victims of family and domestic violence. Without commenting on the structure or operation of the planned Aboriginal Family Violence Service in Perth, the Commission supports increased resources for legal services for victims of family and domestic violence.

However, what is arguably more controversial is the need for adequate legal representation and advice for respondents to violence restraining order applications. Overall, it appears from consultations that applicants are far more likely to receive legal representation than respondents and often respondents are unable to access legal services because of conflict of interest issues or a lack of resources within the service itself to accommodate representation for restraining order matters.

During consultations the lack of legal representation or advice for respondents was considered significant. Stakeholders were concerned about the rights of respondents; however, there was equal concern about the impact on safety of victims of family and domestic violence if respondents do not properly understand the nature of a violence restraining order and consequences of breach. In January 2013 the SCALES Community Legal Centre commenced information sessions for respondents who have objected to a final order being made at Rockingham Magistrates Court. These sessions were developed following complaints from both applicants and respondents about the respondent's lack of understanding of the violence restraining order system. For example, the Commission was told that some respondents dealt with by SCALES had believed that a violence restraining order is a criminal conviction and others believed that the order prevents them from having contact with their children indefinitely. The Commission was informed that the information sessions cover the nature of a violence restraining order; how to read and understand the conditions of an order; what is meant by an 'act of abuse'; how the interim order was obtained (and that respondents can request a copy of the application and the transcript of proceedings); what constitutes a breach of a violence restraining order (including that the respondent will be in breach of the order even if the applicant initiates or encourages the breach); the ability to apply for a variation or cancellation of a violence restraining order; the various options available to respondents as an alternative to objecting to the order (such as consenting to the final order without admissions, offering to enter into an undertaking or negotiating a variation of the order; and that Family Court orders in relation to children will override the violence restraining order. It was contended that this process improves victim safety because respondents are less stressed about the process after attending the session and less likely to continue with their objection to the violence restraining order. The Commission was also told that a pilot has commenced in Joondalup where a local community legal centre is providing advice to respondents at the mention date for contested violence restraining order matters. The Commission is of the view that access to these types of information sessions should be increased throughout the metropolitan area and introduced in regional court locations.

PROPOSAL 27

That the Department of the Attorney General investigate and consider options for providing information sessions and access to legal advice to respondents to violence restraining order applications at all court locations across the state.

MISCONDUCT RESTRAINING ORDERS

Section 34 of the *Restraining Orders Act* provides that the grounds for making a misconduct restraining order are that:

> (a) unless restrained, the respondent is likely to —
>
> (i) behave in a manner that could reasonably be expected to be intimidating or offensive to the person seeking to be protected and that would, in fact, intimidate or offend the person seeking to be protected;
>
> (ii) cause damage to property owned by, or in the possession of, the person seeking to be protected;
>
> or
>
> (iii) behave in a manner that is, or is likely to lead to, a breach of the peace;
>
> and
>
> (b) granting a misconduct restraining order is appropriate in the circumstances.

However, s 35A provides that a misconduct restraining order cannot be made where the person seeking to be protected and the person who would be bound by the order are in a family and domestic relationship. It was suggested during consultations that the legislation should enable misconduct restraining orders to be granted where the parties are in a family and domestic relationship but only where there is no evidence of family and domestic violence. An example was provided where a client of a legal service wished to apply for a misconduct restraining order against her aunt (who lived in a different state) and repeatedly telephoned her at work to harass her about an historical family issue. This person could not obtain a misconduct restraining order because of the existence of a family relationship and a violence restraining order would not have been appropriate in the circumstances. While not wishing to undermine the available protection for victims of family and domestic violence, the Commission is interested to hear from stakeholders about whether misconduct restraining orders should be available for people who are in a family and domestic relationship but where there is no evidence of family and domestic violence.

QUESTION 16

1. Should the *Restraining Orders Act 1997* (WA) be amended to provide that a misconduct restraining order can be imposed where the applicant and the respondent are in a family and domestic relationship so long as the court is satisfied that there has not been and there is unlikely to be any family and domestic violence committed against the person seeking to be protected?
2. Further, if the *Restraining Orders Act 1997* (WA) is amended as suggested in 1, above, should the legislation also provide that the making of a misconduct restraining order between the parties does not prevent the person protected by the order from applying for a violence restraining order at any time?

UNDERTAKINGS

Where a respondent objects to a final violence restraining order being made, the applicant may agree to withdraw the application on the basis that the respondent has entered into an undertaking (ie, a promise not to behave in a particular manner). Alternatively, the matter may be resolved by both parties agreeing to enter into mutual undertakings. An undertaking may contain the same types of conditions as would ordinarily be included in a violence restraining order. There is nothing in the *Restraining Orders Act* that deals with undertakings and, although they can be made orally or in writing, the Commission understands that, generally, undertakings in Western Australia are made in writing. There is no sanction for failing to comply with an undertaking and they are not enforceable by the police. An undertaking in lieu of a violence restraining order may, therefore, undermine victim safety.[190] However, a breach of an undertaking may be evidence to support a future application for a violence restraining order.

A number of issues were brought to the Commission's attention during consultations in relation to undertakings. There was significant concern that victims of family and domestic violence are being pressured into accepting undertakings instead of proceeding with their application for a violence restraining order. In some instances it was stated that applicants may feel pressure to accept an undertaking because they fear the process of a full

190. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [18.156].

contested hearing or because they are unrepresented and do not understand that undertakings are not enforceable.[191] It was also asserted that pressure may be applied by the magistrate to enter into an undertaking because of workload and court listing demands. The Commission was told that there are some magistrates who actively encourage parties to enter into undertakings and hand a pro forma undertaking to the parties. An advocacy service representing women from culturally and linguistically diverse backgrounds warned that undertakings may be inappropriate in cases where applicants are relying on the existence of family and domestic violence for the purposes of their immigration status because the Immigration Department does not recognise undertakings as evidence of family and domestic violence. It was explained that sometimes advocates have managed to convince applicants not to accept the undertaking against the advice of their own lawyer. However, it was acknowledged by a lawyer who represents victims of family and domestic violence that undertakings may be suggested where there does not appear to be sufficient evidence to establish the grounds for a violence restraining order.

In response to similar issues raised during its reference, the ALRC/NSWLRC recommended that state and territory courts should require undertakings to be in writing on a standard form and this form should include a signed acknowledgement by each party that they understand that a breach of the undertaking is not enforceable and is not a criminal offence; that the acceptance of an undertaking by the court does not prevent further applications for a violence restraining order; and that evidence of a breach may be used in later proceedings.[192] While the Commission supports this approach, a more-innovative suggestion was put forward to the Commission by a lawyer who acts for victims of family and domestic violence. It was proposed that an enforceable consent order (something less than a violence restraining order but more than an undertaking) would provide a more effective form of relief in cases where an undertaking is currently used.[193] In other words, the option of a 'consent order' should be viewed as an alternative to undertakings rather than as an alternative to a violence restraining order.

In order for a consent order to achieve greater protection for victims of family and domestic violence there would need to be some enforcement mechanism. The Commission notes that under family law legislation non-compliance with an undertaking (which is included within the definition of an 'order' under the legislation[194]) without a reasonable excuse may be enforced by the imposition of sanctions such as a bond, a fine or even imprisonment.[195] The option of imprisonment might not be appropriate in this context because arguably there would be little to distinguish consent orders from violence restraining orders if the same penalties were available. However, a civil consent order with sanctions such as a monetary bond,[196] a requirement to participate in an intervention program or a fine may well be a workable alterative to a violence restraining order in some instances. It is acknowledged that similar pressures may be felt by victims of family and domestic violence to make consent orders (especially if they are unrepresented) and that judicial officers may encourage consent orders as a means of reducing heavy court lists. However, it is suggested that an enforceable order with potential consequences may be a better option than the current form of undertakings used in violence restraining order matters.

In addition, the legislation could provide that failure to comply with a consent order is a specific ground for obtaining a violence restraining order in the future. It could also be specifically provided that non-compliance need only be established on the balance of probabilities hence setting a lesser standard of proof than is the case for breaches of a violence restraining order. The Commission is interested to hear the views of a wide range of agencies and individuals about this possible proposal and accordingly seeks submissions on the following questions.

191. This was also submitted to the ALRC/NSWLRC, ibid [18.157].
192. Ibid, Recommendation 18-4.
193. This is to be distinguished from a violence restraining order made by consent pursuant to s 41 of the *Restraining Orders Act 1997* (WA) because a violence restraining order made by consent (even without admissions) is the same as any other violence restraining order with the same criminal consequences for non-compliance.
194. *Family Court Act 1997* (WA) s 5; *Family Law Act 1975* (Cth) s 4(1). An order affecting children is defined to include 'an undertaking given to, and accepted by, the court that relates to a parenting order or injunction'.
195. See, eg, *Family Court Act 1997* (WA) Div 3 which deals with the consequences of failure to comply with orders and other obligations, that affect children. Imprisonment may only be imposed if the contravention was intentional or fraudulent.
196. A monetary bond would require the person who contravened the consent order to enter into an agreement to forfeit a specified amount in the event of further breaches of the order.

QUESTION 17

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide for 'consent orders' as an alternative to the current process of undertakings with the following characteristics:

a. A consent order is an order of the court and is to be specifically registered.
b. A consent order may include conditions to be complied with by the respondent to an application for a violence restraining order only or by both the respondent and the applicant.
c. The court making the consent order is to provide a copy of the order to the Western Australia Police.
d. Failure to comply with the conditions of a consent order can be enforced on the application of the person aggrieved (or by a police officer, child welfare officer or other authorised person on their behalf) and the non-compliance can attract specified sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
e. A court is to be satisfied that a person has failed to comply with the conditions of the consent order on the balance of probabilities.
f. A finding that a person has failed to comply with the conditions of a consent order is sufficient evidence to satisfy a court that there are grounds for a violence restraining order to be made out unless there are exceptional circumstances to decide otherwise.

INTERSTATE ORDERS

A person protected by an interstate order (and other persons on behalf of the person protected) may apply for the registration of the order in Western Australia.[197] The person who is bound by the order does not need to be served with the application. If an application is made, the registrar is to register the interstate order and notify the interstate court, the applicant and the Commissioner of Police of the registration.[198] There does not appear to be any major concerns in relation to the registration of interstate orders. However, Western Australia Police mentioned that plans for a national register of family and domestic violence protection orders (which is intended to avoid the need for orders to be registered in other jurisdictions) have been somewhat stifled because Western Australia's violence restraining orders are not family and domestic violence specific.[199] It was also noted that there is a general concern across jurisdictions about the variation or cancellation of nationally registered orders by a different jurisdiction from the jurisdiction that made the order. It was suggested that where a person protected and/or person bound by an order resided close to a state or territory border, it would be beneficial if family and domestic violence restraining orders could be automatically registered in the bordering jurisdiction without the need for an application to be made. This option would require cooperation with other states and territories. Bearing in mind that interstate orders were not a significant issue during consultations, submissions are sought from interested stakeholders about whether there is any need for reform in this area.

QUESTION 18

1. Are there any practical issues concerning the registration of interstate violence restraining orders under the *Restraining Orders Act 1997* (WA)?
2. Does the *Restraining Orders Act 1997* (WA) require any reform in relation to interstate orders?

197. *Restraining Orders Act 1997* (WA) s 75.
198. *Restraining Orders Act 1997* (WA) s 76(1).
199. In Chapter Six below the Commission recommends that there should be new family and domestic violence restraining order specific legislation and therefore violence restraining orders that are family and domestic violence related will be separately identified and recorded.

Chapter Four

Criminal Justice Response to Family and Domestic Violence

Contents

Introduction

As evident from the discussion of the nature and dynamics of family and domestic violence in Chapter One and the legal definition of family and domestic violence in the preceding chapter, family and domestic violence encompasses a broad range of behaviour – a large proportion of this behaviour is contrary to the criminal law. This section of the Discussion Paper examines the criminal justice response to family and domestic violence related offences, as well as the interaction of the criminal justice system and the civil restraining order system. In this context, it is important to bear in mind that the civil and criminal justice responses are not intended to operate independently of each other or as alternative options. Both responses should, where applicable, operate together in a seamless and integrated manner to maximise victim safety and perpetrator accountability; reduce family and domestic violence; and minimise unnecessary duplication. It is acknowledged, however, that there will be instances where the criminal justice system cannot intervene because the behaviour constituting family and domestic violence is not a criminal offence or because the victim of an offence is unwilling or unable to support a criminal prosecution. In these situations, the violence restraining order system is the only legal recourse available.

In Chapter Three the Commission discussed the increasing levels of family and domestic violence incidents being reported to police and provided data in relation to the number of reports categorised as 'general' in comparison to 'criminal'. Based on the indicative data provided by the Western Australia Police, Domestic Violence Incident Reports (DVIRs) classified as crimes (as opposed to 'general') accounted for 40% of all DVIRs in 2012.[1]

Further verified data provided to the Commission in November 2013 indicates that in 2012 there were 11,866 domestic violence[2] incidents where an offence against the person[3] was recorded. Of these incidents, 4,100 resulted in an offender being processed[4] (34%).[5]

1. There was a total of 44,947 DVIRs in 2012 with 18,250 being classified as a DVIR crime rather than DVIR general. The material provided to the Commission in October 2013 explains that the statistics 'must be used as an indication only and not classified as verified. Verified statistics are those matters that are reported to the police within the relevant time period that have not been determined to be falsely or mistakenly reported.' The material advises that verified statistics are not available: Western Australia Police, *Statistics for Law Reform Commission of Western Australia* (undated).
2. That is where the 'domestic relationship flag' is recorded as 'Yes'. The material provided by the Western Australia Police indicated that the domestic relationship flag 'can include cohabitation, there does not have to be any personal relationship involved': Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, data provided by email (20 November 2013).
3. An offence against the person would not necessarily include all potential family and domestic violence related offences. For example, damage is not classified as an offence against the person under the *Criminal Code* (WA). The material provided by the Western Australia Police states that offences against the person include 'homicide, assault, sexual assault, threatening behaviour, deprivation of liberty and robbery': Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, data provided by email (20 November 2013).
4. An offender being processed means either arrested or summoned: Inspector Paul Newman, telephone consultation (25 November 2013).
5. Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, data provided by email (20 November 2013). Further data provided by the Business Intelligence Office indicates that the proportion of domestic violence incidents involving an offence against the person that resulted in an offender being processed was higher in regional areas (48%) than the metropolitan area (27%).

Criminal offences

There are many offences under the *Criminal Code* (WA) that can potentially apply to family and domestic violence. This section identifies typical offences committed in the context of family and domestic violence and discusses specific issues that have been brought to the Commission's attention during consultations concerning particular offences.

FAMILY AND DOMESTIC VIOLENCE RELATED OFFENCES

The most serious offences that potentially occur in family and domestic violence settings are homicide offences, which include murder, manslaughter and unlawful assault causing death. The key difference between murder and manslaughter is the presence or absence of intent. Murder is established if the offender unlawfully kills with an intention to kill or an intention to cause a life threatening injury to the victim.[1] Manslaughter is an unlawful killing without such intent; however, it may be excused under the criminal law on the basis of the defence of accident (ie, that the death was not reasonably foreseeable).[2] The offence of unlawful assault causing death (which is discussed in detail below) may be established even if death was not reasonably foreseeable in the circumstances.[3] Attempted murder is also dealt with in the same chapter of the *Criminal Code*.[4]

The table below shows the number of homicide offences[5] since 2004 where the parties were in a family and domestic relationship.[6]

Year	Homicide Offences		
	Metropolitan	Regional	Total
2004	19	8	27
2005	7	13	20
2006	11	12	23
2007	19	4	23
2008	10	8	18
2009	8	6	14
2010	5	3	8
2011	9	7	16
2012	13	13	26
2013[7]	12	7	19

On an Australia-wide basis for the two-year period from 2008–2009 and 2009–2010 domestic homicides[8] accounted for 36% of all homicides (which was only slightly less than the figure for homicides between friends and acquaintances (37%)).[9] It was observed that in the past the proportion of homicides involving friends and acquaintances has usually been significantly higher than the proportion of domestic homicides.[10] Of the 185 domestic homicides over the two-year period, 66% were intimate partner homicides; 23% involved the killing of a parent or child; 2% were homicides between siblings; and the remaining 9% involved other family members.[11] It is noted (from the table above) that in Western Australia there appears to have been a marked increase in domestic homicides in 2012 and 2013.

Chapter XXIX of the *Criminal Code* includes serious offences of violence such as acts with intent to cause grievous bodily harm, causing grievous bodily harm and unlawful wounding. Sexual offences are dealt with under Chapter XXXI of the *Criminal Code* and the more common offences likely to arise in the

1. See *Criminal Code* (WA) ss 279(1)(a) & (b). Section 279(1)(c) also provides that murder includes an unlawful killing where 'the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life'. This provision is often referred to as 'felony murder' and would be unlikely to arise in the context of family and domestic violence.
2. *Criminal Code* (WA) s 280.
3. *Criminal Code* (WA) s 281.
4. See *Criminal Code* (WA) Chapter XXXVIII.
5. The Commission confirmed with the Business Intelligence Unit of the Western Australia Police that homicides are murder, manslaughter and unlawful assault causing death: Inspector Paul Newman, telephone consultation (25 November 2013).
6. Business Intelligence Office, Strategy and Performance Directorate, Western Australia Police, data provided by email (21 November 2013).
7. The table represents domestic homicides in Western Australia from 1 January 2004 to 6 November 2013.
8. Domestic homicides are homicides between intimate partners, parents and child, siblings and other family members.
9. Chan A & Payne J, 'Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program annual report' (2013) 21 *AIC Reports Monitoring Reports* vii.
10. Eg, in 2007–2008 domestic homicides constituted 52% of all homicides: ibid 6–7.
11. Ibid vii.

context of family and domestic violence include sexual penetration without consent, sexual offences against children, sexual coercion and sexual offences by a lineal relative. Other relevant offences include kidnapping,[12] deprivation of liberty,[13] assaults,[14] threats (including threats to kill, injure, endanger or harm a person; and threats to destroy, damage, endanger or harm any property),[15] stalking,[16] damage,[17] and breaching a violence restraining order or a police order.[18]

Aggravating circumstances

A number of offences under the *Criminal Code* include a higher maximum penalty if the offence is committed in aggravating circumstances.[19] The term 'circumstances of aggravation' is defined in s 221 of the *Criminal Code* as:

> (1) In this Part —
>
> circumstances of aggravation means circumstances in which —
>
> (a) the offender is in a family and domestic relationship with the victim of the offence; or
>
> (b) a child was present when the offence was committed; or
>
> (c) the conduct of the offender in committing the offence constituted a breach of an order made or registered under the *Restraining Orders Act 1997* or to which that Act applies; or
>
> (d) the victim is of or over the age of 60 years.
>
> (2) In this section —
>
> family and domestic relationship has the same meaning as it has in section 4 of the *Restraining Orders Act 1997*.

Therefore, one basis of the definition of aggravating circumstances is the existence of a family and domestic relationship between the victim and the offender.[20] A different approach would be to require the presence of a history of family and domestic violence rather than a family and domestic relationship because the mere existence of a specified relationship may not of itself indicate that an offence is more serious. For example, if two cousins who had not communicated for 20 years became involved in a physical altercation during a chance social meeting and one of them was convicted of assault occasioning bodily harm, the existence of a familial connection between them would not necessarily make the offence any more serious than a similar incident between two strangers or two friends. However, as highlighted by lawyers during consultations, requiring proof of a history of family and domestic violence can be difficult, especially if the victim has not disclosed or reported past behaviour. While the Commission appreciates that the current definition of circumstances of aggravation may be, in some instances, too broad it is not minded to propose any reform because a sentencing court retains discretion to take into account all of the circumstances of the case in determining the appropriate penalty.

An important issue is that there are a number of offences that potentially apply to family and domestic violence that do not currently include a higher penalty if the offence is committed in circumstances of aggravation. For the sake of this discussion, the Commission has categorised those offences as follows.

Offences with a maximum penalty of life imprisonment

The offences of murder,[21] manslaughter, criminal damage by fire and attempted murder carry a penalty of up to life imprisonment. None of these offences specify circumstances of aggravation for a logical reason – there is no higher penalty that can be set. However, in determining the seriousness of the offence, the presence of a family and domestic relationship is a relevant factor.

This has been accommodated to some extent by s 63B(1) of the *Restraining Orders Act 1997* (WA) which provides that when a person has committed

12. *Criminal Code* (WA) s 332.
13. *Criminal Code* (WA) s 333.
14. *Criminal Code* (WA) Chapter XXX.
15. *Criminal Code* (WA) s XXXIIIA.
16. *Criminal Code* (WA) Chapter XXXIIIB.
17. *Criminal Code* (WA) ss 444 & 445.
18. These offences are discussed in detail above in Chapter Three.
19. Section 7(3) of the *Sentencing Act 1995* (WA) provides that if the statutory penalty for an offence is greater if the offence is committed in circumstances of aggravation, the offender is not liable to the greater statutory penalty unless he or she has been charged and convicted of committing the offence in those circumstances. Further, if the offender has not been charged with committing the offence in circumstances of aggravation those circumstances may still be taken into account as aggravating factors.
20. It is noted that South Australia is the only other Australian jurisdiction to include the existence of a family and domestic relationship in its definition of aggravating circumstances: *Criminal Law Consolidation Act 1935* (SA) s 5AA which includes the fact that the victim was a spouse or domestic partner of the offender or a child of the offender or a child of the offender's spouse or domestic partner. This definition applies to a wide range of offences.
21. The offence of murder carries a presumptive sentence of life imprisonment. Section 280(4) of the *Criminal Code* (WA) provides that an adult convicted of murder must be sentenced to life imprisonment unless that sentence would be 'clearly unjust given the circumstances of the offence and the person' and the 'person is unlikely to be a threat to the safety of the community when released from imprisonment'. If so, the offender is liable to 20 years' imprisonment.

a violent personal offence and is in a family and domestic relationship with the victim (or a child was present when the offence was committed or the conduct constituted a breach of a restraining order) the 'court sentencing the offender is to determine the seriousness of the offence taking that circumstance into account'.[22] A violent personal offence is defined in s 63B(3) to include murder, manslaughter and attempt to kill. Therefore, criminal damage by fire is not covered by any of the specific legislative provisions that explicitly provide that the presence of a family and domestic relationship is an aggravating factor.

In *The State of Western Australia v Bennett*[23] the offender was sentenced for stealing a motor vehicle, making a threat to kill and criminal damage by fire. The latter two offences were committed against his partner and there was a significant history of domestic violence. In relation to the criminal damage offence, the victim had left her premises because she was in fear of the offender, and while she was gone he telephoned her and sent numerous text messages threatening to damage her house. The state appealed against the leniency of the sentence imposed (15 months' imprisonment). On appeal it was stated that:

> It cannot be doubted that the offence of arson committed in this instance was serious enough to bring it within the category of 'very serious cases of arson' ... This is so because the respondent's offending was apparently motivated by revenge, it caused the destruction of a residential building, and it was against the background of a violent domestic relationship.[24]

The sentence was increased to four years and nine months' imprisonment. It is clear that the existence of a history of domestic violence was taken into account as an aggravating factor in this case, despite the fact that s 63B(3) does not cover that offence.

Offences with a maximum of 20 years' imprisonment

The definition of circumstances of aggravation under s 221 of the *Criminal Code* (discussed above) applies, with modification, to sexual offences. Section 319 of the *Criminal Code* provides that 'circumstances of aggravation, without limiting the definition of that expression in s 221, includes' various other circumstances (eg, the offender is armed, in company with another person, does bodily harm or threatens to kill the victim). Accordingly, various sexual offences that may be committed between persons who are in a family and domestic relationship are subject to the higher statutory penalty of 20 years' imprisonment that applies for sexual offences committed in circumstances of aggravation (eg, a person who sexually penetrates another without that person's consent in circumstances of aggravation is liable to 20 years' imprisonment instead of 14 years' imprisonment for the offence committed without aggravation).[25]

There are a number of relevant offences of violence that currently carry a maximum penalty of 20 years' imprisonment. Because 20 years' imprisonment is the highest period of imprisonment specified under the *Criminal Code* for any offence (except for those offences that carry a maximum penalty of life imprisonment) there is no elevated statutory penalty stipulated for circumstances of aggravation. These offences include disabling by means of violence in order to commit an indictable offence (s 292); stupefying in order to commit an indictable offence (s 293); acts with omission to cause bodily harm with intent to harm (s 304); and, most notably, acts intended to cause grievous bodily harm (s 294) and kidnapping (s 332). Of these offences, only kidnapping is included within the definition of a 'violent personal offence' for the purpose of s 63B(1) of the *Restraining Orders Act*.

Offences with a maximum penalty of less than 20 years' imprisonment

There are a number of offences of violence under the *Criminal Code* that include 'circumstances of aggravation'. The following table shows the difference in penalty between offences committed in circumstances of aggravation compared with offences committed in the absence of those circumstances.

There are a number of offences excluded from this list that are likely to regularly be committed in circumstances involving family and domestic violence: deprivation of liberty, threats, criminal damage and assault causing death. Deprivation

22. Section 63B(2) clarifies that subsection (1) does not affect court's discretion to decide whether or not a circumstance is a circumstance to take into account in sentencing an offender for any *other* offence.
23. [2009] WASCA 93.
24. Ibid [50] (Miller JA ,Owen JA & Buss JA concurring).
25. However, it is noted that there are some sexual offences in Chapter XXXI of the *Criminal Code* that might conceivably be committed where the offender and victim are in a family and domestic relationship that currently have a maximum penalty of 20 years' imprisonment (and where there is no aggravated penalty provided for circumstances of aggravation). These offences include sexual penetration of a child under the age of 13 years and procuring, inciting or encouraging a child under the age of 13 years to engage in sexual behaviour under s 320; certain sexual offences against a lineal relative under s 329; certain sexual offences against an incapable person under s 330; and certain offences involving sexual servitude under ss 331B and 331C.

Offence	Statutory penalty	
	Where no circumstances of aggravation	Where circumstances of aggravation
Stalking (s 338E)	3 years' imprisonment	8 years' imprisonment[26]
Grievous bodily harm (s 294)	10 years' imprisonment	14 years' imprisonment
Wounding (s 301)	5 years' imprisonment	7 years' imprisonment[27]
Assault occasioning bodily harm (s 317)	5 years' imprisonment	7 years' imprisonment[28]
Assault with intent	5 years' imprisonment	7 years' imprisonment[29]
Assault (s 313)	18 months' imprisonment and a fine of $18,000	3 years' imprisonment and a fine of $36,000
Indecent assault (s 323)	5 years' imprisonment	7 years' imprisonment[30]

of liberty and various offences involving threats are included within the scope of s 63B(1) of the *Restraining Orders Act*.[31] However, criminal damage and assault causing death are not included. The maximum penalty for criminal damage (other than damage by fire) is 10 years' imprisonment.[32] Likewise, the maximum penalty for assault causing death is 10 years' imprisonment. The absence of circumstances of aggravation for the offence of assault causing death attracted considerable comment during the Commission's consultations. However, concerns about this offence were broad enough to warrant separate consideration (see discussion later in this section).

Overall, the way that the legislation deals with circumstances of aggravation involving a family and domestic relationship is confusing and inconsistent. The Commission appreciates that sentencing courts would ordinarily take into account the existence of prior family and domestic violence in determining the seriousness of an offence for sentencing purposes.[33] However, there is merit in s 63B of the *Restraining Orders Act* applying more widely because it refers to the existence of a family and domestic *relationship* rather than a history of family and domestic violence (which is not always easy to prove).

Accordingly, the Commission is of the view that reform is warranted. It is recognised that including a higher statutory penalty for offences already carrying a maximum penalty of 20 years' imprisonment or life imprisonment is problematic (or, in the case of life imprisonment, impossible). Expanding the definition of 'violent personal offence' in s 63B of the *Restraining Orders Act* to include offences of criminal damage by fire (s 444), disabling by means of violence in order to commit an indictable offence

26. The circumstances of aggravation for the offence of stalking include the matters contained in s 221 of the *Criminal Code* (WA) as well as two other circumstances (ie, that immediately before or during, or immediately after the commission of the offence the offender was armed or the conduct constituted a breach of a condition of bail).
27. If the offence of wounding is dealt with summarily the maximum penalty if it is committed without circumstances of aggravation is 2 years' imprisonment and a fine of $24,000. If it is committed with circumstances of aggravation the maximum penalty is 3 years' imprisonment and a fine of $36,000.
28. If the offence of assault occasioning bodily harm is dealt with summarily the maximum penalty if it is committed without circumstances of aggravation is 2 years' imprisonment and a fine of $24,000. If it is committed with circumstances of aggravation the maximum penalty is 3 years' imprisonment and a fine of $36,000.
29. If the offence of assault with intent is dealt with summarily the maximum penalty if it is committed without circumstances of aggravation is 2 years' imprisonment and a fine of $24,000. If it is committed with circumstances of aggravation the maximum penalty is 3 years' imprisonment and a fine of $36,000.
30. The offence of aggravated indecent assault is set out in s 324 of the *Criminal Code* (WA).
31. The definition of violent personal offence includes deprivation of liberty (s 333); threats with intent to gain (s 338A); threats (including threat to kill) (s 338B); and statement or act creating false apprehension as to the existence of a threat or danger (s 338C). Additionally, it is noted that stalking is included within the definition of a violent personal offence despite the offence provision itself stipulating circumstances of aggravation.
32. Section 444 of the *Criminal Code* (WA) provides for a higher statutory penalty (14 years' imprisonment) if the offence is committed in circumstances of racial aggravation.
33. It is noted that in *The State of Western Australia v Naumoski* [2013] WASCA 215 the offender was sentenced to five years' imprisonment for an offence of doing grievous bodily harm with intent to maim, disfigure, disable or do grievous bodily harm contrary to s 294 of the *Criminal Code* (WA). The maximum penalty for this offence is 20 years' imprisonment. The offender and victim had separated. During the incident the offender stabbed the victim multiple times to the face, neck, arms and body. The victim was disfigured for life. On appeal it was stated that the circumstances of the offence 'place it high on the scale of seriousness just short of the worst category' [18] and the sentence was increased to seven years' imprisonment. However, McLure P also commented that 'I am not persuaded that the sentencing subtleties are appropriately conveyed by characterising the domestic relationship (whether past, existing or anticipated) setting as itself aggravating the offending' [41].

(s 292), stupefying in order to commit an indictable offence (s 293), acts with omission to cause bodily harm with intent to harm (s 304), and acts intended to cause grievous bodily harm (s 294) would assist by making the current provisions consistent. In addition, it is not clear why the offences of criminal damage, deprivation of liberty, threats and assault causing death should not include a higher statutory penalty if the offence is committed in circumstances of aggravation.

During consultations it was commented that s 63B of the *Restraining Orders Act* may more appropriately be included in the *Sentencing Act 1995* (WA) or the *Criminal Code*. It was suggested that judicial officers, prosecutors and lawyers may not appreciate its existence given that it appears in the *Restraining Orders Act*. The Commission seeks submissions about whether the proposed new s 63B should be moved into different legislation.

PROPOSAL 28

1. That the definition of 'violent personal offence' in s 63B of the *Restraining Orders Act 1997* (WA) be expanded to include criminal damage by fire (s 444), disabling by means of violence in order to commit an indictable offence (s 292); stupefying in order to commit an indictable offence (s 293); acts with omission to cause bodily harm with intent to harm (s 304); and acts intended to cause grievous bodily harm (s 294).
2. That the *Criminal Code* (WA) be amended to provide for a higher statutory penalty for the offences of criminal damage under s 444 (other than criminal damage by fire), deprivation of liberty under s 333, threats under ss338A–C, and assault causing death under s 281 if the offence is committed in circumstances of aggravation as defined under s 221.[34]
3. That if 2 above is implemented, s 63B of the *Restraining Orders Act 1997* (WA) should, for the sake of clarity, be amended to remove the offences of deprivation of liberty under s 333 and threats under ss 338A–338C of the *Criminal Code*.

34. For the sake of consistency, the higher statutory penalty for criminal damage (other than criminal damage by fire) should be 14 years' imprisonment because 14 years' imprisonment is specified currently if the offence is committed in circumstances of racial aggravation. Arguably, the higher statutory penalty for deprivation of liberty should also be 10 years' imprisonment. The appropriate statutory penalty for assault causing death committed in circumstances of aggravation is discussed below.

QUESTION 19

Should the proposed amended s 63B of the *Restraining Orders Act 1997* (WA) be transferred into the *Sentencing Act 1995* (WA) or the *Criminal Code* (WA) or remain in the *Restraining Orders Act 1997* (WA)?

Data

Because 'circumstances of aggravation' as defined under s 221 of the *Criminal Code* include three separate categories, it is not always clear whether an offence is aggravated because the offender and victim were in a family and domestic relationship or because one of the other circumstances existed.[35] During consultations with a number of representatives from the Department of Corrective Services it was highlighted that from their perspective they cannot always easily identify whether an offender has been convicted of an offence involving a victim who is or was in a family and domestic relationship with the offender. This is because the offence description may only refer to the existence of circumstances of aggravation rather than the nature of those circumstances. It was suggested that where the circumstances of aggravation are that the perpetrator and victim were in a family and domestic relationship, this should be articulated in the offence description at an accused's first entry into the criminal justice system. In this way, relevant agencies at all stages of the system are aware of whether there was a family and domestic relationship between the victim and the offender allowing appropriate legal responses[36] and social services to be more readily identified. This could possibly be achieved by the Western Australia Police specifically recording on the prosecution notice or the statement of material facts that the victim and offender were in a family and domestic relationship. The Commission sees merit in a more accurate mechanism of recording information about whether offences are committed against persons with whom

35. For example, if a child was present during the commission of the offence this would not necessarily be an indication of family and domestic violence. Likewise, if the relevant conduct constituted a breach of a violence restraining order it may be a situation where a violence restraining order was in place between two unrelated persons.
36. This includes the identification of appropriate legal pathways; for example, more accurate recording of whether the circumstances of aggravation involved a family and domestic relationship would be useful for courts when trying to identify cases that are eligible for specialist family violence court programs. As discussed later in this chapter, it would also provide a trigger to the Prisoners Review Board that an offence on the prisoner's criminal record was related to family and domestic violence and enable the Board to make further inquiries and request relevant information to inform its decision.

the offender is in a family and domestic relationship but, given the impact on particular agencies, it seeks submissions about the best and most efficient way of achieving this.

QUESTION 20

Should the Western Australia Police be required to record, as a circumstance of aggravation alleged in relation to a particular offence as part of the offence description, whether the victim and the accused were in a family and domestic relationship? If so, should this be recorded:

a. in the statement of material facts;

b. in the prosecution notice; or

c. elsewhere?

Assault causing death

As noted in the introduction to this Discussion Paper, in May 2012 the Western Australian Parliament received a petition from over 2,600 residents expressing concern about the inappropriate use of the offence of unlawful assault causing death for family and domestic violence related fatalities. In response to these concerns a private member's bill was introduced into Parliament on 26 September 2012 to increase the penalty for that offence to a maximum of 20 years' imprisonment if the offence was committed in circumstances of aggravation.[37] This bill was defeated. The Commission has proposed above that circumstances of aggravation be included for the offence of assault causing death; however, the magnitude of concerns raised during consultations in relation to this offence justify a more detailed analysis of the circumstances of its use.

Section 281 of the *Criminal Code* provides that:

> (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
>
> (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

This offence was introduced in 2008 as part of a package of reforms to the law of homicide.[38] The offence was designed to provide a response to fatalities arising from 'one-punch' cases. During parliamentary debates it was stated that:

> This new offence is to address the so-called one-punch homicide cases. An example of these types of cases is when a person who is punched falls to the ground and suffers a blow to the head from hitting the ground and dies... As the law currently applies, offenders who are charged with manslaughter in such cases are often acquitted on the basis that the death was an accident. A death will be an accident when it was not reasonably foreseeable that death would result as a consequence of the punch. Under the new provision, it will be irrelevant whether the death was foreseen or foreseeable, and it will also be irrelevant that the death was unintended. [39]

Therefore, assault causing death was essentially distinguished from manslaughter on the basis that criminal liability attached irrespective of whether death was reasonably foreseeable. At the time the offence of assault causing death was enacted the maximum penalty for manslaughter was 20 years. Hence, there was a clear differentiation in penalty. Since that time, the penalty for manslaughter has been increased to life imprisonment.[40]

As mentioned above, it has been asserted that since its enactment the offence of assault causing death has been used inappropriately in cases of family and domestic violence fatalities. In 2012 the Human Rights Law Centre argued that the offence 'does not reflect the different circumstances and severity of domestic violence' and that it has been 'used in cases where there has been a history of abuse as though they are equivalent to a "one punch homicide" and offenders are sentenced accordingly'.[41] The petition to Parliament in 2012 referred to four domestic violence related fatalities where it was contended that the penalties imposed for assault causing death were unduly lenient.[42]

37. Criminal Code Amendment (Domestic Violence) Bill 2012 (WA).
38. See *Criminal Law Amendment (Homicide) Act 2008* (WA). The vast majority of these reforms implemented recommendations made by the Commission in its reference on homicide: LRCWA, *Review of the Law of* Homicide, Final Report (2007). However, the Commission did not recommend the introduction of the offence of unlawful assault causing death. It is also noted that the defence of provocation contained in s 246 of the *Criminal Code* may apply to the offence of assault causing death because 'an assault' is an element of the offence: see s 245. Given that the Commission recommended the repeal of the partial defence of provocation, it also recommended that a review of the compete defence of provocation under s 246 of the *Criminal Code* be undertaken: Recommendation 30.
39. Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Mr Jim McGinty).
40. *Manslaughter Legislation Amendment Act 2011* (WA).
41. Human Rights Law Centre, *Human Rights Implications of Unlawful Assault Causing Death Laws* (14 March 2012) 3.
42. Western Australia, Legislative Council Standing Committee on Environment and Public Affairs, *Petition Number 161: Review of the Laws Pertaining to Domestic Violence*, Report No. 27 (2012) 10.

During parliamentary debates in relation to the Criminal Code Amendment (Domestic Violence) Bill 2012 it was claimed that the offence of assault causing death has 'mainly been used in domestic violence situations' and that media reports show that 'one-punch laws have been used in 12 cases of domestic violence'.[43]

The Office of the Director of Public Prosecutions has provided the Commission with statistics in relation to the offence of assault causing death.[44] Since August 2008 until the end of 2012 there have been 18 indictments and 13 convictions for this offence. It appears from this material[45] and discussions with the Office of the Director of Public Prosecutions that there have been no further convictions for assault causing death involving a family and domestic relationship since 2012.

For six of the 13 matters the victim and offender were in a family and domestic relationship (as defined under the *Restraining Orders Act*). The sentences imposed for the 13 matters resulting in a conviction ranged from 1 year 4 months' imprisonment to 5 years' imprisonment. The following table shows the sentences imposed based on whether there was a family and domestic relationship.

Sentences imposed	
Family and domestic relationship	**No family and domestic relationship**
Sentence unknown*	1 year 4 months
2 years 6 months	1 year 6 months
2 years 10 months	1 year 7 months
3.5 years	1 year 8 months
5 years	2 years 6 months
5 years	2 years 8 months
	3 years

* Sentence unable to be determined from available records.

Overall, the periods of imprisonment imposed for assault causing death where the offender and the victim were in a family and domestic relationship have been higher than for non-family and domestic relationships.

As explained during the Commission's consultation with the Office of the Director of Public Prosecutions, assault causing death is a statutory alternative for the offence of murder and manslaughter. For eight of the 13 matters resulting in a conviction, the offence of assault causing death was an alternative to murder/manslaughter. In other words, in these cases the offence of assault causing death was not the original charge preferred. It was also clarified that in some circumstances, assault causing death is the appropriate charge because the evidence is contradictory in relation to the cause of death and it will not be possible to negate the defence of accident for a charge of manslaughter. It was emphasised that, in the absence of the offence of assault causing death, some fatalities caused in family and domestic violence cases would go unpunished.

The Commission has considered the summaries provided in the Office of the Director of Public Prosecutions' comparative sentencing table in relation to the five cases of assault causing death where the offender and victim were in a family and domestic relationship and the sentence imposed is known. In *The State of Western Australia v Loo*[46] the offender and victim who were both males were intoxicated after attending a funeral. There was an argument between the offender and his sister (the victim's de facto partner). The victim followed his partner and the offender and there was an altercation where the offender punched the victim once causing him to fall to the ground unconscious. The cause of death was found to be bleeding to the brain caused either by trauma to the head or neck. The sentence imposed for this offence was two years and six months' imprisonment. Although, the offender and victim were in a family and domestic relationship, there was no suggestion of any history of violence or power imbalance between the parties. Indeed, the circumstances of this case suggest that it was appropriately covered by the offence of assault causing death because the death followed a single punch.

In some of the cases, the determination of the cause of death was a complicating factor in terms of relying on the offence of manslaughter instead of assault causing death. In *State of Western Australia v Jones*[47] there was a significant history of domestic violence and the victim and her children had been living in a refuge. When the victim visited the offender to see her daughter who was spending the weekend with the offender, an argument ensued and the offender punched the victim to the temple causing her to fall

43. Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2012, 7596 (Dr A.D Buti & Ms JM Freeman).
44. Office of the Director of Public Prosecutions, statistics provided by correspondence (23 September 2013).
45. Office of the Director of Public Prosecutions, *Unlawful Assault Causing Death* (December 2012) Comparative Sentencing Table.
46. Unreported, District Court of Western Australia, ALB41 of 2012.
47. [2011] WASCSR 136.

to the ground and continued to attack her as she lay on the floor. The victim died during the night and he left her body in the house for 12 days before he finally admitted to police that he had assaulted the victim. The cause of death could not be determined because the body was so badly decomposed. The sentence imposed was five years' imprisonment. In *The State of Western Australia v Indich*[48] the victim and accused had been in a de facto relationship. The offender became angry because the victim had not prepared him a meal and he punched her once to the ribs. The victim suffered two broken ribs and a lacerated spleen; pre-existing and post-operative complications led to her death two days later. The sentence imposed in this case was two years and 10 months' imprisonment.

In *The State of Western Australia v Warra*[49] the offender and victim were in de facto relationship and it was indicated that there was a history of domestic violence. An argument developed because the offender believed that the victim was being unfaithful. He punched the victim to the head and she fell to the ground. The offender continued to attack her while she was on the ground and again assaulted her the following day (including kicking her to the head while she was on the ground). The victim went to a refuge but subsequently returned to offender. They both consumed alcohol and the offender again attacked the victim, kicking her to the face. The victim died during the night. A sentence of five years' imprisonment was imposed for this matter. Finally, in *The State of Western Australia v Zyrucha*[50] the victim and offender, who were in a de facto relationship, had a two-day alcohol and drug binge. The victim was involved in a car crash. She was treated at hospital and was then returned home by police. After the victim returned home, she was assaulted twice by the offender. She later died during her sleep and there were conflicting medical opinions in relation to the cause of death. The offender in this case received a sentence of three years and six months' imprisonment.

It is the Commission's view that there is insufficient evidence to sustain the contention that the offence of assault causing death has been inappropriately charged in cases of family and domestic violence related fatalities. First, there have only been six convictions for this offence where the parties were in family and domestic relationship (46% of total convictions). Second, there will be situations where murder or manslaughter is charged but a jury convicts the accused of the alternative offence. Third, where a choice is made by the prosecution to indict for assault causing death it is important to recognise that, if there are evidentiary issues concerning the cause of the death, it may be that the accused is likely to be able to rely on the defence of accident. Finally, the Commission is particularly concerned that if the offence of assault causing death is unavailable as an option in family and domestic violence cases then it is quite conceivable that some perpetrators of serious family and domestic violence would be unpunished for causing the death.

Having said that, the Commission appreciates that the circumstances in some family and domestic violence related offences may be particularly serious and justify a higher penalty. The Commission has already proposed above that a higher statutory penalty should be provided for assault causing death if it is committed in circumstances of aggravation (which includes that the accused and the deceased were in a family and domestic relationship).[51] Given that the offence of manslaughter now carries a maximum penalty of life imprisonment, the Commission seeks submissions about whether an increase in the penalty for assault causing death in circumstances of aggravation to a maximum of 20 years' imprisonment is appropriate?

QUESTION 21

Should the maximum penalty for the offence of assault causing death under s 281 of the *Criminal Code* (WA) committed in circumstances of aggravation be 20 years' imprisonment?

Stalking

During consultations concerns were expressed by the Western Australia Police as well as a victim support agency that the offence of stalking under the *Criminal Code* only covers behaviour at a particularly serious level and that it would be beneficial if the *Criminal Code* provided a lower level offence of stalking to enable intervention by the criminal justice system at an earlier stage (ie, before the behaviour escalates to serious stalking).

However, Chapter XXXIIIB of the *Criminal Code* provides for both an indictable and a simple offence of stalking. Section 338E(1) provides for the indictable

48. Unreported, Supreme Court of Western Australia, No 211 of 2009.
49. [2011] WASCSR 17.
50. Unreported, Supreme Court of Western Australia, No 127 of 2009.
51. See above Proposal 28(2).

offence[52] and requires proof that the accused pursued[53] a person with 'intent to intimidate[54] that person or a third person'. Section 338E(2) provides for the simple offence of stalking:

> A person who pursues another person in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, that person or a third person is guilty of a simple offence.

Therefore, the more serious offence requires proof of an intention to intimidate whereas the simple offence requires proof that a person was in fact intimidated (and the behaviour of the accused was objectively likely to intimidate) irrespective of the intention of the accused.

Consultations with the Office of the Director of Public Prosecutions did not indicate any problems in regard to the indictable offence of stalking other than the observation that any offence that requires proof of intention is usually more difficult to prove than an offence that does not require proof of intention.[55] One police officer also advised that he saw no issue in relation to the use of the simple offence of stalking and actively encouraged its use among other officers. The Commission understands from its consultations with representatives from the 2014 Gender Bias Taskforce Review[56] that the offence of stalking is being reviewed. For that reason, and because no significant issues were raised during consultations, the Commission has not made any proposal for reform in relation to the substance of the stalking offences.

However, as noted earlier in this Paper, there is a continuing issue in regard to the manner in which the law responds to family and domestic violence related behaviour that is undertaken by electronic means and this would include cyberstalking. It has been observed that cyberstalking is

> analogous to traditional forms of stalking in that it incorporates persistent behaviours that instil apprehension and fear. However, with the advent of new technologies, traditional stalking has taken on entirely new forms through mediums such as email and the Internet.[57]

It is arguable that the current definition of 'pursue' may not adequately cover specific types of cyberstalking. If, for example, a perpetrator posted photos of a victim on a social networking site with an intention of intimidating that person, it may not constitute direct or indirect communication with that person as required under s 338D(1) of the *Criminal Code*.[58] It has been noted that other jurisdictions specifically accommodate electronic communications in their stalking offences. For example, s 359B of the *Criminal Code* (Qld) defines 'unlawful stalking' to include conduct that is intentionally directed at a person; engaged in on any one occasion if the conduct is protracted or on more than one occasion; and consists of 'contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology'.

Bearing in mind that the offence of stalking extends beyond family and domestic violence related behaviour (and the complexity of the issues involved), the Commission proposes that a specific review be undertaken in relation to the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of abusive or threatening behaviour undertaken by electronic means.

PROPOSAL 29

That the Western Australian government conduct a review into the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of abusive or threatening behaviour undertaken by electronic means.

52. The offence can be dealt with summarily. On indictment, the penalty is a maximum of eight years' imprisonment if the offence is committed in circumstances of aggravation or, otherwise, three years' imprisonment. Section 338D of the *Criminal Code* provides that the circumstances of aggravation as set out in s 221 apply to the offence of stalking but, in addition, it is also a circumstance of aggravation that the offender was armed or that the conduct constituting the offence breached a condition of bail.
53. 'Pursue' is defined in s 338D(1) as 'to repeatedly communicate with the person, whether directly or indirectly and whether in words or otherwise'; 'to repeatedly follow the person'; 'to repeatedly cause the person to receive unsolicited items'; 'to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place'; and 'whether or not repeatedly, to do any of the foregoing in breach of a restraining order or bail condition'.
54. 'Intimidate' is defined in s 338D(1) to include 'to cause physical or mental harm to the person'; 'to cause apprehension or fear in the person'; 'to prevent the person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act'; and 'to compel the person to do an act that the person is lawfully entitled to abstain from doing'.
55. Statistics provided by the Office of the Director of Public Prosecutions indicate that the number of charges under s 338E of the *Criminal Code* have fluctuated over many years. For each annual period between 1996–1997 and 2009–2010 the number of charges has varied between as low as five and up to as high as 44. In 2010–2011 there was a total of seven charges with three of these cases resulting in convictions. In 2011–2012 there were 11 charges and four convictions: Office of the Director of Public Prosecutions, correspondence (20 November 2013).
56. The 2014 Gender Bias Taskforce Review is undertaking a 20th anniversary review of the 1994 Chief Justice's Gender Bias Taskforce Report and its report is expected to be published in 2014.
57. Ogilvie E, 'Cyberstalking' (2000) 166 *Australian Institute of Criminology Trends & Issues* 1.
58. See ibid 5.

As a relatively minor issue, the Western Australia Police Family Violence State Coordination Unit mentioned that the current legislative provisions dealing with stalking are cumbersome insofar as they make it difficult to easily identify that the aggravated offence of stalking is a serious offence for the purpose of the power of police to arrest without a warrant under the *Criminal Investigation Act 2006* (WA). The basis of this complaint is that four separate provisions must be accessed to determine that the offence falls within the definition of a serious offence. Section 128(1) of the *Criminal Investigation Act* generally defines a 'serious offence' as an offence with a statutory penalty which includes imprisonment for five years or more or life imprisonment. While s 338E of the *Criminal Code* specifies that the penalty for aggravated stalking is eight years' imprisonment, it is necessary to resort to both ss 221 and 338D of the *Criminal Code* to determine the circumstances of aggravation. As discussed above, the definition of circumstances of aggravation in s 221 refers to the definition of a family and domestic relationship in the *Restraining Orders Act*. It was the view of the Family Violence State Coordination Unit that s 338D should specifically refer to all of the possible circumstances of aggravation so it is clearer for police officers to appreciate that aggravated stalking is a serious offence. The Commission's view is that any confusion in this regard is appropriately addressed through police training and policy manuals.[59]

DEFENCES

In 2007 the Commission published its report on the *Review of the Law of Homicide*.[60] This reference examined homicide offences, defences and sentencing, and culminated in substantial reforms to the criminal law in 2008.[61] This report included a chapter dealing with domestic violence and homicide, and outlined how the Commission's recommendations would apply in such cases. Most relevantly, the defence of self-defence was reformulated, partly to enable victims of family and domestic violence to rely on the defence in circumstances where they have been compelled to resort to lethal violence in their own defence. In particular, two previous preconditions for self-defence (the existence of an assault and a fear of death or grievous bodily harm) were removed.

59. The Commission has proposed that the Western Australia Police provide more regular training to all police officers in relation to family and domestic violence: see below Chapter Three, Proposal 5.
60. LRCWA, *Review of the Law of Homicide*, Final Report, Project No 97 (2007).
61. See *Criminal Law Amendment (Homicide) Act 2008* (WA). Many, but not all, of the changes effected by this Act implemented the Commission's recommendations.

However, the precise formulation of the new defence of self defence is different from the Commission's original recommendation.[62] Section 248(4) of the *Criminal Code* now provides that a harmful act[63] is done in self-defence if:

> (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
> (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
> (c) there are reasonable grounds for those beliefs.

Section 248(3) establishes the partial defence of excessive self-defence by providing that:

> (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
> (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.

In addition, the Commission recommended a provision be inserted into the *Evidence Act 1906* (WA) requiring a trial judge to direct the jury that an act may be carried out in self-defence even though there was no immediate threat of harm so long as the threat was inevitable and, further, that a response may be reasonable for the purpose of self-defence even if it was not a proportionate response. This recommendation was designed to accommodate the circumstances of female victims of family and domestic violence who may resort to lethal force in self-defence.[64] It was also recommended that opinion evidence about family and domestic violence may be led in relation to certain aspects of self-defence and that persons be permitted to give opinion evidence about family and domestic violence where their qualifications are based solely on their experience.[65]

62. The Commission recommended a different test whereby the accused must have believed on reasonable grounds that it was necessary to use defensive force, the accused must have believed that the act was necessary in self defence, and the act must have been a reasonable response to the circumstances (as the accused perceived them on reasonable grounds to be). See LRCWA, *Review of the Law of Homicide*, Final Report, Project No. 97 (2007) Recommendation 23.
63. A 'harmful act' is defined as 'an act that is an element of an offence under this Part other than Chapter XXXV'.
64. LRCWA, *Review of the Law of Homicide*, Final Report, Project No. 97 (2007) 168–9 & Recommendation 22. This recommendation was implemented in part by the insertion into the new s 248 in *Criminal Code* (WA) that the harmful act does not need to be imminent.
65. Ibid, Recommendations 41 & 42.

The recommendations about opinion evidence have not yet been implemented.

The Commission also recommended that a review of the new homicide laws should be conducted after five years and this review should consider, in particular, actual cases to determine if the laws are operating as intended.[66] Section 17 of the *Criminal Law Amendment (Homicide) Act 2008* (WA) implemented this recommendation by requiring a statutory review of the changes as soon as practicable after five years (ie, 1 August 2013). The Commission understands that this statutory review is currently underway and submissions are being sought from relevant stakeholders. In addition, the 2014 Gender Bias Taskforce Review will be looking at aspects of the 2008 homicide law reforms. Bearing this in mind, along with the absence of any concerns raised by stakeholders in relation to the practical application of the laws, the Commission is aware of no reason to alter its original recommendations.

66. LRCWA, *Review of the Law of Homicide*, Final Report, Project No. 97 (2007), Recommendation 2.

Criminal practice and procedure

BAIL

An accused arrested for a family and domestic violence related offence may be released on bail on specific conditions until the matter is finalised in court. Commonly, in such matters, the police and/or the court will impose what are referred to as 'protective bail conditions'. Protective bail conditions are imposed under clauses 2(2)(c) and (d) of Part D, schedule 1 of the *Bail Act 1981* (WA). Those clauses provide that a bail condition may be imposed to ensure that, among other things, the accused 'does not endanger the safety, welfare or property of any person' or 'does not interfere with witnesses or otherwise obstruct the course of justice'. Often, protective bail conditions for family and domestic violence related offences will provide that an accused is not to have any contact whatsoever with the victim of the offence. Specific conditions will also frequently mirror typical restraints imposed under a violence restraining order (eg, not to approach the victim within a specified distance or not to remain on or attend at specified premises). In addition, protective bail conditions may include a non-molestation condition; that is, that the accused is not to behave in an offensive, intimidatory or emotionally abusive manner towards the victim of the offence.

Protective bail conditions and violence restraining orders

Accused persons may be subject to both protective bail conditions and restraints imposed by a violence restraining order. This may occur because the victim of the offence has obtained a violence restraining order independently of the criminal justice process. It may also arise because a court makes a violence restraining order during criminal proceedings under s 63 of the *Restraining Orders Act 1997* (WA); however, the Commission was repeatedly informed during consultations that this is rare.

Alternatively, an accused may only be subject to protective bail conditions (especially if the victim of the offence has not applied for a violence restraining order). Lawyers consulted by the Commission advised that police officers will frequently impose protective bail conditions in order to ensure the safety of the victim. It was explained that some magistrates are of the view that protective bail conditions alone are sufficient. However, once the charge is finalised the protective bail conditions lapse and, unless the victim has obtained a violence restraining order, there will not be any ongoing legal protection afforded to the victim.

Clause (2a) of Part D, schedule 1 of the *Bail Act 1981* (WA) provides that before imposing a protective bail condition the judicial officer or police officer is

> to consider whether that purpose would be better served, or could be better assisted, by a restraining order made under the Restraining Orders Act 1997 and whether, in the case of a judicial officer, to exercise the power in section 63 of that Act or, in the case of an authorised officer, to make a telephone application under that Act.

Section 63(1) of the *Restraining Orders Act* provides that:

> A court, including a judicial officer considering a case for bail, before which a person charged with an offence is appearing may make a restraining order against that person or any other person who gives evidence in relation to the charge.

Clause 2(2a) above expresses the requirement to consider a restraining order as an alternative to protective bail conditions rather than an additional tool to provide protection for the victim. In its reference on Court Intervention Programs, the Commission observed that it is understandable that some magistrates may prefer protective bail conditions over a violence restraining order because it may not be possible to be satisfied that the grounds for making a violence restraining order have been made out[1] and because of concern that it is generally easier for a violence restraining order to be cancelled.[2] On the other hand, it was observed that police officers are more likely to respond to a breach of a violence restraining order and the penalties imposed are likely to be higher.[3]

The Commission recommended that clause 2(2a) should be 'amended to provide that on a grant

1. This is a requirement under s 63(4) of the *Restraining Orders Act 1997* (WA).
2. LRCWA, *Court Intervention Programs*, Consultation Paper, Project No. 96 (2008) 144.
3. Ibid.

of bail for a purpose set out in subclause 2(c) or (d) a judicial officer or police officer is to consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both'.[4] The purpose of this recommendation was to encourage the consideration of both options operating concurrently in addition to viewing these orders as alternative options.

As stated at the outset, the Commission has been told that s 63 of the *Restraining Orders Act* is underutilised in criminal proceedings (including bail proceedings). In addition, the Commission was informed that some judicial officers and prosecutors are unaware that this power exists. The Commission discusses the interaction of violence restraining orders and criminal proceedings further below but at this stage of the discussion it is highlighted that the provisions of the *Bail Act* should not discourage the use of both a violence restraining order and protective bail conditions at the one time. Accordingly, the Commission repeats the following recommendation from its 2009 report.

PROPOSAL 30

That clause 2(2a) of Part D, Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial officer or authorised officer must consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.

Lawyers consulted by the Commission for this reference also mentioned that, where both protective bail conditions and a violence restraining order are in place, it is important that the conditions are not contradictory.[5] Further, magistrates and lawyers emphasised that changes to either protective bail conditions or the conditions of a violence restraining order without corresponding changes to the other conditions may lead to confusion and to unintended breaches. In order to ensure that where protective bail conditions and violence restraining orders co-exist their conditions are consistent, the Commission makes the following proposal.

PROPOSAL 31

That before setting or amending protective bail conditions for an offence involving family and domestic violence, the judicial officer or authorised officer must consider whether there is an existing interim or final violence restraining order between the accused and the victim of the offence and, if so, the court is to ensure that the conditions of bail and the conditions of the violence restraining order are compatible unless to do so would pose a risk to the safety of the victim.

Jurisdiction to grant bail for breaching a violence restraining order

As discussed in Chapter Three, s 16A(3) of the *Bail Act* provides that a police officer does not have jurisdiction to grant bail to an accused who has been arrested and charged with breaching a violence restraining order in an urban area (currently the metropolitan area only). In such cases, the accused must be brought before a court for bail to be considered by a magistrate and, as noted during consultations, this may mean that an accused is kept in custody overnight until he or she can be brought before a court. The Commission has already observed that police have jurisdiction to set bail for serious family and domestic violence related offences (eg, sexual penetration without consent, grievous bodily harm and stalking). It is the Commission's view that, in practice, s 16A(3) may in fact have the unintended consequence of encouraging police to use the summons process for breaching a violence restraining order instead of arrest. It is also inconsistent that accused persons in the metropolitan area must be brought before court for bail to be considered whereas accused persons in regional locations can have their bail set by the police. While the Commission appreciates the practical reason for this approach (ie, an accused may be kept in custody for a longer period in regional and remote areas because a court may not be sitting), it is anomalous and may be unfair that accused are treated differently in this respect simply because of their location. Therefore, the Commission proposes that s 16A(3) of the *Bail Act* should be repealed.

PROPOSAL 32

That s 16A(3) of the *Bail Act 1981* (WA) be repealed.

4. LRCWA, *Court Intervention Programs*, Final Report, Project No. 96 (2009), Recommendation 28.
5. The Commission was told that offenders participating in the Family Violence Court program will generally be subject to protective bail conditions. If there is a current violence restraining order, the court will endeavour to ensure that the protective bail conditions are the same as the violence restraining order conditions. In the past the court has stipulated that the protective bail conditions are as per the conditions of the violence restraining order; however, the courts are now specific about the precise conditions because it is recognised that the violence restraining order might be cancelled.

Bail risk assessment reports

The Family Violence Service of the Department of the Attorney General currently facilitates the preparation of written bail risk assessment reports for use in the specialist Family Violence Courts in the metropolitan area. These assessments are usually prepared after being requested by the court when a participant in the Family Violence Court program seeks a variation of protective bail conditions. They may also be prepared if requested by an external magistrate; however, the application to vary bail conditions will be transferred to and dealt with by the local Family Violence Court.

The Commission was told that generally these bail risk assessments will take approximately one to three weeks to be prepared and due to resourcing constraints only a limited number can be requested each week (usually one to two). Depending on the outcome of the risk assessment, the court may refuse to vary the protective bail conditions or might commence a process whereby staged contact between the offender and the victim is facilitated (eg, initially telephone contact may be allowed and then limited in-person contact may be permitted with an eventual relaxation of the protective bail conditions to simply include a non-molestation clause).

There is no explicit statutory basis for these bail risk assessments; however, they are widely supported by magistrates and many lawyers. Magistrates consulted by the Commission explained that the information contained in these reports is invaluable. The Commission has examined sample reports and they appear to include the following information (where applicable):

- Current protective bail conditions.
- Input from the victim (if the victim has agreed to be interviewed or contacted).
- A criminal history and court history check through the court database.
- History of violence restraining orders issued against the accused.
- Summary of the statement of material facts in relation to the current offences.
- Information from the Western Australia Police in relation to prior Domestic Violence Incident Reports (DVIRs).
- Information from the Department for Child Protection and Family Support in relation to the parties.
- Risk assessment score and associated comments.
- Information from the Department of Corrective Services.
- Recommendation from the Family Violence Service in relation to the proposed variation to protective bail conditions.

While the vast majority of people who discussed these reports with the Commission were in favour of their expanded use, there was some caution expressed by defence lawyers. It was noted that these reports contain information that may not be appropriate in subsequent proceedings before the same judicial officer (ie, sentencing proceedings). In particular, there was concern about the information provided by police in relation to DVIRs because this information may relate to alleged behaviour that has not been subject to a charge (let alone a conviction). However, the Commission is not convinced that this argument precludes consideration of the material contained in the bail risk assessment reports. To begin with, s 22 of the *Bail Act* provides that a judicial officer or authorised person 'may in considering any case for bail receive and take into account such information as he thinks fit whether or not the same would normally be admissible in a court of law'. Also, the purpose of the bail risk assessment is to enable consideration of the risk to the safety of the victim which is clearly required under the provisions of the *Bail Act*. The Commission believes that a judicial officer who has read the material contained in a bail risk assessment report will disregard irrelevant matters in subsequent sentencing proceedings (assuming that the judicial officer in fact recalls that information).

Given the overwhelming support for the expanded use of bail risk assessments and the Commission's view that in family and domestic violence matters it is vital that decision-makers are properly informed, it is proposed that additional resources should be provided to enable these reports to be prepared and used in all relevant bail proceedings. This will provide a practical mechanism for ensuring victim safety in the criminal justice system. Given that the *Bail Act* currently authorises bail decision-makers to take into account such information as they think fit, it does not appear necessary to provide a statutory basis for the provision of these reports. However, it was suggested to the Commission by one Family Violence Service worker that the legislation should recognise bail risk assessment reports to encourage their expanded use. The Commission seeks further submissions on this subject.

PROPOSAL 33

That funding be provided to the Family Violence Service (and other relevant agencies such as Victim Support Services) to enable bail risk assessment reports to be prepared for the purpose of considering bail conditions for all cases involving specified family and domestic violence offences unless the accused does not object to the inclusion of full protective bail conditions being imposed (ie, that no contact at all is permitted between the accused and the victim).

QUESTION 22

Should the *Bail Act 1981* (WA) explicitly provide that a court hearing a bail application in relation to an accused who has been charged with specified family and domestic violence related offences can request a bail risk assessment report to be prepared?

It is noted that the process used for the provision of bail risk assessment reports may be a useful way of providing information to courts hearing contested final violence restraining order matters as discussed in Chapter Three.[6] Later in this chapter the Commission proposes a pilot program where a metropolitan Family Violence Court also hears violence restraining order matters where the applicant and respondent are in a family and domestic relationship. As part of this pilot program it is proposed that risk assessment reports, modelled on the bail risk assessment reports, be provided to the court.

SENTENCING

Apart from the concern expressed by many stakeholders in relation to the perceived inadequate sentences imposed for breaching a violence restraining order or a police order (see discussion in Chapter Three), there were a number of discrete issues raised in relation to the sentencing process for family and domestic violence related offences. These are examined below.

National criminal records

The Commission was told by lawyers who represent victims of family and domestic violence that it is common for offenders to be sentenced in the absence of a full national criminal record. The practice in this regard was said to be ad hoc. During the consultation with the Western Australia Police Family Violence State Coordination Unit a degree of caution was expressed about the ease and speed by which a full national criminal record can be obtained by an arresting officer and included in the prosecution brief. Irrespective of any practical barriers to obtaining this information, it is inappropriate that a sentencing court may be considering the appropriate penalty for an offender who has committed a family and domestic violence offence in the absence of knowledge about whether that person has previously been convicted of similar offences and what sentencing options were imposed in the past. While these factors cannot aggravate the seriousness of an offence[7] they may be very relevant when determining whether an offender should be provided with an opportunity for a community-based disposition that includes treatment or intervention or whether the offender has reached the stage where imprisonment is the only appropriate option. The Commission proposes that the Western Australia Police ensure that national criminal records are included in the prosecution brief as early as possible for every family and domestic violence related offence.[8]

PROPOSAL 34

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every family and domestic violence related offence includes the accused's national criminal record as soon as is practicable after the person is charged.

Perpetrator programs

The Commission noted in Chapter Three that there is a degree of uncertainty in regard to the effectiveness of perpetrator programs in terms of reducing recidivism. The Department for Child Protection and Family Support has published a guide for child protection workers engaging with perpetrators of family and domestic violence which observes that:

> Research about the value of [men's behaviour change programs] in terms of men's behaviour change is equivocal. The evidence suggests that participation in an [men's behaviour change

6. See above Chapter Three, Evidence and Information.

7. Section 7(2) of the *Sentencing Act 1995* (WA) provides that an offence is not aggravated by the fact that the offender has a criminal record or a 'previous sentence has not achieved the purpose for which it was imposed'.

8. Because of the Commission's Terms of Reference it has limited this proposal to family and domestic violence related offences; however, it is observed that national criminal records should be provided for all offences.

> programs] or family and domestic violence-focused counselling is not a guarantee of changing behaviour. Only a minority of men make and sustain substantial, comprehensive changes to all of their behaviour. Many will change some aspects of their violence and may or may not sustain this over time. Some men participate in a program but ultimately make no or minimal changes, or reduce some forms of violence but increase others in order to maintain overall levels of coercive control.[9]

A recent literature review in the United States in relation to domestic violence perpetrator programs in Washington found that group-based treatment for male offenders (based on the Duluth model) 'appears to have no effect on recidivism' and that this conclusion is consistent with previous studies. It was acknowledged that there may be other reasons for courts to order participation in these programs, such as offender accountability.[10] It was explained that the Duluth model assumes domestic violence is a gender-specific behaviour and that men 'are socialised to take control and to use physical force when necessary to maintain dominance'.[11] In addition, the model works on the assumption that domestic violence is not caused by 'mental illness, substance abuse, anger stress or dysfunctional relationships'.[12]

This view was reiterated to the Commission by some victim advocates and it was emphasised, in particular, that substance abuse should not be viewed as a cause of family and domestic violence. However, it is clear from the research and from the Commission's consultations that substance abuse along with intergenerational violence, past trauma, breakdown in culture and social disadvantage contributes significantly to family and domestic violence within at least Aboriginal communities.[13] Specifically, it was submitted that mainstream perpetrator programs are not appropriate for Aboriginal offenders because they are based on the view that family and domestic violence is primarily caused by beliefs about power and control over women. It was submitted by stakeholders that programs for perpetrators must be culturally appropriate.

Group perpetrator programs are available for offenders in Western Australia who participate in the Family Violence Court programs in the metropolitan area and for those participating in the Barndimalgu Aboriginal Family Violence Court in Geraldton. The Commission was told that Aboriginal offenders participating in the Family Violence Court programs are able to access an Indigenous Family Violence Program run by the Department for Corrective Services (or can choose to participate in the mainstream program).[14] The group program for the Barndimalgu Court is also an Aboriginal-specific program but is delivered by Communicare. Stakeholders in Geraldton explained that this program is based on a Northern Territory program and has been adapted for Western Australia. It includes issues such as intergenerational violence and the stolen generation. Participants in the Barndimalgu Court are invariably required to complete a four-week alcohol and drug abuse course at the start of the program and often before they commence the family violence program.[15]

A large number of people working in the family and domestic violence service sector, as well as judicial officers, lawyers and police consulted by the Commission, expressed support for treatment intervention for perpetrators. While acknowledging that the evidence-base for success of these programs in terms of reduced recidivism is limited, the Commission notes that, anecdotally, some programs appear to have an impact on future behaviour. The Commission highlights the reported success of the Barndimalgu Aboriginal Family Violence Court program for a number of its past and current participants. Stakeholders informed the Commission that they had seen many success stories during the life of the program. As noted in Chapter Three, the Commission has requested copies of the evaluation reports for the Family Violence Courts and the Barndimalgu Court; however, the Commission has

9. Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 66.
10. Miller M, Drake E & Nafziger M, 'What Works to Reduce Recidivism by Domestic Violence Offenders?' in *Washington State Institute for Public Policy*, Document No. 13-01-1201 (2013) 12.
11. Ibid 2.
12. Ibid 3.
13. See, eg, Cripps K & Davis M, 'Communities Working to Reduce Indigenous Family Violence' (Indigenous Justice Clearinghouse, 2012) Brief, 1; Gordon S et al, *Putting the picture together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 56; LRCWA, *Aboriginal Customary Laws*, Final Report, Project No. 94 (2006) 283–284. Also, the Aboriginal Social Justice Commissioner of the Australian Human Rights Commission has observed that statistics reveal 'that alcohol is a significant factor in Indigenous family violence' and 'there is more likelihood of significant harm when drinking occurs': Gooda M, 'Justice Reinvestment: A new strategy to address family violence' (paper delivered at the National Family Violence Prevention Forum, Mackay, Queensland, 19 May 2010) 2.
14. The Commission was also informed that the Indigenous Family Violence Program is currently being revised to include greater cultural input.
15. The approach to participation in substance abuse programs by Family Violence Courts differs. In Midland, participants are often directed to complete the STIR program; however, some people consulted in other Family Violence Courts expressed concern about permitting offenders with substances abuse problems into the family violence programs.

been advised that a decision is yet to be made about whether it will be given access to these reports.

In the absence of these reports, the Commission does not consider that it is appropriate to express a conclusion about whether programs for perpetrators of family and domestic violence are successful in Western Australia in terms of reduced reoffending. However, it is evident that there are significant gaps in access to perpetrator programs. For example, female offenders cannot participate in the Indigenous Family Violence Program in Geraldton and participants in the metropolitan Family Violence Courts are ineligible to participate in the group program unless the relevant behaviour occurred in an intimate relationship (participants who have committed offences against other family members are referred to individual counselling). During its visit to the Kimberley, great concern was expressed to the Commission about the lack of programs for family and domestic violence, in particular that there are no programs at all in the East Kimberley. It is also apparent that programs for prisoners are limited particularly where the prisoner is serving a short sentence. Consultation with representatives from the Department for Corrective Services highlighted that the provision of appropriate group programs for family and domestic violence in remote areas is problematic. It was explained that rolling group programs[16] are considered best practice; however, in order to provide such programs there must be a sufficient demand (ie, certain number of eligible offenders to enable the program to operate on a continuing basis). Further, there are few service providers in remote areas that are equipped to deliver group family and domestic violence programs.

Bearing in mind the high incidence of family and domestic violence within Aboriginal communities,[17] it is important that culturally appropriate and evidence-based programs are made available throughout the state.[18] Furthermore, subject to the outcomes of the evaluation of the Family Violence Courts in the metropolitan area, consideration should be given to ensuring that there is wider access to perpetrator programs across the state. It is the Commission's view that a full audit and review of the success or otherwise of existing programs for family and domestic violence perpetrators should be undertaken (including consideration of the outcomes of the Family Violence Courts and Barndimalgu Aboriginal Family Violence Court, and other programs available to offenders as part of a community-based sentencing disposition or while in prison or on parole).

PROPOSAL 35

That the Department of the Attorney General and the Department of Corrective Services jointly undertake an audit and a review of the outcomes of all existing Western Australian treatment programs for family and domestic violence offenders.

Sentencing options

The most common sentencing outcomes for offenders in Western Australia include fines, community-based orders, suspended imprisonment, conditional suspended imprisonment and imprisonment. The Commission understands that a review of the *Sentencing Act 1995* (WA) has been undertaken by the Department of the Attorney General but at the time of writing this paper the report of the review was not publicly available.[19] During consultations the limitations of existing sentencing options were referred to. For fly-in fly-out workers it was suggested that periodic imprisonment orders (eg, where the offender could serve a sentence of imprisonment one week out of every month) would be useful in some family and domestic violence cases. Likewise, it was argued that weekend detention may be a valuable option for intimate partner violence to reflect the seriousness of the offence and increase offender accountability but also enable the offender to continue employment and provide financial support to the victim (and any children). A former Family Violence Service worker noted that fines are not always appropriate where the parties remain together because the victim may also suffer financial stress as a result. Fines may also 'exacerbate the risk of further violence if the offender is already aggrieved about financial matters'.[20] The current limitation on sentences of imprisonment to more than six months was also mentioned during consultations.

The Commission sees merit in expanding available sentencing options for family and domestic violence

16. That is, where the program runs on a continuous basis so participants enter and exit the program at different times.
17. See above Chapter One, Impact on particular groups.
18. In its Final Report on Aboriginal Customary Laws in 2006 the Commission recommended that the Western Australia government encourage, support and resource community-based and community-owned Aboriginal family violence intervention and treatment programs: LRCWA, *Aboriginal Customary Laws*, Final Report, Project No. 94 (2006), Recommendation 91.
19. The Commission understands that the report of the statutory review was tabled in Parliament on 5 December 2013; however, it was not publicly available on 6 December 2013 (the date on which this Paper was finalised): *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013).
20. See also Victorian Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report* (2013) 47.

offenders; however, any reform will have wider implications and in the absence of consideration of the review of the *Sentencing Act* and knowledge of any likely proposed amendments, the Commission does not feel it is appropriate to recommend any specific reforms at this stage. It is proposed, therefore, that the Western Australia government's response to the review of the *Sentencing Act* should include specific consideration of whether any reforms provide adequate options for family and domestic offenders.

PROPOSAL 36

That when responding to the review of the *Sentencing Act 1995* (WA) the Western Australia government specifically consider whether any proposed reforms provide adequate options for family and domestic offenders and whether any additional reforms are required to ensure that the available sentencing options are appropriate.

Parole

As mentioned in the introduction to this Paper, the decision of the State Coroner in the investigation of the death of Andrea Pickett in 2012 emphasised a number of system failures surrounding the circumstances of her death at the hands of her estranged husband. At the time of the offence, the offender was subject to parole for threatening to kill the deceased. The offender was released on parole on condition that he have no direct or indirect contact with the victim. His supervision on parole mainly consisted of telephone contact and there had only been one visit to his house (located outside of Perth) to make sure that he was in fact living there. The conclusion expressed by the State Coroner was that the offender's parole supervision provided no protection to the deceased.[21] Recommendations were made including that the monitoring of parolees should, wherever possible, be undertaken in person; that local police should be informed that a parolee is residing in the location and of the terms of that parole; and that the Department of Corrective Services and the Western Australia Police improve their information sharing to enable police to have a role in monitoring parole conditions.

The Western Australia Police informed the State Coroner that the processes had since changed and Western Australia Police now receive a list from the Department of Corrective Services on a daily basis of all offenders who have been released on parole and an alert is placed on the Incident Management System (which includes the conditions of parole).[22] During the Commission's consultations, the Western Australia Police Family Violence State Coordination Unit advised that all relevant recommendations from the coronial inquest had been implemented. Representatives from the Department of Corrective Services in Geraldton explained that if a parolee is living in a remote location, the community corrections officer will visit that person as often as possible (eg, when they attend the location for court) and will also liaise with local agencies (eg, police) to ensure that the parolee is regularly sighted in person. The Commission was also advised that the department and police now conduct a monthly offender management forum where they identify high-risk offenders and that local police are invited to weekly case management meetings for particular offenders. Overall, it was observed that communication between the two agencies has improved considerably.

In relation to the decision-making process for release on parole, representatives from the Department of Corrective Services advised that repeat family and domestic violence offenders who have previously breached community-based supervision orders will invariably be refused parole. It was stated that the Victim Offender Mediation Unit will usually interview the victim who is entitled to have direct input into the decision about release on parole. However, the Chairman of the Prisoners Review Board stated that it is uncommon for victims to provide direct input and usually the victim's views are obtained by the Victim Offender Mediation Unit (which interviews both the offender and the victim, and most commonly recommends non-contact conditions). For offenders who have been sentenced to significant terms of imprisonment, the Prisoners Review Board will request home assessment reports and risk assessments to inform its decision.

The Chairman of the Prisoners Review Board emphasised that victim safety is a high priority in the board's decision-making process. In cases of family and domestic violence offending, the board will rarely allow an offender to reside with the victim of the offence (irrespective of the victim's wishes). In particular, it was noted that where the offender and victim wish to reside together and there are underlying substance abuse issues the risk to safety is considered too great.[23] This approach is based

21. State Coroner of Western Australia, *Record of Investigation into Death of Andrea Louise Pickett* (June 2012) 21–5.

22. Ibid 59.

23. If the offender is returning to the same community but not living with the victim and the victim expressed the view that she or he wanted contact with the offender, non-contact conditions would not usually be imposed.

on ss 5A and 5B *of the Sentencing Administration Act 2003* (WA). Section 5A provides that one of the relevant considerations in relation to release on parole is

> the degree of risk (having regard to any likelihood of the prisoner committing an offence when subject to an early release order and the likely nature and seriousness of any such offence) that the release of the prisoner would appear to present to the personal safety of people in the community or of any individual in the community.

Section 5B stipulates that the Prisoners Review Board or any other person performing functions under the Act 'must regard the safety of the community as the paramount consideration'.

Importantly, it was also clarified that these considerations are taken into account even when the current offence is not family and domestic violence related but where there is a history of family and domestic violence offending. However, the available information in these cases is limited to earlier Prisoners Review Board files where past family and domestic violence related offences resulted in imprisonment. If the board is aware that a prior offence listed on the offender's criminal history is family and domestic violence related it can request information from the police; however, it is not always clear from the record whether the offence occurred in a family and domestic violence context. In this regard, the Commission has sought submissions about whether the Western Australia Police should be required to record whether an offence took place between persons in a family and domestic relationship.[24] If the criminal history of an offender included a clear flag to indicate that the offence was family and domestic violence related, then this would provide a trigger to the Prisoners Review Board to undertake further inquiries and request relevant information.

Of particular concern to the Prisoners Review Board are the gaps in information about violence restraining orders. If a violence restraining order is in existence the board will endeavour to ensure that the conditions of parole match the conditions of the violence restraining order (if appropriate) and will include a generic condition of parole that the offender comply with the conditions of the violence restraining order. If the board is informed that the offender has breached the conditions of the violence restraining order it can suspend or cancel parole immediately and issue a warrant for the arrest of the offender. It was noted that victims often contact the Prisoners Review Board to inform it of a breach. It was suggested that there should be a central database that includes all violence restraining orders made from the Magistrates Court, the District Court and the Supreme Court.

In Chapter Three the Commission has proposed that the Department of the Attorney General develop an IT process enabling the Magistrates Court and the Family Court of Western Australia to have access to each other's records to determine if named parties are subject to orders in the other jurisdiction.[25] The Commission considers that as part of this process the applicable database should include violence restraining orders made in all courts so that the Prisoners Review Board is able to check on the existence of violence restraining orders.

PROPOSAL 37

That the Department of the Attorney General develop an IT process that enables all family and domestic violence restraining orders to be included in one database and accessible by the Prisoners Review Board.

Apart from these issues, no other specific concerns in relation to parole were raised during consultations, other than a general observation during a meeting with the Victims of Crime Reference Group that it is vital that the parole system responds to issues of victim safety. In the absence of any evidence to suggest otherwise, the Commission is satisfied that processes and procedures have been adequately updated in response to the Andrea Pickett case and that victim safety is the priority consideration of the Prisoners Review Board.

Global positioning system (GPS) tracking

Currently in Western Australia, GPS tracking is used for serious sex offenders under the *Dangerous Sexual Offenders Act 2006* (WA). The regime commenced on 20 May 2013. The Department of Corrective Services explains that:

> GPS monitors offenders in near real-time. A device is fitted to their ankle and sends out a signal to a satellite. The device then relays location information to the Central Monitoring Station in Midland and the Department's Public Protection Unit at head office. The information is overseen by electronic monitoring officers who work at both the Central Monitoring Station and as part of the Public Protection Unit. An alarm is

24. See above Question 20.

25. See above Chapter Three, Proposal 20.

activated if the offender enters an exclusion zone or tries to tamper with the device. The electronic monitoring officers assess the alarm and arrange an appropriate response, which could include a phone call, a visit from an adult community corrections officer or even police intervention depending on the risk posed.[26]

As at 30 June 2013 a total of 16 people were subject to this GPS monitoring in Western Australia.[27]

In January 2013 the Attorney General stated that the government was considering legislation to enable GPS tracking of 'repeat domestic violence offenders'.[28] A number of people consulted by the Commission suggested that GPS tracking should be used for family and domestic violence offenders and/or respondents subject to violence restraining orders. However, others argued that a degree of caution should be adopted because GPS tracking has limitations. These include that GPS tracking only enables a person's whereabouts to be monitored[29] so any threatening or abusive behaviour conducted electronically or by a third person would not be captured. GPS technology enables the perpetrator and victim to have split devices – the offender wears a device and the victim carries one. The effectiveness of this system is dependent on whether the victim remembers to carry the device. There is also a risk if GPS tracking is adopted it will be seen as the panacea. However, the system is not foolproof; signals can be lost and perpetrators can remove the device (although if this occurs there will be an alert). Further, the effectiveness of any response to an alert that an offender has removed the device or is in a prohibited location will ultimately depend on the capacity of the police to respond.

The Department of Corrective Services and the Prisoners Review Board stated that the current legislation enables GPS tracking for parole orders but not for sentencing orders because the current sentencing legislation only enables electronic monitoring of offenders in their home. Under the *Sentencing Act* an offender may be required to 'wear any device' for the purpose of surveillance or monitoring but only as part of a curfew requirement under a pre-sentence order, intensive supervision order or conditional suspended imprisonment order. A curfew requirement is a requirement that an offender remains at a 'specified place' and submits to surveillance and monitoring.[30]

In contrast, s 30 of the *Sentence Administration Act 2003* (WA) provides that the Prisoners Review Board can include as a condition of a parole order 'a requirement that the prisoner wear any device for monitoring purposes'.[31] It is not limited to monitoring whether the person is at a particular location or place. Also, ss 18 and 19A of the *Dangerous Sexual Offenders Act 2006* (WA) provide for GPS tracking for serious sexual offenders upon their release from prison by providing that a supervision order under the legislation must require the offender to 'be subject to electronic monitoring' and by enabling a community corrections officer to direct the offender to 'wear an approved electronic monitoring device' and to direct the offender to 'permit the installation of an approved electronic monitoring device at the place where the person resides or, if the person does not have a place of residence, at any other place specified by the community corrections officer'. Section 19A(1) provides that the 'purpose of electronic monitoring of a person subject to a supervision order is to enable the location of the person to be monitored'. Again, these provisions permit the person's whereabouts to be monitored as distinct from checking whether the person is at a specified place.

Accordingly, the Commission agrees that GPS tracking is permitted for offenders subject to parole (as well as for dangerous sexual offenders) but is not legislatively authorised for offenders subject to sentencing orders. There is also no provision under legislation to permit GPS tracking of persons bound by a violence restraining order.[32]

Given the qualifications expressed above in relation to GPS tracking, the Commission's preliminary view is that it should only be utilised for high-risk family and domestic violence offenders and only where it is part of a broader interagency case management approach in relation to victim safety. Offenders who are imprisoned would ordinarily represent the highest risk category and, as noted above, the current legislation enables GPS tracking for parolees. In addition, it may also be appropriate for similar provisions as appear under the *Dangerous Sexual Offenders Act* to apply to high-risk family and domestic violence offenders after any parole term or sentence has expired. However, given that the current regime for GPS tracking of serious sex offenders

26. Department of Corrective Services, *Annual Report 2012–2013* (2013) 54.
27. Ibid 53.
28. Hon Murray Cowper & Hon Michael Mischin, 'Government to Expand GPS Tracking of Offenders', *Ministerial Media Statements,* 20 January 2013.
29. See Department of Corrective Services, *Annual Report 2012–2013* (2013) 53.
30. *Sentencing Act 1995* (WA) ss 33H, 75 & 84C.
31. The term 'device' is not defined under the *Sentencing Act 1995* (WA) or the *Sentence Administration Act 2003* (WA).
32. It is noted that no other Australian jurisdiction currently provides for GPS tracking for respondents to violence restraining orders (or similar orders).

is very new, the Commission cautions against any changes being made to expand this process to other offenders prematurely. The Commission proposes, therefore, that after a period of two years the Department for Corrective Services undertake a comprehensive review of the effectiveness of GPS tracking under the *Dangerous Sexual Offenders Act* with a view to determining if it is appropriate to expand GPS tracking to other persons, and if so, in what circumstances.

PROPOSAL 38

That after two years has elapsed since the GPS tracking system for dangerous sexual offenders under the *Dangerous Sexual Offenders Act 2006* (WA) commenced, the Department for Corrective Services undertake a review of the effectiveness of GPS tracking including consideration of:

a. The number of offenders subject to GPS tracking;

b. The cost of GPS tracking per offender;

c. The number of offenders who interfered with the device;

d. The circumstances in which alerts were received by the monitoring unit and the effectiveness of the responses to these alerts; and

e. Whether GPS tracking should be expanded to other persons including family and domestic violence offenders and persons bound by violence restraining orders and, if so, in what circumstances.

RESTRAINING ORDERS DURING CRIMINAL PROCEEDINGS

As highlighted in Chapter Two of this Paper, a key theme that emerged from the Commission's consultations is duplication of family and domestic violence related legal proceedings. One way this occurs is where violence restraining order proceedings are dealt with separately from criminal proceedings that relate to the same behaviour. Some of the problems associated with duplication in this context are the re-traumatisation of victims, duplication of resources within the legal system and delays to proceedings.

Currently, the *Restraining Orders Act* enables violence restraining orders to be imposed during criminal proceedings in two ways: as a discretionary decision or automatically upon conviction for specified serious personal violence offences.

General discretion to make violence restraining orders during criminal proceedings

Section 63(1) of the *Restraining Orders Act* provides that:

> A court, including a judicial officer considering a case for bail, before which a person charged with an offence is appearing may make a restraining order against that person or any other person who gives evidence in relation to the charge.

Section 63(3a) details when a restraining order may be made and for present purposes it is important to note that a restraining order may be made under this section on the initiative of the court or at the request of a party to the proceedings (eg, the prosecution). A restraining order cannot be made under s 63 unless the court is satisfied of the grounds for making an order under the relevant provisions of the Act and the court has considered the matters that are required to be taken into account under s 12 or s 35 of the Act. In addition, a restraining order cannot be made unless the 'person is present when the order is made and has been given an opportunity to be heard on the matter'. Generally, a restraining order made under s 63 is a final order; however, if the person who would be bound by the order objects to it being made, the court may make an interim order.

The Commission was repeatedly informed during consultations that violence restraining orders are seldom made during criminal proceedings under this provision. This is borne out by the data provided to the Commission by the Department of the Attorney General. Only a few violence restraining orders were made in this context each year between 2005 and 2009. Since then, the annual number has increased; however, the total number of violence restraining orders made under s 63 by the lower courts remains small (48 orders in 2010; 31 in 2011; and 21 orders in 2012).[33]

Automatic violence restraining orders during criminal proceedings

Section 63A of the Act provides an automatic process for specified 'violent personal offences'. Pursuant to this provision a court that convicts a person for a 'violent personal offence' is required to make a final violence restraining order for the protection of the victim unless there is already such an order in force

33. Cheryl Gwilliam, Director General, Department of the Attorney General, correspondence (25 October 2013) enclosing 'Restraining Order Data for the Law Reform Commission'.

for life. If a violence restraining order for a lesser period is already in force, the court is required to vary the order by extending the duration of the order for life. However, a court is not to make a violence restraining order if the victim objects to the violence restraining order being made. A 'violent personal offence' is defined as the following offences: attempt to kill (s 283 of the *Criminal Code*); grievous bodily harm (s 297); sexual penetration without consent (s 325); aggravated sexual penetration without consent (s 326); sexual coercion (s 327); and aggravated sexual coercion (s 328). The provision is not specific to family and domestic violence so the automatic imposition of a violence restraining order for these offences may occur when the offence is committed against a stranger or other person who is not in a family and domestic relationship with the offender.

Putting to one side whether the range of offences should be expanded under s 63A, based upon the nature and seriousness of the current offences included within the definition of a 'violent personal offence' there are two notable offences that are excluded from the ambit of s 63A: acts intended to cause grievous bodily harm or prevent arrest (s 294) and kidnapping (s 332). Both of these offences carry a maximum penalty of 20 years' imprisonment. The Commission is of the view that, irrespective of whether any other reform is undertaken in relation to the imposition of violence restraining orders during criminal proceedings, s 63A of the *Restraining Orders Act* should be amended to include these two offences.

PROPOSAL 39

That s 63A of the *Restraining Orders Act 1997* (WA) be amended to include the offences of acts intended to cause grievous bodily harm or prevent arrest under s 294 of the *Criminal Code* (WA) and kidnapping under s 332 of the *Criminal Code* (WA).

Expanding the power to make violence restraining orders during criminal proceedings

The 2008 review of the *Restraining Orders Act* referred to the unnecessary duplication that occurs when 'violence restraining order applications are not adequately integrated within the criminal offence process where the incident giving rise to both proceedings is the same'.[34] It was observed that:

> Ideally, when a matter comes before the court on a first appearance, where it is a criminal offence relating to a domestic violence incident, then the court ought to be in a position to issue an interim violence restraining order on the basis of material facts presented to it by the prosecutor, in the same way that courts may make a determination that an accused should be refused bail or subjected to protective bail conditions which impose restraints of the same kind as may be imposed by a violence restraining order.[35]

The difference between this approach and the current legislative regime is that a violence restraining order can now only be imposed during criminal proceedings if the court is satisfied that the grounds for making a violence restraining order have been made out. The mere charging of an offence related to family and domestic violence may not always be sufficient to establish on the balance of probabilities that an act of family and domestic violence has occurred and is likely to occur again in the future. This was acknowledged by some lawyers during consultations and put forward as one reason why courts exercising criminal jurisdiction may be disinclined to grant a violence restraining order under s 63 of the *Restraining Orders Act*. On the other hand, given that a court may currently make an interim violence restraining order based solely on the untested evidence of an applicant, there is an argument that a decision to charge an accused with a family and domestic violence related criminal offence provides an equally appropriate basis for an interim order.

Also, as noted above, protective bail conditions may be imposed upon an accused as a result of being charged and courts may consider that a violence restraining order in addition to protective bail conditions is unnecessary. However, the making of an interim violence restraining order at this stage of the process has advantages – the order will not lapse simply because the charge has been finally dealt with and the victim of the offence is not required to separately attend court and provide evidence to obtain an interim order.

Other jurisdictions provide for the making of orders during criminal proceedings. Section 40(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides that:

> When a person is charged with an offence that appears to the court to be a serious offence,[36] the

34. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 35–6.

35. Ibid 36.

36. A serious offence is defined in s 40(5) to include attempted murder and a domestic violence offence (other than murder or manslaughter) as well as other specified offences. A domestic violence offence is separately defined in s 11 as a 'personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship'. A person violence

court must make an interim court order against the defendant for the protection of the person against whom the offence appears to have been committed whether or not an application for an order has been made.

Under this provision, when an interim order is made, the defendant is required to be summonsed to appear for the matter to be heard on the determination of the charge. A court is not required to make the interim order if satisfied that the order is not required; for example, because an apprehended violence order has already been made. Section 39 of the Act provides that a final order is to be made upon a conviction for a domestic violence offence (other than murder or manslaughter) and stalking. Again the court can decline to make a final order if satisfied that the order is not required. The Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC) observed that this scheme appears to be working well in practice because courts provide victims with the opportunity to put forward their views in relation to the making of an order.[37]

The provisions in other jurisdictions are discretionary. Section 36 of the *Family Violence Act 2004* (Tas) provides a general power for a court, hearing proceedings for a family violence offence, to make a family violence order if satisfied on the balance of probabilities of the grounds for making such an order (ie, that the person has committed family violence and that the person may again commit family violence). Section 42 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that if a person is convicted of an offence involving domestic violence the court may make a protection order so long as it is satisfied that the grounds for making the order have been established. However, this power is conditional upon the offender, prosecutor and person who would be protected by the order being given a reasonable opportunity to present evidence and make submissions in relation to the order.

The ALRC/NSWLRC did not opt for an automatic regime and recommended that courts should have the discretion to make a protection order at any stage of criminal proceedings and that interim orders should be made until there has been a conviction.[38] It was noted that improved judicial education and specialisation in relation to family and domestic violence should be adequate to ensure that orders are made in appropriate cases.

offence is defined in s 4 which contains a large list of specified offences.

37. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [11.80].
38. Ibid [11.118] and Recommendation 11-3.

During consultations there was support for an expanded regime for the automatic imposition of violence restraining orders during criminal proceedings. Some magistrates indicated that an automatic process would be useful because it would mean that busy Magistrates Courts would not need to separately consider whether there was evidence to establish the grounds for a violence restraining order. It was also suggested that any 'automatic process' in Western Australia should be conditional upon the views of the victim being put forward to the court. It was noted that the current lifetime order under s 63A would not necessarily have to apply to any new offences included within the ambit of the provision.

The Commission is of the view that prior to conviction, only interim orders should be made. Currently, under s 63 the order made is a final order unless the person who would be bound objects, in which case the court *may* make an interim order. If a final order is made under s 63 and the accused is subsequently acquitted of the charge, he or she will be required to separately and subsequently apply for a cancellation of the violence restraining order. As is the case under s 63A, final orders should be made upon conviction. In both situations, the Commission considers that both the person who would be protected and the person who would be bound by the order should have the opportunity to be heard. The Commission seeks submissions about the range of specified offences that should be covered by this proposal but notes that there is an argument for expanding the offences beyond the offences that are currently included in s 63A (and under Proposal 39 above).

PROPOSAL 40

That ss 63 and 63A of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that:

a. If a person is charged with a specified offence, the court is to make an interim violence restraining order and the determination of whether the interim order should be made into a final order is to occur at the time of the determination of the charge.

b. If a person is convicted of a specified offence, the court is to make a final violence restraining order.

   i. If the offence is a violent personal offence as currently defined under s 63A (or as defined under Proposal 39 above)

the violence restraining order is to be imposed for life.

ii. In any other case, the court has discretion to determine the duration of the violence restraining order; however, the court is required to consider the length of any sentence imposed for the offence including the time the offender will spend in custody serving a sentence of imprisonment.

c. That before making an interim or final violence restraining order under (a) or (b) above the court is to provide the person who would be bound by the order and the person who would be protected by the order with a reasonable opportunity to be heard in relation to the making of the order.

d. The court is not to make an order under (a) or (b) above if it is satisfied that the order is unnecessary for the protection of the person who would be protected by the order.

QUESTION 23

In addition to the offences currently covered by s 63A of the *Restraining Orders Act 1997* (WA), what other offences should be specified for the purposes of the above proposal?

EVIDENCE

Victims of family and domestic violence are often reluctant to give evidence in criminal proceedings because of the fear of facing the perpetrator in court and the trauma of re-living events of family and domestic violence. This was frequently mentioned during the Commission's consultations along with the resulting problem that some victims of family and domestic violence will refuse to provide a statement to police in support of a criminal charge or may withdraw from the criminal justice process.

Special witness provisions

Section 106R(1) of the *Evidence Act 1906* (WA) provides that a person giving evidence may be declared as a special witness. If a judge[39] of a court makes an order declaring a person as a special witness it may direct that one or more of the following arrangements be made:[40]

- that the witness can have a support person close by;
- that the witness can have a communicator while giving evidence; and
- that for criminal proceedings where facilities and equipment are available for the witness to give evidence by video link from outside the courtroom or where such facilities are not available a screen, one-way glass or other device be placed so that the witness cannot see the accused.[41]

An order declaring a person as a special witness may be made on application on notice by a party to a proceeding or on the court's own motion.[42] The grounds on which a special witness order can be made are that if the person is not treated as a special witness he or she would, in the court's opinion:

(a) by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or

(b) be likely —

(i) to suffer severe emotional trauma; or

(ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,

by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.[43]

For proceedings in relation to a 'serious sexual offence' a special witness order must be made in relation to the alleged victim unless the court is satisfied that the above grounds do not apply to the person *and* the person does not wish to be declared a special witness.[44]

The Office of the Director of Public Prosecutions advised the Commission that the special witness provisions are routinely used in family and domestic violence matters in the superior courts and that there are no problems encountered in practice. Further, it was stated that, while it may be ideal for witnesses to give their evidence in person in the courtroom, it is preferable for witnesses to give evidence with the assistance of the special provisions rather than not giving evidence at all. Defence lawyers rarely object

39. A judge is defined in s 3 of the *Evidence Act 1906* (WA) to include a judge of the Supreme Court, the District Court, the Family Court of Western Australia, a judge or magistrate of the Children's Court and a magistrate of the Magistrates Court.

40. *Evidence Act 1906* (WA) s 106A(4).
41. *Evidence Act 1906* (WA) ss 106N(2) & 4).
42. *Evidence Act 1906* (WA) ss 106R(2).
43. *Evidence Act 1906* (WA) ss 106R(3).
44. *Evidence Act 1906* (WA) ss 106R(3a).

to an order for a witness to be declared as a special witness. The Commission was also informed by the Deputy Chief Magistrate that video link facilities are available in the Magistrates Court and any prior issues in relation to availability no longer exist since the new District Court building was opened. On some occasions, the Magistrates Court makes use of facilities in the District Court so that the victim of an offence is not required to attend the same court building as the accused. Likewise, remote room facilities are accessed from different court locations (eg, if the victim and the accused reside in different parts of the state).

It was suggested to the Commission during consultations that the special witness provisions should automatically apply to victims of family and domestic violence without the need for an application to be made; that is, on the same basis as the current provision in relation to victims of serious sexual offences. Serious sexual offences are defined as offences listed in Part B of Schedule 7 of the *Evidence Act* which carry a maximum penalty of seven years' imprisonment or more. The relevant offences in Part B of schedule 7 include sexual offences under Chapter XXXI of the *Criminal Code*. Sexual offences under Chapter XXXI that fit within the definition include sexual offences against children, aggravated indecent assault, sexual penetration without consent, aggravated sexual penetration without consent, sexual coercion and aggravated sexual coercion. Based on the seriousness of the offences and the vulnerability of victims of family and domestic violence it may be warranted to expand the requirement to make an order declaring a witness to be a special witness in s 106R(3a) to certain serious family and domestic violence related offences. However, there does not appear to be any difficulty in practice in obtaining such an order. Furthermore, it appears that the prosecution would make the application and, therefore, the onus is not on the victim to apply for a special witness declaration. At this stage, the Commission is not inclined to propose any reform but seeks submissions about whether any problems have been encountered in practice for victims of family and domestic violence in this regard.

QUESTION 24

Are there any difficulties in practice for victims of family and domestic violence being declared as special witnesses under s 106R of the *Evidence Act 1906* (WA) and having access to the special arrangements for giving evidence provided for special witnesses?

Prior inconsistent statements

A significant impediment to successfully prosecuting family and domestic violence related offences is when victims recant from their original statement when giving evidence in court (typically because of fear of repercussion from the accused). This problem was recognised in the 2008 review of the *Restraining Orders Act*. It was commented that this problem is twofold because it has a negative impact on successful prosecutions and also can discourage police from charging perpetrators with family and domestic violence if they believe that the victim is likely to recant from the original statement.[45] While it was noted that one solution is to improve investigative processes so that sufficient evidence is obtained without the need to rely on the victim's evidence, it was also suggested that reform to the provisions of the *Evidence Act* dealing with the admissibility of prior inconsistent statements may be required. The basis of the proposed amendment is that, although evidence given on oath is generally considered to be the 'best evidence', in cases of family and domestic violence the oath 'cannot compete with the pressures the perpetrator uses on the victim'.[46] For that reason, it is argued that the content of the original statement provided to the police or prosecution may be more likely to represent the truth.

Section 21 of the *Evidence Act* currently provides that:

> Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
>
> The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of the opinion that the witness is hostile to the party by whom he was called and permits the question.

In the present context this means that the prosecution may be able to cross examine a victim of family and domestic violence about the existence of a prior inconsistent statement if the victim is declared a hostile witness. However, the prior statement cannot be admitted into evidence for the purpose of establishing the truth of its contents.[47]

45. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 38.
46. Ibid 39.
47. Ibid 39–40.

The 2008 review proposed that in family and domestic violence cases, a prior inconsistent statement should be admissible to establish the truth of its contents and that a party seeking to admit a prior inconsistent statement is not required to have the victim declared as a hostile witness.[48] During consultations it was suggested that this approach may be warranted in family and domestic violence cases; however, given the significance of such a reform, the Commission seeks further submissions.

QUESTION 25

Should the *Evidence Act 1906* (WA) be amended to provide that a prior inconsistent statement made by an alleged victim of a family and domestic violence related offence is admissible to establish the truth of its contents and, if so, in what circumstances should this be permitted?

48. Recommendation 9.

Specialist Family Violence Courts

Specialist family violence courts exist in Western Australia and a number of other Australian jurisdictions, although their jurisdiction and operation vary.[1] Family violence courts aim to enhance victim safety and increase perpetrator accountability.[2] The Commission uses the term 'family violence court' to refer to any specialist court process that deals with family and domestic violence matters irrespective of whether it is a separately created court or a dedicated list within the general court system. In this section the Commission provides a brief overview of the metropolitan Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court in Geraldton. It has been largely informed by the Commission's observations of these courts and extensive consultations with magistrates, lawyers, victim support workers, officers from the Department of Corrective Services and the Department for Child Protection and Family Support, and prosecutors who work in these courts. Therefore, the discussion focuses on the current practices adopted by these specialist courts. However, the consideration of these specialist courts is somewhat limited because, as already noted in this Chapter, the Commission has not been given access to the evaluation reports of the Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court. Nevertheless, based upon the practical issues raised during consultations and research, the Commission makes a number of proposals for reform.

METROPOLITAN FAMILY VIOLENCE COURTS

The first specialist family violence court in Western Australia was established in Joondalup in 1999 as a two-year pilot program. An evaluation of the pilot in 2000–2001 concluded that the program was a 'qualified success'.[3] From 2007 onwards the Department of the Attorney General expanded the Family Violence Courts to other metropolitan locations under the 'Reducing Aboriginal Imprisonment Strategy'. Family Violence Courts currently operate in Magistrates Courts at Perth, Midland, Fremantle, Joondalup, Rockingham and Armadale. Each court sits one day per week and is capped at a maximum of 24 participants. The Commission observed the Family Violence Courts at Perth, Fremantle and Midland and consulted with the magistrates who presently sit in each of the six locations. There is presently no legislative basis for or recognition of the Family Violence Courts. While processes vary to some degree between each court, there are key common features:

Jurisdiction: The Family Violence Courts deal with family and domestic violence related criminal matters where the offender has been convicted and the charge can be dealt with summarily. This is almost always where a plea of guilty has been or will be entered, although it appears from the Commission's consultations that very occasionally some magistrates will allow an offender to participate in the program following conviction after a trial. The Commission understands from its discussions with magistrates that the original intention was for the Family Violence Courts to hear violence restraining order matters and deal with contested criminal matters; however, this did not eventuate in practice. Although, in the outer metropolitan courts (ie, not Perth), the specialist Family Violence Court magistrate will often (but not exclusively) deal with violence restraining order applications because that magistrate is permanently

1. The first specialist family violence was established in South Australia in 1999. Currently, the specialist court list in South Australia operates in two metropolitan locations and deals with both criminal and intervention order matters: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Abuse-Prevention-Program-and-Family-Violence-Courts.aspx>. In New South Wales, the Domestic Violence Intervention Court Model was piloted in Wagga Wagga and Campbelltown in 2005. In Victoria the Family Violence Court Division is a division of the Magistrates Court of Victoria and is established through legislation. It has the broadest jurisdiction of all specialist family violence courts because it can deal with criminal matters, intervention order matters, victims of crime compensation applications and certain family law parenting order matters. The Family Violence Court Division sits in one rural (Ballarat) and one metropolitan (Heidelberg) location. The Family Violence Intervention Program in the Australian Capital Territory provides an interagency approach to responding to family and domestic violence and incorporates a dedicated specialist family violence list. Family violence charges are identified and transferred to this list: Cussen T & Lyneham M, *ACT Family Violence Intervention Program Review,* Australian Institute of Criminology Technical and Background Paper No. 52 (2012) 9.
2. King M & Batagol B, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 *International Journal of Law and Psychiatry* 406, 406.
3. For further discussion of the Joondalup Family Violence Court, see LRCWA, *Court Intervention Programs,* Consultation Paper, Project No. 96 (2008) 131–2.

located at that court. In contrast, in Perth, violence restraining orders are dealt with by many different magistrates and justices of the peace each day.

Referral process: The intention is for all family and domestic violence related charges to be listed for their first appearance in the relevant Family Violence Court. To achieve this, police are meant to summons or bail an accused charged with a family and domestic violence related offence to the day on which the Family Violence Court sits in each location. The Family Violence Service at Perth advised the Commission that in the outer metropolitan courts this occurs in approximately 60% of cases; however, in Perth the Family Violence Court is only receiving about 20%–25% of family and domestic violence charges at first appearance.[4] In addition, the Commission was told that recently in Perth new referrals were decreasing and the suggested reason is that family and domestic violence charges are not being listed in sufficient numbers to enable potential participants to access the program.

Eligibility: An accused is generally only eligible for participation in the program if he or she pleads guilty to the offence and voluntarily agrees to undertake the program requirements. Once an accused pleads guilty an assessment in relation to suitability will be undertaken. In some of the Family Violence Courts offenders with significant substance abuse and/or mental health issues are deemed unsuitable. In contrast, offenders are permitted to participate in the Supervised Treatment Intervention Regime (STIR)[5] program in the Midland Family Violence Court. The various stakeholders in Midland explained that usually the offender commences the STIR program first (often because there is a waiting period to start the family violence program); however, there can be a crossover when the offender is participating in both programs at the same time.

Program requirements: Offenders participating in the program are placed on conditional bail while they await the outcome of their assessment and this bail continues for the duration of the program. Usually bail conditions include full protective conditions preventing any contact between the victim and the offender. As discussed earlier in this chapter, if an offender seeks a variation of protective bail conditions, a bail risk assessment report will usually be prepared for the court before any relaxation of bail is permitted. Once an offender is accepted into the court program they are required to attend the rolling group family violence program which is run by external agencies (eg, Communicare, Relationships Australia).[6] These programs typically last for 20 weeks and participants are required to attend sessions on a weekly basis. The external providers stipulate fairly strict compliance – two to three failures to attend will invariably result in termination from the program. There is a separate Indigenous Family Violence Court run by the Department for Corrective Services for Aboriginal offenders.[7]

Specialist support services: Each Family Violence Court is supported by the Family Violence Service of the Department of the Attorney General. This service provides support and assistance to victims of family and domestic violence. Family Violence Service workers are directly involved in the court process but they also provide other services for victims (eg, assistance with applications for violence restraining orders). In Perth, the Family Violence Service has a secure waiting area and is located next to the Domestic Violence Legal Unit (DVLU) of Legal Aid. The DVLU provides a duty lawyer five days a week in Perth for matters in the Perth Family Violence Court, as well as violence restraining order applications. The Family Violence Service and the DVLU work closely together. The Commission understands that lawyers from the DVLU represent victims in other courts but are not physically stationed at other courts on a regular basis. The Family Violence Service will seek to engage with the victim for each matter being dealt with by the Family Violence Court. If the victim agrees, a full risk assessment will be undertaken. Victims who wish to be involved in the court process will be regularly updated about the offender's participation in the program.

4. During consultations it was estimated that in Midland, the family and domestic violence related charges are listed on the Family Violence Court day (Mondays) in approximately 98% of cases.
5. STIR is a pre-sentence program to assist with drug issues for 'moderate-level crimes'. It sits beneath the Drug Court in the hierarchy of drug diversion programs: see further http://www.dao.health.wa.gov.au/Informationandresources/WADiversionProgram/SupervisedTreatmentInterventionRegimeSTIR.aspx
6. The Commission was advised that the program run by Relationships Australia is limited to intimate partner violence; however, the Family Violence Courts will endeavour to find other suitable programs (eg, alcohol counselling and individual psychological counselling). It was also highlighted during consultations that fly-in fly-out workers are usually ineligible for these group programs because of the requirement to attend every week. It was noted by one magistrate that family and domestic violence offenders require, in some instances, far more intensive intervention in order to deal with the multitude of issues such as accommodation, drug and alcohol use and unemployment.
7. The Family Violence Service in Perth indicated at the time of its consultation with the Commission that there was one Aboriginal participant in the program; however, a few weeks earlier there had been five Aboriginal offenders involved in the Perth Family Violence Court. The Commission's meeting with all stakeholders involved in Midland Family Violence Court advised at that time there were seven Aboriginal offenders out of total of 24 offenders participating in the program.

Case management: Offenders participating in the court program are case managed by an interagency case management team consisting of a Family Violence Service worker, the prosecutor, the external program provider, a worker from the Department for Child Protection and Family Services (DCPFS) and a Department of Corrective Services community corrections officer. The case management team meets on a weekly basis to discuss the offender's compliance and information is shared between the various team members. The Commission was advised that an expansion of the case management team is currently being considered with a view to including the magistrate and a Legal Aid duty lawyer for some (but not all) of the Family Violence Courts.

Court reviews and judicial monitoring: Offenders are required to reappear in the Family Violence Court at regular intervals after they commence the program in order that the magistrates can assess their compliance with the program requirements. Magistrates tend to adopt a therapeutic jurisprudence approach to these reviews by encouraging those who are complying or warning those who are not performing satisfactorily.[8] Depending on the level of risk, these court reviews may be scheduled as often as every four weeks or as seldom as twice for the entire program (Perth). From the Commission's observations of the courts in operation, information obtained from the various agencies involved is presented to the court by the community corrections officer at these reviews. It was suggested to the Commission that the Family Violence Courts had not been adopting a therapeutic jurisprudence approach to the level that was originally intended; however, the frequency of court reviews appeared to be increasing.

Specific issues in relation to the operation of the Family Violence Courts

Increasing participation in Family Violence Courts

As noted above, it was intended that all family and domestic violence related offences would be first listed in a Family Violence Court so that potential participants could be identified and encouraged to participate. If accused are listed in the general Magistrates Court, the option of participation in the Family Violence Court may be overlooked. On the other hand, some lawyers consulted did not approve of this referral process noting participation is meant to be voluntary so an accused should request a referral to the court rather than being automatically listed in the court. However, if an accused does not wish to participate (or is ineligible for some other reason) he or she will be transferred to a general court.

It was suggested to the Commission that legislation should provide that all family and domestic violence related charges are to be listed in a Family Violence Court for their first appearance to enable the various agencies involved to provide information to the accused about the program and also to facilitate access to victim support services. However, the Commission is of the view that a legislative direction in this regard is not appropriate. There may be cases where an accused has been refused bail and it is vital that the matter is brought before a court as soon as possible (and Family Violence Courts only sit one day a week in each location). Nevertheless, the Western Australia Police policy should specify that if an accused is charged with a family and domestic violence related offence, the police should ensure, as far as is practicable, that the accused is either bailed or summonsed to appear at the next available sitting of the applicable Family Violence Court. This should be augmented by updated training so police officers are aware of the requirement.

PROPOSAL 41

1. That the Western Australia Police policy on family and domestic violence stipulate that an accused who has been charged with a family and domestic violence related offence and who is not in custody must, as far as is practicable, be required to attend court for the first appearance at the next available sitting of the relevant Family Violence Court in the metropolitan area.
2. That the Western Australia Police ensure that police officers are informed of this requirement as part of their regular training in relation to family and domestic violence.

Co-located DCPFS

The Midland Family Violence Court is the only Family Violence Court to currently include an officer from DCPFS as part of the court process. DCPFS is part of the case management team for all Family Violence

8. It has been observed that judicial monitoring 'can have different goals depending on the context, including achieving enforcement, ensuring victim safety, promoting offender accountability and/or promoting offender motivation to engage in positive behavioural change while supporting them through the process'. It is argued that judicial monitoring in family violence courts should focus on resolving criminal behaviour and underlying issues but that victim safety should remain the paramount consideration: King M & Batagol B, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 *International Journal of Law and Psychiatry* 406, 406 & 409.

Courts but in Midland the officer attends all sittings of the court and provides information when required. This officer is also part of the co-located Family and Domestic Violence Response Team (FDVRT) with the Western Australia Police and a non-government agency.[9] It was explained to the Commission that this process enables relevant information to be provided to the court at a much earlier time. For example, an accused may appear in the Midland Family Violence Court on a Monday for a scheduled review of compliance with the program. As part of the FDVRT this officer may be aware that the offender was involved in a domestic violence incident over the weekend. The other members of the case management team including the prosecutor may not be aware of the occurrence of a police callout involving the offender unless and until a charge has been preferred. The DCPFS can also check the department's records in relation to prior involvement with the offender and discuss relevant issues directly with the victim and the offender when required. Two Family Violence Court magistrates specifically expressed their support for the co-location of a DCPFS officer at the court. The Commission is aware that there is a co-located DCPFS officer at the Family Court of Western Australia and she provides a key role in informing the Family Court Counselling and Consultancy Service of prior involvement of the family with DCPFS and any risk issues concerning children.[10] The Commission supports this co-location model and proposes that DCPFS enable an officer to attend the Family Violence Court in each location.

PROPOSAL 42

That the Department for Child Protection and Family Support enable the officer who is part of the Family Violence Court case management team to attend court (one day per week) in each court location.

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BARNDIMALGU ABORIGINAL FAMILY VIOLENCE COURT

The Barndimalgu Aboriginal Family Violence Court in Geraldton (Barndimalgu Court) was established in 2007. Like the Family Violence Courts in the metropolitan area it is not created under legislation and operates as a specialist court within the general court system. The Barndimalgu Court sits every fortnight on Fridays in the Geraldton Magistrates Court. The court operates in a more informal way than a traditional court and all members of the court team sit around an oval table. Two respected Aboriginal community members[11] sit alongside the magistrate and the others present at the table are the prosecutor, the community corrections officer, the offender and a lawyer from the Aboriginal Legal Service of Western Australia. The coordinator sits at a side table and assists the court by calling the names of the offenders and conducting other administrative duties during the proceedings. The maximum permitted number of participants in the program at any one time is 20. During the Commission's visit there were 15 offenders participating in the program.

Jurisdiction: The Barndimalgu Court deals with family and domestic violence offences where the accused pleads guilty; it does not hear violence restraining order matters.

Referral process: The coordinator of the Barndimalgu Court manually checks the general court list each day to identify cases involving family and domestic violence where the accused and/or the alleged victim are Aboriginal. Once a matter is identified in this way, a red flag is placed on the prosecution notice and this alerts the magistrate that the case is eligible for the Barndimalgu Court. When the accused appears in the general Magistrates Court, the magistrate will enter into a dialogue with the accused about participation in the Barndimalgu Court program. In order to be transferred into the Barndimalgu Court from the general court a plea of guilty must be entered.[12] It was observed during consultations that it is more often than not offenders who are facing a term of imprisonment who agree to participate in the program. The coordinator of the court advised that referrals to the Barndimalgu Court have increased in recent times and this was attributed to the approach of the local magistrate as

9. The FDVRT is discussed above in Chapter Three.
10. See Family Court of Western Australia, Annual Review 2010–2011 (2011) 5 & 18. It is observed that the co-location of a senior DCPFS officer in the Family Court 'remains a vital part of our plan to ensure the timely exchange of information and management of cases involving child protection issues'.
11. There are 10 community court members available for the Barndimalgu Court. It was contended that for some offenders the presence of community members is enough to encourage accountability. Interestingly, offenders will sometimes talk to community court members outside of the court process and seek their advice and support (especially if community court member has a role in a government agency such as housing). One community court member told the Commission that she endeavours to encourage the offender to speak and contribute to the court process. Another advised that he encourages offenders to stay out of trouble, warns them of the unpleasantness of prison and expresses the community's disapproval of their behaviour. He also stated that the presence of community court members is important in terms of shaming.
12. The Barndimalgu Court will deal with other non-family and domestic violence related charges as long as there is a plea of guilty to the family and domestic violence offence.

well as improved community education in relation to the court.

Eligibility: To be eligible to participate in the Barndimalgu Court the offender and/or the victim must be Aboriginal.[13] The court is open to both males and females, although the Commission was told that in its early years some magistrates would not allow females to participate. The Indigenous Family Violence Program (IFVP) is only open to Aboriginal men so it can be difficult to find alternative programs for females and for non-Aboriginal male offenders (individual counselling is usually arranged). Interestingly, the Barndimalgu Court will allow juvenile offenders aged 17 years or more to participate. This was said to be partly in recognition that some Aboriginal males of this age are considered men under Aboriginal law. The inclusion of juveniles is complicated because it is often considered inappropriate from a policy perspective to mix adults and juveniles together in the same program.

Assessment: If an accused indicates an interest in participating in the Barndimalgu Court the matter will be adjourned for an assessment to be undertaken. This initial assessment will take four weeks. Following this initial assessment a further assessment will be done in relation to suitability for the IFVP. It was noted during consultations that some offenders are very remorseful from the start and keen to participate while others are motivated by a desire to avoid imprisonment. This is considered by those working in the court to be acceptable because once an offender commences the program they generally start to see changes in attitude and behaviour.

Program requirements: Offenders participating in the Barndimalgu Court are placed on conditional bail with conditions often requiring urinalysis, no consumption of alcohol, attendance at programs, and protective bail conditions in relation to the victim including a non-molestation condition. Unlike the Family Violence Courts in the metropolitan area, full protective bail conditions are not necessarily the starting point – the court recognises that many of its participants continue in their relationships with the victim and that it would be fruitless to prohibit contact. It was estimated by stakeholders that between approximately 80% and 90% of participants remain in their relationship with the victim.[14] While subject to the Barndimalgu Court program, participants undertake alcohol and drug counselling (usually four group sessions). Following this, they participate in the IFVP which involves 20 group counselling sessions (one per week). If the participant fails to attend three sessions of the IFVP they are usually terminated from the program. It was explained to the Commission that the IFVP is culturally appropriate and deals with issues such as intergenerational violence and the stolen generation, as well as relationship issues. Because it is a rolling program it was suggested it works effectively because new participants learn from the existing participants and are encouraged by their efforts. When the participants finish the program they paint their handprint onto a banner to represent that they have stopped the violence. In addition, when offenders 'graduate' from the Barndimalgu Court they are handed a certificate by the magistrate and congratulated for their completion of the program. The Commission observed two offenders graduate from the program and was impressed by the recognition displayed by other participants who were waiting to appear in the Barndimalgu Court. When these two offenders left the courtroom, those waiting outside clapped in acknowledgement.

Court stakeholders: In addition to the magistrate and the community court members, a key role is played by the community corrections officer. She is the primary case manager and offenders are required to report to her once a week over and above their other weekly program requirements. The prosecutor and the lawyers from the Aboriginal Legal Service are very supportive of the program and also try to support the offender's rehabilitation.

Victim Support Service: The Victim Support Service provides support and assistance to victims in the court precincts. It was acknowledged that until recently there had been some difficulty in retaining staff but now there are two staff working for the Victim Support Service that are specifically designated to the Barndimalgu Court. At the time of the Commission's visit there were only two victims engaged with the service but this was expected to increase in view of resolution of the staffing issues. The Victim Support Service will usually provide a written report to the court in relation to the victim's circumstances and risk issues. Victims are permitted to speak in court if they wish and, if so, this is usually done in the

13. On the day the Commission visited the Barndimalgu Court in operation, 16 matters were listed. Of these, all offenders were male and 14 were Aboriginal (one offender was non-Aboriginal and the other ethnicity is unknown because he failed to attend court).

14. On the day that the Commission observed the court 14 of the 16 matters involved offences committed during an intimate relationship. Of these 14 matters there were eight cases where the offender and the victim remained together, and six where the relationship had ended (but two of these had only separated within days of the court hearing).

absence of the offender. The Victim Support Service continues providing support to the victim for six weeks after the offender finishes the Barndimalgu Court program. A relatively new group program has been developed in Geraldton by Centacare called 'Straight Talk'. Victims are encouraged to attend this program on a voluntary basis. The program was developed because it was found that after the offenders had participated in the IFVP and began to execute strategies to avoid violence (eg, walking away, abstaining from alcohol, telephoning police if they felt they were losing control) the victim would follow them and question their conduct. It was felt that victims would benefit if they were informed of what the offenders were learning as well as being provided with their own support for ongoing issues. Some Straight Talk participants have reportedly obtained employment or their drivers licence for the first time. The program runs for 10 weeks (for two hours per week) and guest speakers attend. Centacare are in the process of evaluating the Straight Talk program.

Case management: Case management meetings to discuss the offender's compliance with the program are held fortnightly and attended by the court coordinator, the community corrections officer, a representative from the program provider and a Victim Support Service worker.

Court reviews and judicial monitoring: Court reviews in the Barndimalgu Court occur more frequently than they do in the metropolitan Family Violence Courts. Offenders are required to attend court for a review every fortnight.

From the Commission's own observations of the Barndimalgu Court it appears to be achieving positive results. Of the 16 matters listed, there were nine offenders who were fully or almost fully complying with all of the requirements of the program (ie, attending court, attending drug/alcohol counselling, attending group sessions and attending scheduled meetings with the community corrections officer). The other seven cases ranged from offenders who were non-compliant to offenders who were experiencing difficulties and whose compliance was sporadic. Fifteen of the 16 offenders appeared in court. All stakeholders spoke highly of the program and the Commission was informed that the data suggest that the Barndimalgu Court is achieving results in terms of reducing recidivism. Subject to the outcomes of the evaluation of the Barndimalgu Court, the Commission suggests that expansion of this model to other areas of the state with appropriate adjustments to factor in local conditions should be explored.

ISSUES

Deferral of sentencing

As explained above, offenders who participate in the Family Violence Court are placed on conditional bail during the program following a plea of guilty. In other words, the Family Violence Courts operate as a pre-sentence option. Section 16(2) of the *Sentencing Act 1995* (WA) provides that the 'sentencing of an offender must not be adjourned for more than 6 months after the offender is convicted'. Because offenders participating in the Family Violence Courts are convicted before any assessment of their suitability to participate takes place, the six-month limit is not always sufficient to enable the offender to complete the group family violence program. This is especially problematic where there is a waiting list for entry to the program. Magistrates, lawyers and many others involved in the Family Violence Courts strongly advocated for s 16(2) of the *Sentencing Act* to be amended to enable sentencing to be deferred for longer than six months. It was explained that where the six-month period had expired an offender would usually be sentenced to a community-based disposition to compete the group program. However, once this occurs the interagency approach of the Family Violence Courts is lost – the offender is solely supervised by the Department of Corrective Services. This message was reiterated to the Commission during its visit to Geraldton. Because of the time taken to complete the necessary assessments for the Barndimalgu Court, it was observed that the six-month limit on the deferral of sentencing can be counterproductive because it would be preferable for the offender to remain engaged with the Barndimalgu Court for the duration of the IFVP.

It is noted that in its reference on court intervention programs the Commission recommended that s 16(2) of the *Sentencing Act* be amended to enable sentencing to be deferred for 12 months.[15] The Commission maintains that this recommendation is appropriate and therefore again proposes that s 16(2) of the *Sentencing Act* be amended.

PROPOSAL 43

That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

15. LRCWA, *Court Intervention Programs,* Final Report, Project No. 96 (2009) Recommendation 13.

Legislative recognition

The Family Violence Courts and the Barndimalgu Court have no legislative recognition in Western Australia. In contrast, the Drug Court is prescribed as a speciality court[16] and this enables the Drug Court to sentence offenders to a conditional suspended imprisonment order.[17] Apart from the obvious inability to impose a conditional suspended imprisonment order for family and domestic violence offenders at the completion of the program, it was also observed by some magistrates that the lack of legislative recognition undermines the value placed on specialist family violence courts. It is noted that the specialist family violence court in Victoria is created under s 4H of the *Magistrates Court Act 1989* (Vic) as a separate division of the Magistrates Court of Victoria. Legislative recognition may provide sustainability for specialist courts in terms of government support and ongoing funding, as well as enable the jurisdiction of the court to be clearly defined. However, without knowing the outcomes of the evaluations of the Family Violence Courts and the Barndimalgu Court, it would be premature to make any recommendations in relation to the general legislative recognition of Family Violence Courts in Western Australia. Having said that, the Commission can see no reason why the Family Violence Courts and the Barndimalgu Court (which have now been in operation for a number of years) should not have the benefit of imposing conditional suspended imprisonment orders given that family and domestic violence offences are serious and a term of imprisonment coupled with conditions to undergo further treatment intervention may be justified in some cases.

PROPOSAL 44

That the Family Violence Courts operating at Midland, Joondalup, Perth, Rockingham, Armadale and Fremantle and the Barndimalgu Court in Geraldton be prescribed as speciality courts under the *Sentencing Act 1995* (WA).

Integration of violence restraining order jurisdiction and criminal jurisdiction

During consultations there was strong support for the Family Violence Courts to deal with violence restraining order matters as well as all aspects of the criminal process including trials. As noted above, this was apparently envisaged when these courts were originally developed. However, this support was not universal. Magistrates sitting in the outer metropolitan Family Violence Courts did not see any particular value in expanding the current Family Violence Courts to deal with family and domestic violence restraining order matters because, for the most part, they deal with violence restraining order applications in their court location in any event. It also appears that the magistrates sitting in these courts have sufficient understanding of the nature and dynamics of family and domestic violence that when they deal with violence restraining order matters they are sensitive to the issues. Magistrates in the Family Violence Courts were not subject to the criticism levelled at some general magistrates in regard to their approach to victims and lack of awareness of family and domestic violence. It also appears that the specialist magistrates who deal with violence restraining orders in their general court are generally more proactive in regard to checking information such as the respondent's court history, prior or existing violence restraining orders between the parties and any existing Family Court orders.

The problem seems to arise in Perth where violence restraining order matters are dealt with by many different magistrates and justices of the peace. However, expanding the jurisdiction of the Perth Family Violence Court is unrealistic because it currently sits one day per week and violence restraining order matters are heard by at least one magistrate every day along with justices of the peace who deal with violence restraining order applications for half a day every day of the week. One specialist magistrate could not possibly deal with all of the family and domestic violence offences in the Perth Magistrates Court, as well as all family and domestic violence restraining order cases. The Commission does not consider that it is appropriate to propose at this stage the establishment an integrated specialist jurisdiction in Perth because of the considerable resources that would be required and because the Commission does not have access to the evaluations of the existing Family Violence Courts. If the Commission is provided with access to the evaluation reports it may be in a position to reconsider this issue at a later time.

It was suggested to the Commission that Fremantle may be a suitable site for a pilot integrated specialist Family Violence Court because there are already two magistrates working full time in the Fremantle Magistrates Court and one could potentially deal with all family and domestic violence offences (including bail, sentencing and trials), as well as violence

16. Regulation 4A of the *Sentencing Regulations 1996* (WA) prescribes the Magistrates Court sitting at Perth and dealing with the class of offenders who abuse prohibited drugs or plants as a speciality court.
17. See *Sentencing Regulations 1996* (WA) reg 6B.

restraining order matters. The Commission considers that this is an option worth considering because the development of a pilot enables consideration of whether an integrated court results in improved outcomes before any expansion is considered. To work effectively, the pilot would ideally require a specialist prosecutor and specialist lawyers (eg, DVLU and specialist lawyers for respondents and accused) in addition to the involvement of all of the agencies that are currently involved in the Family Violence Court. A pilot could develop special procedures to improve the experiences of victims of family and domestic violence such as special listing times for ex parte violence restraining order applications and improve on existing information exchange processes between participating agencies. The inclusion of violence restraining order matters in a specialist court with the accompanying input from the various agencies involved in the current Family Violence Courts is likely to provide more effective case management of violence restraining order matters and enable better information to be available to the decision-maker. Specifically, risk assessment reports (based on the existing bail risk assessment reports used in Family Violence Courts) should be used for violence restraining order matters in this pilot program.

It is noted that some agencies expressed a degree of trepidation or uncertainty in regard to their obligations in respect of information exchange during consultations. Some staff were unsure of when they were required or entitled to disclose information to other agencies and victim support workers were concerned about putting a victim's safety at risk by disclosing information that may subsequently be made available to the perpetrator. The development of a more-integrated specialist Family Violence Court would provide a useful opportunity for a wide variety of agencies to further develop Memoranda of Understanding and/or protocols in this regard.

In addition, the Commission has proposed amendments to the *Restraining Orders Act 1997* (WA) to facilitate the making of an interim violence restraining order when an accused is charged with a specified family and domestic violence offence and to make final orders upon conviction. This proposal would be usefully tested in an integrated court that deals with both criminal proceedings and violence restraining order matters.[18] Because the Commission has not consulted specifically on this option and because it will impact in practical ways on various agencies, the Commission seeks submissions in relation to the option of a pilot in Fremantle (or any alternative location that might be suggested) and, in particular, is interested to hear from relevant agencies about any practical or legal impediments to such a proposal.

QUESTION 26

Should a pilot integrated specialist Family Violence Court be established in Fremantle Magistrates Court to deal with all family and domestic violence related criminal offences (including bail, sentencing and trials) and all family and domestic violence related violence restraining order applications (including ex parte applications and contested hearings)?

As a final observation, the Commission emphasises that any future expansion of specialist family violence courts is only one potential solution to improve the justice system's response to family and domestic violence. Specialist courts cannot feasibly be established in all court locations throughout Western Australia. In this regard, the New South Wales Parliament Legislative Council Standing Committee on Social Issues recommended in 2012 that the New South Wales government integrate the 'most successful aspects of the Domestic Violence Intervention Court Model into all NSW local courts'.[19] These were listed as including ensuring the presence of victim support services at the court; 'minimising' adjournments; reducing court delay; ensuring a consistent response to family and domestic violence by police; collecting consistent evidence; providing perpetrator programs to reduce reoffending; establishing regular interagency meetings to manage and respond to risks to victims and children; and ensuring interagency collaboration.

Therefore, specialist courts or lists can be the innovators in terms of appropriate practices and processes that improve outcomes for victims of family and domestic violence in all courts. Lessons learned should then be incorporated into mainstream practices wherever possible[20] and specialist magistrates should share their knowledge by conducting training for other judicial officers and developing practices that can be adopted across the board.

18. See Proposal 40.

19. New South Wales Parliament Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in New South Wales* (2012) Recommendation 73.

20. For example, in New South Wales the Local Court Practice Note 1 of 2012 was developed from a specialist court program but applies to all Local Courts and prioritises domestic violence matters for expedited hearings: ibid 323.

Chapter Five

Other Legal Responses to Family and Domestic Violence

Contents

Interaction of violence restraining order proceedings with the Family Court

A regular complaint heard by the Commission during its consultations concerned the difficulties experienced by victims of family and domestic violence and others (including lawyers and respondents to violence restraining order applications) when the parties are subject to concurrent proceedings in the Magistrates Court and the Family Court of Western Australia ('the Family Court'). As explained in Chapter Two of this Paper, duplication of proceedings was a key issue raised by a majority of stakeholders across the board. In this context, the problems of duplication include re-traumatisation for victims; inefficiencies in terms of resources for courts, lawyers and other experts; and confusion for parties resulting from inconsistent orders. More generally, a number of people expressed the preference for family and domestic violence restraining orders to be dealt with by the Family Court because of its enhanced processes for obtaining relevant information, greater awareness and understanding of the nature and dynamics of family and domestic violence, better case management processes and availability of family consultants.

Concurrent proceedings commonly arise after a respondent is served with an interim violence restraining order and discovers that contact with children is prohibited or restricted under the order. The respondent may then lodge an application for a parenting order in the Family Court with a view to obtaining orders that permit access to children (and that will override the conditions of the violence restraining order[1]). Crossover may also occur when Family Court proceedings are already on foot and a party to those proceedings applies for a violence restraining order alleging recent violent or abusive behaviour. It was suggested by a number of people that parties to Family Court proceedings sometimes initiate an application for a violence restraining order to gain a 'forensic advantage'. That is, it is perceived that the existence of a violence restraining order against the other party will assist their case in the Family Court. A direct forensic advantage was rejected by the Chief Judge of the Family Court who explained that the Family Court will take into account the *existence* of a violence restraining order (eg, to consider appropriate terms for a parenting order) but will make its own assessment of the available evidence in relation to the presence of family and domestic violence and risks to children. It was not disputed, however, that obtaining a violence restraining order may otherwise benefit a party to Family Court parenting order proceedings because it prevents the other party from having contact with children unless and until a contrary order is made by the Family Court. In addition, the Commission was also told that many magistrates are reluctant to make violence restraining orders for the benefit of children and will often suggest to an applicant that any concerns in relation to the children should be dealt with separately by the Family Court.

THE CURRENT LAW AND PROCESS

Magistrates Court and Children's Court

As explained earlier in this Paper, although there is power under the *Restraining Orders Act 1997* (WA) for other courts to make violence restraining orders during proceedings, *applications* for violence restraining orders must be made in either the Magistrates Court or the Children's Court.[2] The violence restraining order application form (available on the Magistrates Court and Children's Court websites) asks, among other things, whether there are any current family orders concerning the respondent's rights in relation to children and whether there are any current Family Court proceedings in which such orders are being sought. The checkboxes provided enable a 'Yes', 'No' or 'Unknown' answer. Section 66 of the *Restraining Orders Act* also stipulates that the applicant is required to inform the court of any known family orders. If the applicant is a party to the family order, he or she must provide the court with a copy of the order (or, if not, inform the court of the terms of the family order as far as they are known). An applicant is also required to inform the court of any pending Family Court proceedings and details thereof. However, non-compliance with these requirements does not invalidate the restraining

1. Section 68Q of the *Family Law Act 1975* (Cth) provides that to the extent that an order or injunction which permits a person to spend time with a child is inconsistent with an existing 'family violence order', the family violence order is invalid. In other words, an order made by the Family Court of Western Australia will override a violence restraining order (see s 175 of the *Family Court Act 1997* (WA)).

2. *Restraining Orders Act 1997* (WA) s 25(3).

order. It was explained to the Commission that presently, the courts rely on being informed of existing Family Court orders by the applicant (and the respondent). In other words, it is a self-report system and no independent verification is provided for or undertaken.

Section 65 of the *Restraining Orders Act* provides that if 'a court does not have jurisdiction to adjust a family order the court is not to make a restraining order that conflicts with that family order'. A family order is defined in s 5 and, in summary; it includes a parenting order, recovery order, injunction, undertaking given to and accepted by a court, a parenting plan and bond entered into in accordance with the order (so long as the order concerns who the child lives with, the time the child is to spend with a person and the communication a child is to have with a person). Section 12 of the *Restraining Orders Act* also lists 'any family orders' as one of the relevant factors to be taken into account when considering whether to make a violence restraining order or the conditions of such an order. These provisions taken together would suggest that it is important for the Magistrates Court or Children's Court to be able to confirm as a matter of course whether or not there are existing Family Court orders or proceedings involving the parties to a violence restraining order matter, and the terms of such orders.

Family Court

Under s 63(2) of the *Restraining Orders Act* the Family Court has jurisdiction to make a restraining order against a party to the proceedings or any other person who gives evidence in the proceedings. The same constraints as apply to a court exercising criminal jurisdiction (as discussed in Chapter Four) apply in this context. For example, the court must be satisfied that there are grounds for making a violence restraining order and the person who would be bound by the order must be present and be given an opportunity to be heard. The Commission was told during consultations that the Family Court rarely makes violence restraining orders during its proceedings and only does so in exceptional circumstances. One such example was put forward where a violence restraining order was necessary to protect lawyers and service providers who were involved in the proceedings.

As explained in Chapter Three of this Paper, family law legislation has been recently amended to include an expanded definition of family violence. In relation to the making of a parenting order, the court is required to take into account the best interests of the child as the paramount consideration.[3] In determining what is in a child's best interests the court is required to consider the 'benefit to the child of having a meaningful relationship with both of the child's parents' and the 'need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' (these are categorised as 'primary considerations').[4] As a result of the amendments to federal family law legislation in 2012[5] and corresponding amendments enacted in Western Australia in October 2013, the court is required to give greater weight to the need to protect the child from the specified harm than to the benefit to the child of having a meaningful relationship with his or her parents. Accordingly, the presence of family and domestic violence is a key issue for the decision-maker in Family Court parenting order matters.

The legislation also lists a number of 'additional considerations' in determining what is in the best interests of the child. These include 'any family violence involving the child or a member of the child's family' and

> if a family violence order applies, or has applied, to the child or a member of the child's family — any relevant inferences that can be drawn from the order, taking into account the following —
>
> (i) the nature of the order;
>
> (ii) the circumstances in which the order was made;
>
> (iii) any evidence admitted in proceedings for the order;
>
> (iv) any findings made by the court in, or in proceedings for, the order;
>
> (v) any other relevant matter[6]

A 'family violence order' is defined in s 5 of the *Family Court Act 1997* (WA)[7] as 'an order (including an interim order) made under a law of a State or a Territory to protect a person from family violence'. An interim or final violence restraining order made under the *Restraining Orders Act* between parties who are in a family and domestic relationship would fall within this definition. Further, when considering what order

3. *Family Court Act 1997* (WA) s 66A; *Family Law Act 1975* (Cth) s 60CA.
4. *Family Court Act 1997* (WA) s 66C; *Family Law Act 1975* (Cth) s 60CC.
5. These amendments were a result of the recommendations made by the Australian Law Reform Commission and the New South Wales Law Reform Commission in 2010: see ALRC/NSWLRC, *Family Violence – A National Response* (2010).
6. *Family Court Act 1997* (WA) s 66C; *Family Law Act 1975* (Cth) s 60CC. Previously these provisions provided that one of the additional considerations was that a family violence order applies to the child or a member of the child's family if the order is a final order or the making of the order was contested by a person.
7. *Family Law Act 1975* (Cth) s 4(1).

to make the court is required, 'to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration', to ensure that the order is 'consistent with any family violence order' and 'does not expose a person to an unacceptable risk of family violence'.[8]

The Family Court relies, to some extent, on the parties self-reporting the existence of a violence restraining order. A party to a parenting order application is required to inform the court of an existing family violence order (if the party is aware of it). Additionally, a person who is not a party to the proceedings may inform the court of a family violence order.[9] Further, if a party alleges child abuse or family violence the applicant is required to file a Form 4 Notice of Child Abuse or Family Violence (along with a supporting affidavit). This notice is required by legislation to be forwarded to the Department for Child Protection and Family Support (DCPFS).[10] DCPFS will undertake its own inquiries in relation to the allegations contained in the Form 4 Notice and provide a response to the Family Court.

If the Family Court makes a parenting order (or a recovery order, or injunction) and that order is inconsistent with a family violence order the court is required to specify the inconsistency in the order. A detailed explanation is also required to be given to the parties (and to the person against whom the family violence order is directed if that person is not a party) in relation to the purpose and terms of the order and the court's reasons for making an order that is inconsistent with the family violence order.[11] Copies of the order are to be given to the parties (and other persons including the Commissioner of Police, DCPFS and the registrar of the court that last made or varied the family violence order).

Interaction between the courts

It is clear that the Magistrates Court, the Children's Court and the Family Court are required by legislation to take into consideration family orders and family violence orders. From the Commission's consultations it is apparent that there are issues in relation to how each court is informed of the existence of orders made in the other court. The Magistrates Court and the Children's Court rely on self-reporting by the parties to a violence restraining order application so, in the absence of information elicited from the parties, the court will not be aware of the existence of a family order. There is no process that enables the Magistrates Court or the Children's Court to access the Family Court database to determine whether a family order is in existence or whether there are Family Court proceedings on foot. However, the information sharing protocols that were entered into in 2009 permit a magistrate (and other authorised persons) to telephone the Family Court duty registrar and request information as to whether a person is involved in proceedings in the Family Court.[12]

Likewise, in the Family Court the principal way of discovering the existence of a violence restraining order is from the material supplied by the parties. However, the Commission understands that the Family Court Counselling and Consultancy Service (FCCCS) has had access to the Magistrates Court database (CHIPS) and makes inquiries in appropriate cases in relation to the past court history of the parties, any pending charges and any violence restraining orders. As advised by the Department of the Attorney General, court civil data ceased to be entered into CHIPS in October 2012. Since 25 November 2013, all lower courts civil and criminal data are now contained in the Integrated Courts Management System (ICMS).[13] The FCCCS advised that while there have been some problems in accessing ICMS these problems now appear to have been resolved. The FCCCS noted that the information available to them via the Magistrates Court database is limited, but it at least provides an alert to make further inquiries. This process is also established through information sharing protocols that were entered into between the courts and others in 2009.[14] If the Magistrates Court or the Family Court is aware of the existence of an order made by the other court, the information sharing protocols include procedures for obtaining copies of orders and court records. In addition, the protocols cover other aspects of information sharing between the Family Violence Court and the Family Court where there are common clients (eg, where a Family Violence Court worker is concerned that a child who is subject to a parenting order may be at risk, the protocols provide for procedures in relation to disclosing information to the FCCCS).

8. *Family Court Act 1997* (WA) s 66G; *Family Law Act 1975* (Cth) s 60CG.
9. *Family Court Act 1997* (WA) s 66F; *Family Law Act 1975* (Cth) s 60CF.
10. *Family Court Act 1997* (WA) s 159; *Family Law Act 1975* (Cth) s 67Z.
11. *Family Court Act 1997* (WA) s 174; *Family Law Act 1975* (Cth) s 68P.
12. *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009) clause 2.2 (i).
13. Andrew Marshall, Department of the Attorney General, correspondence (2 December 2013).
14. *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009) 2.2 (ii).

Overall, the information obtained during consultations suggests that these protocols are not being widely used. Family Violence Service workers expressed concern in relation to the disclosure of information to the FCCCS because the information may become known to the other party. The Commission was also told by some staff that they were not always aware or confident of what information could properly be disclosed. The FCCCS indicated that in the past it would utilise the provisions of the protocols to request permission to search, inspect or obtain copies of the record of proceedings in the Magistrates Court; however, this process proved lengthy and was sometimes refused. Therefore, the preferred option is to obtain copies of transcripts of violence restraining order proceedings from the parties directly (although it was noted by the Chief Judge of the Family Court that the court is not always provided with such transcript, and it would be useful and relevant information). Significantly, the Children's Court is not a party to the information sharing protocols and it was confirmed by the President of the Children's Court that there is no mechanism to check whether parties to its proceedings are subject to violence restraining orders made in the Magistrates Court or to Family Court orders.

In Chapter Three the Commission proposed that the Department of the Attorney General develop an IT system or process enabling the Magistrates Court and the Family Court of Western Australia to access each other's records to determine if named parties are subject to orders in the other jurisdiction.[15] Given that the Family Court currently has access to the Magistrates Court database, the principal issue that needs to be addressed is access by the Magistrates Court to the Family Court database. Any new system or process should ensure that both courts can easily check (in real time, as matters are electronically recorded in the relevant system) relevant information in relation to proceedings in and orders made by the other court. The Commission proposes that a similar system be devised for the Children's Court.

In addition to facilitating access to court records, the Commission is of the view that the information sharing protocols should be reviewed and revised to ensure that they adequately enable appropriate information sharing to occur in matters where the courts have common clients. Further, the Children's Court should be a party to the information sharing protocols. Finally, sufficient training and information should be made available to court staff to ensure that they are aware and confident of the ambit of the information sharing protocols.

15. Chapter Three, Proposal 20(2).

PROPOSAL 45

1. That the Department of the Attorney General develop an IT process that enables the Children's Court to access the records of the Magistrates Court and the Family Court of Western Australia.
2. That the parties to the *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009) review and revise the protocols to ensure that they adequately enable appropriate and effective information sharing; include the Children's Court of Western Australia; and ensure adequate information and training is provided to staff to properly request and provide the information provided for in the protocols.

EXPANDING THE JURISDICTION OF THE FAMILY COURT

In response to the issues arising from duplication of proceedings where there are concurrent violence restraining order and parenting order proceedings, a considerable number of people consulted advocated for violence restraining order proceedings to be dealt with by the Family Court. Overall, it was suggested that the ex parte interim order application stage of the process should continue to be heard in the Magistrates Court (primarily because it is imperative that an interim order can be obtained quickly and locally).[16] Following the making of an interim order it was submitted that the determination of the final order should be dealt with in the Family Court.[17] One magistrate suggested that as soon as the interim order is made the matter should be transferred to the Family Court,[18] while others submitted that the

16. The Family Court only has one registry in Perth and it would not be appropriate for applicants from outer metropolitan and regional areas to be required to file an application in the Family Court.
17. In addition, if the applicant did not seek an interim violence restraining order, the application for a final violence restraining order (where contested) should be heard in the Family Court.
18. It was suggested that as soon as an interim violence restraining order was made (in any case where the parties are or have been married or in a de facto relationship), the matter should be transferred to the Family Court and listed before a registrar within seven days. It was acknowledged that additional resources for the appointment of possibly two new full-time registrars would be required. Further, it was

Family Court should only deal with a final violence restraining order if it is contested by the respondent. In order to enable the Family Court to determine an application for a violence restraining order that had been initiated in the Magistrates Court, legislative amendments to the *Magistrates Court (Civil Proceedings) Act 2004* (WA) would be required. Currently, s 22 of the Act deals with a change of venue and permits the Magistrates Court to order that the proceedings be transferred to another place in the state but only if an application for change of venue is made by a party and the other party has been given notice. It would not be appropriate for the decision to rest with one party. The court should have the power to determine whether transfer to the Family Court is appropriate in the circumstances.

The Commission appreciates the benefits of enabling the Family Court to deal with the violence restraining order matter at the same time as it deals with the parenting order application (in terms of reducing re-traumatisation of victims and limiting duplication); however, it is clear that there are considerable practical barriers to implementing this option. The Chief Judge explained to the Commission[19] that:

- The potential benefit of avoiding two separate hearings is highly unlikely to be realised in practice because of the long delays currently experienced in the Family Court. The current median waiting time to trial in the Family Court is 100 weeks. Because a contested violence restraining order should be dealt with as expeditiously as possible, it would not be appropriate for the hearing to be delayed until such time as the parenting order hearing could proceed. This would mean that for many cases the parties would be involved in two separate hearings in any case (albeit in the same court). This would not achieve the reduced cost burden to the legal system (and parties) as anticipated by the suggested integration of jurisdictions. In addition, a victim of family and domestic violence would be required to re-tell their story on two separate occasions (albeit possibly before the same judicial officer).
- While the Case Assessment Conferences (used in the Family Court in a large proportion of child-related proceedings) may in theory be a useful process for violence restraining order matters, in practice there is usually only one Case Assessment Conference held. If the contested violence restraining order matter is transferred after the conference has already taken place, available resources would not permit a second conference to be held.
- The infrastructure requirements to enable the Family Court to deal with contested violence restraining order hearings are, in reality, insurmountable absent very significant increases in resources to that court. Currently, the Family Court has no available court space, in fact on most days the court uses all of its 10 courtrooms and often has to use Native Title Tribunal courtrooms (in the same building). On some occasions the Family Court has been required to use a courtroom in the Central Law Courts. Even if resources were provided to appoint additional judicial officers to assist with the increased workload, there is no available space for judicial chambers and no free office space for judicial support staff and additional legal and other support services. It was noted that even the child minding facilities at the Family Court are fully stretched.

It was also observed that dealing with a contested violence restraining order matter and a parenting order matter at the same time may impact the outcomes of Family Court child-related proceedings. The respondent may strongly object to the making of the violence restraining order but be amenable to a negotiated outcome in relation to parenting orders.[20] If this was the case, the inclusion of violence restraining order proceedings may significantly protract the outcome in the parenting order matter (and this may not be in the best interests of the children).

It is also noted by others that any proposal to enable contested violence restraining orders to be dealt with by the Family Court would be difficult in regional areas because the Family Court only attends each regional court location a few times a year. Again, it would be inappropriate for the violence restraining order to be adjourned only for the purpose of waiting for an available circuit date some months away (especially if the local regional magistrate was able to deal with the matter at a much earlier time).

The Commission can see considerable merit, in theory, of enabling the Magistrates Court to transfer contested final violence restraining order proceedings to the Family Court where the parties are currently

stated that the registrar should case manage the matter at the start and transfer it to a family law magistrate or judge at the relevant stage.

19. Chief Judge Stephen Thackray, Family Court of Western Australia, consultation (23 October 2013).

20. It was suggested that if a violence restraining order matter was transferred to the Family Court and the parenting order matter was able to be settled before the violence restraining order hearing was due to take place, the Family Court should be permitted to transfer the violence restraining order matter back to the Magistrates Court.

involved in parenting order proceedings in the Family Court. Indeed, were sufficient resources available to the Family Court, this would probably be the most desirable outcome. However, given the impediments to implementing this option in practice, the Commission does not consider that such a proposal at this stage is feasible, in the absence of significant increases in the physical and curial resources available to the Family Court. The Commission is particularly concerned with any delay in the resolution of the violence restraining order matter as a consequence of it being transferred to the Family Court (as it is currently resourced). It is vital that a respondent who objects to a violence restraining order can have the matter determined as soon as possible given the imposition of restraints that accompany an interim order. Although the applicant will remain protected by a violence restraining order during the period of an interim order, any unnecessary delay in resolving the matter is likely to lead to increased stress for both applicant and respondent. In addition, this model requires a significant injection of resources (both financial and infrastructural) and would depend upon, among other things, new Family Court space or a new building.

The Commission has not had the opportunity to evaluate the economic benefits that may be obtained from enabling the Family Court to hear contested violence restraining order matters as compared with the economic cost involved. Further, the Commission is of the view that certain of the perceived benefits of having violence restraining order matters heard in the Family Court will be accomplished, at least in part, if other proposals in this Paper are implemented. In particular, the proposals designed to increase the level of awareness and understanding of family and domestic violence by decision-makers dealing with violence restraining order matters and improvements in the way that relevant information is presented to the court will assist in ensuring that the Magistrates Court is equipped to deal with violence restraining order matters in a fair and informed manner. The Commission observes that if there was a commitment from government to provide the required additional resources to the Family Court to facilitate the consolidation of contested final violence restraining order proceedings where there are concurrent proceedings in the Family Court, such a reform would appear to offer substantial benefits. The costs of such a reform would warrant further evaluation.

Victim rights

The Standing Council on Law and Justice's *National Framework of Rights and Services for Victims of Crime 2013–2016* is designed to improve coordination between all Australian jurisdictions in relation to victim services by identifying 'principles underpinning national approaches to supporting the rights of victims and delivering services' and improving coordination between jurisdictions.[1] The framework observes that under international human rights standards a victim is defined to 'include immediate family and dependants, and those who intervene to assist during or prevent the commission of a crime'.[2] Further, the framework contains five guiding principles:

- **Respectful and dignified treatment:** Victims of crime should be treated with respect and dignity and be provided with support taking into account their diverse backgrounds.
- **Information and access:** Timely referral and information about the range of support services should be provided to victims (regardless of where they reside).
- **Justice and fair treatment:** Support should be offered to victims to ensure that they understand and can exercise their rights.
- **Financial assistance:** A victim who has been injured as a result of a crime should have access to financial assistance from the jurisdiction in which the crime was committed.
- **Leadership and collaboration**: All Australian jurisdictions are to provide a coordinated response to ensure 'streamlined service delivery'.[3]

Various strategies are proposed to implement the framework and an evaluation will be undertaken at the end of 2015.

The Western Australian government has a dedicated Commissioner and website for victims of crime.[4] It contains information about emergency contacts, victims support services and legal processes (including how to report a crime, restraining orders and criminal injuries compensation). It includes website links to other relevant agencies. It also describes the role of the Victims of Crime Reference Group which was established in 2011 to advise the government about victim issues.[5] It is now chaired by the Commissioner for Victims of Crime and includes six victims of crime, the manager of the Victims Support and Child Witness Service of the Department of the Attorney General and representatives from the Office of the Director of Public Prosecutions, Western Australia Police and the Department of Corrective Services. The Commissioner for Victims of Crime, Jennifer Hoffman, was appointed in July 2013 and has responsibility for ensuring that members of the public and government agencies are aware of their rights and responsibilities under the *Victims of Crime Act 1994* (WA); for providing advice to the Department of the Attorney General (and the Attorney General) about victim issues in Western Australia; monitoring the justice system response to victims; and communicating and developing working relationships with victims of crime, stakeholders and government departments.

VICTIM SERVICES IN WESTERN AUSTRALIA

The Department of the Attorney General has three distinct arms to its services provided for victims: the Victim Support Service (VSS), the Child Witness Service (CWS) and the Family Violence Service. The role of the Family Violence Service has been discussed in detail in Chapter Four of this Paper. In summary, it provides support services to victims of family and domestic violence and has a direct role in case management and the provision of information to the Family Violence Courts. In addition, it provides support and assistance to victims of family and domestic violence who wish to apply for a violence restraining order. It only operates in the metropolitan area.

1. Standing Council on Law and Justice, *National Framework of Rights and Services for Victims of Crime 2013–2016* (2013) 2.
2. Ibid 3.
3. Ibid 4.
4. See <http://www.victimsofcrime.wa.gov.au/>.
5. Porter C, *New Victims of Crime Reference Group to Meet*, Ministerial Media Statements (13 September 2011).

The VSS is a statewide service providing confidential counselling and support services to victims of crime. The website page specifically refers to the definition of a victim of crime under the *Victims of Crime Act*, namely that victims are 'people who suffer injury or loss as a direct result of an offence' and 'any member of the immediate family where an offence results in the death of an individual'.[6] It is also stated that the VSS can provide information to victims about the status of police investigations and court proceedings, assist in the preparation of a victim impact statement, provide support to victims during court proceedings, assist with applications for criminal injuries compensation and make referrals to other services. The CWS provides services to children who may need to give evidence in court. It is available to any victim or witness to a crime who is under the age of 18 years. The service assists children to prepare emotionally for giving evidence but it does not directly provide counselling services (although referral to other agencies will be made when appropriate).[7] The Commission was told during consultations that the CWS provides support to the child and his or her family from the time a person has been charged with the offence until the end of any trial. It was stated that the CWS deals with a number of matters where children are supported as witnesses to a violent act in a family and domestic relationship or where they are direct victims of family and domestic violence.

During consultations it was also explained that the VSS and CWS tend to deal with victims of more serious indictable offences (including family and domestic violence related homicides) whereas the FVS usually deals with victims of family and domestic violence related offences that are being dealt with in the Magistrates Court. However, while services may intersect where both are providing support in relation to different aspects of the legal system at the one time, it is more common for services to be provided on a sequential basis.

VICTIM OF CRIMES ACT

The *Victims of Crime Act* provides for guidelines about how victims should be treated.[8] Section 3 of the Act provides that public officers and bodies[9] are 'authorised to have regard to and apply the guidelines' and should do so to the extent that it is:

> (a) Within or relevant to their functions to do so; and
>
> (b) Practicable for them to do so.

However, this provision does not create a legally enforceable right or entitlement.[10] The provisions in some other jurisdictions are stronger in their requirements placed upon public agencies. In Victoria, while the relevant legislation does not create any legally enforceable rights, there is provision for a complaint mechanism and reporting process. The Attorney General is required under s 21 of the *Victims' Charter Act 2006* (Vic) to provide a report on an annual basis that includes the steps taken to promote the Charter principles and the operation of the Act. The Department of Justice is also required to monitor the effectiveness of the Act.[11] Significantly, s 18 of the Act provides:

> (1) If an investigatory agency, a prosecuting agency or a victims' services agency is aware, or should reasonably be aware, that a person is a victim, the agency must have regard to the Charter principles when dealing with the person.
>
> (2) A person or body responsible for the development of criminal law policy, the development of victims' services policy, the administration of criminal justice or the administration of victims' services must, where relevant, have regard to the Charter principles.

In addition, if a person adversely affected by a crime informs an agency that the Charter principles have not been upheld that person should be informed of the applicable complaint process.[12] The Secretary of the Department of Justice is required to develop 'policies and plans to promote the Charter principles' and 'ensure that appropriate processes are established for complaints to be made by persons adversely affected by crime if the Charter principles are not upheld'.[13] In New South Wales, the functions of the Commissioner of Victims Rights are specified under legislation and include promoting and overseeing the implementation of the Charter of Victims

6. <http://www.courts.dotag.wa.gov.au/V/victim_support_service.aspx?uid=8200-5359-7019-4949>.
7. Western Australia, Department of the Attorney General, *Child Witness Service*, Brochure (undated).
8. The guidelines are contained in the *Victims of Crime Act 1994* (WA) sch 1.
9. Public officers and bodies include Ministers of the Crown, judicial officers, officers of courts, the Director of Public Prosecutions, the Commissioner of Police, members of the Western Australia Police, the Prisoners Review Board, the Mentally Impaired Accused Review Board, the Supervised Release Review Board, juvenile justice teams and employees of bodies in the public sector whose functions involve dealing with offenders or victims: *Victims of Crime Act 1994* (WA) s 2.
10. See *Victims of Crime Act 1994* (WA) s 3(3).
11. *Victims' Charter Act 2006* (Vic) s 20.
12. *Victims' Charter Act 2006* (Vic) s 19.
13. *Victims' Charter Act 2006* (Vic) s 20.The victims of crime website in Victoria includes reference to a telephone contact number (the Victim's Charter Enquiries and Complaints Line): see <http://www.victimsofcrime.vic.gov.au/home/resources/your+rights/your+rights+-+the+victims+charter+principles>.

Rights, making recommendations to assist agencies to improve their compliance with the Charter, and receiving and resolving (as far as possible) complaints from victims about alleged breaches of the Charter.[14] The Commissioner also has the power to request in writing the provision of information from any government agency that is relevant to the Commissioner's functions.[15]

Definition of a victim

A 'victim' is defined in s 2 of the *Victims of Crimes Act* as:

> (a) A person who has suffered injury, loss or damage as a direct result of an offence,[16] whether or not that injury, loss or damage was reasonably foreseeable by the offender; or
>
> (b) Where an offence results in a death, any member of the immediate family of the deceased.

During consultations it was suggested that the current definition of a victim of crime should be expanded. For example, it was suggested that persons who witness a crime (which may include children in the context of family and domestic violence) should come within the provisions of the legislation in relation to access to support services. It was also contended that the definition does not adequately accommodate Aboriginal kinship relationships and may also generally exclude important relationships such as foster parents of a deceased child.

The range of persons that come within the provisions of similar legislation in some other jurisdictions is broader. For example, in Victoria the definition of a victim includes a family member of a person who has died as a direct result of a criminal offence.[17] In New South Wales there is a separate part of the *Victims Rights and Support Act 2013* (NSW) dealing with the provision of support for victims of acts of violence. Eligibility for specific supports is dependent on the categorisation of the victim as a primary victim,[18] a secondary victim[19] and a family victim.[20] The South Australian legislation includes a victim's charter which applies to a 'victim' who is defined as 'a person who suffers harm as a result of the commission of the offence (but does not include a person who was a party to the commission of the offence)'.[21]

On 13 November 2013, the *Report on the 2011 Review of the Victims of Crime Act 1994* was tabled in Parliament. This report responds to the statutory requirement for a review to be undertaken as soon as practicable after 1 January 2010.[22] This report was informed by consultations with the Victims of Crime Reference Group, the Western Australia Police, the Department of Corrective Services, the Director of Public Prosecutions, and the Court Counselling and Support Services within the Department of the Attorney General.[23] It also took into account previous internal reviews undertaken in relation the Act.

It was noted that a review of the Act in 1999 recommended that the Act should be strengthened by including a complaints mechanism and changing the 'guidelines' to a Charter of Rights. However, the review conducted in 2005 only recommended that public officers and bodies ensure that they are complying with the guidelines. For the 2011 review, stakeholders submitted that they are complying with the guidelines. No further recommendations in this regard were made. The 2011 review only has one recommendation: that consideration should be given to expanding the definition of a victim under the *Victims of Crimes Act* to cover parents and guardians of children and incapable persons who are direct victims of crimes and to accommodate Aboriginal cultural relationships that are equivalent to parents and guardians. It is also recommended that the current provision, where a victim is defined to include the immediate family of a person who has died as a result of a crime, be expanded to cover cases where a person has been incapacitated as a result of a crime.[24]

14. *Victims Rights and Support Act 2013* (NSW) s 10.
15. *Victims Rights and Support Act 2013* (NSW) s 12.
16. An offence includes an alleged offence: *Victims of Crime Act 1994* (WA) s 2.
17. *Victims' Charter Act 2006* (Vic) s 4. Family member is defined as having the same meaning as set out in s 8(1) and (2) of the *Family Violence Protection Act 2008* (Vic).
18. The definition of 'primary victim of an act of violence' under s 20 of the *Victims Rights and Support Act 2013* (NSW) includes a person who is injured as a direct result of trying to prevent another person from committing the act or trying to help or rescue another person against whom the act is being committed or had just been committed. A family victim is an immediate family member of a person who has died: s 22.
19. Under s 21 a secondary victim includes a person who is injured as a direct result of witnessing the act of violence. The definition also extends, in the case of parents or guardians of children under the age of 18 years if that person is injured as a result of becoming aware of the act of violence committed against the child.
20. A family victim is an immediate family member of a person who has died: *Victims Rights and Support Act 2013* (NSW) ss 22 & 23.
21. *Victims of Crime Act 2001* (SA) s 4.
22. *Victims of Crime Act 1994* (WA) s 6.
23. Department of the Attorney General, *Report on the 2011 Review of the Victims of Crime Act 1994* (November 2013).
24. Ibid.

The Commission is of the view that there is a good case for updating and strengthening the provisions of the *Victims of Crime Act*. However, bearing in mind the results of the recent review referred to above, it proposes that the definition of a victim be expanded but seeks submissions about what categories of persons should be included in the definition of victim. The Commission notes that, if the definition of a victim is expanded and there is no accompanying increase in the resources available to victim support services, the same fixed resources will then be applied to a larger pool of recipients. That may result in either a reduction in services provided to all victims or a restriction in the services provided to certain categories of victims.

The Commission also seeks submissions about whether any reform to the legislation is required to facilitate a victim lodging a complaint in relation to his or her treatment by the legal system.

PROPOSAL 46

That the definition of a victim under s 2 of the *Victims of Crime Act 1994* (WA) be expanded to include a wider range of persons who may be harmed as a result of an offence (in particular, parents and guardians of children).

QUESTION 27

1. Which categories of persons should be included in the expanded definition of a victim under the *Victims of Crime Act 1994* (WA)?
2. Should the *Victims of Crime Act 1994* (WA) include a complaints mechanism to enable a victim to lodge a complaint about his or her treatment by the legal system and other relevant agencies and, if so, how should such complaints be dealt with?

DISCLOSURE OF VICTIM IMPACT STATEMENTS

During consultations for this reference the Commission was told by one non-government victim support agency that they were informed of a number of instances where prisoners have access to copies of victim impact statements while in custody. The concern expressed was that possession of these statements may be used to further torment or harass a victim of family and domestic violence.

Pursuant to s 24 of the *Sentencing Act 1995* (WA) a victim impact statement may be provided to a court to assist 'in determining the proper sentence'. Another person is authorised to give a victim impact statement on behalf of a person who is incapable of giving the statement because of age, disability or any other reason if the court considers that it is appropriate. A victim impact statement may be made in writing or presented orally and can provide details in relation to any injury, loss or damage suffered as a direct result of the offence and the effects on the victim of the commission of the offence. It is not to include a statement about how or for how long the offender should be sentenced.[25]

Section 26(1) provides that the court is permitted to make a written victim impact statement available to the prosecutor and to the offender 'on such conditions as it thinks fit'. The same provision applies to pre-sentence reports and victim offender mediation reports.[26] The District Court of Western Australia practice direction in relation to sentencing proceedings provides that a victim impact statement must be lodged in the court and served no less than seven days prior to the sentencing hearing. Clauses 7 and 8 deal with pre-sentence reports and mediation reports. In summary, these reports are to be retained in the possession of the lawyer acting for the offender (and the prosecutor) and the contents must not be disclosed to anyone other than the offender (or other prosecutors employed by the Director of Public Prosecutions). At the conclusion of the sentencing hearing the lawyer acting for the offender and the prosecutor must hand their copies of the report to the judge's associate and delete any electronic copies from their records. These requirements do not apply to victim impact statements.[27]

The Commission is of the view that the current provisions dealing with the physical security of pre-sentence reports and mediation reports should equally apply to victim impact statements. While it is appreciated that the offender must be informed of the contents of a victim impact statement (since it is relevant to sentencing), the victim should be protected from future acts of family and domestic violence (eg, emotional abuse) that may be committed directly as a consequence of the offender's ongoing possession of the victim impact statement.

25. *Sentencing Act 1995* (WA) s 25.
26. *Sentencing Act 1995* (WA) ss 22(5) & 30(1).
27. A similar practice direction applies in the Supreme Court in relation to pre-sentence reports: see Supreme Court of Western Australia, *Consolidated Practice Directions* (2009) cl 5.6. There are no relevant practice directions on the Magistrates Court website.

PROPOSAL 47

That the Supreme Court, District Court, Magistrates Court and Children's Court of Western Australia update or develop their practice directions to ensure that, absent directions to the contrary, all copies of written victim impact statements are returned to the judge's associate (or judicial support officer) immediately after the sentencing proceedings are concluded. Furthermore, the practice directions should specify that any electronic copies that have been provided to the prosecution or defence are to be deleted at the completion of the sentencing hearing.

VICTIM NOTIFICATION REGISTER

The guidelines contained in schedule 1 of *Victims of Crime Act* include, among other things, that:

> (10) Arrangements should be made so that a victim's views and concerns can be considered when a decision is being made about whether or not to release the offender from custody
>
> (11) A victim who has so requested should be informed about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender after release.

To facilitate information to victims about an offender's release from custody, the Department of Corrective Services operates the Victim Notification Register. Any victim may apply to be included so long as the offender is still under supervision of the department (eg, on community-based order, on parole or in prison).[28] Persons are eligible for inclusion on the Victim Notification Register if they suffered injury, loss or damage as a direct result of any offence committed against them or if they are an immediate family member of a victim where the offence resulted in death or incapacitation. This means that a person, who has suffered family and domestic violence at the hands of a prisoner who is about to be released for an unrelated non-family and domestic offence, does not have any right to be notified of the offender's release.

This problem was mentioned to the Commission by the Commissioner for Victims of Crime and it was suggested that the system in Victoria better accommodates victims of family and domestic violence. Inclusion on the Victims Register is generally only available to a victim of family and domestic violence if the offender is in prison as a consequence of a crime committed against them. However, it is stated that persons may also apply for inclusion if they 'are or have been a domestic partner of the prisoner with a family violence intervention order in force against the prisoner'; can 'demonstrate a documented history of family violence being committed against' them by the prisoner; or were a witness for the prosecution at the trial.[29] The Commission agrees that the Victims Notification Register should be available to the victims of family and domestic violence even if the current sentence of imprisonment was not imposed in relation to an offence committed against them. A number of people consulted advised that release from custody may be a particularly dangerous time for victims of family and domestic violence.

PROPOSAL 48

That the Department of Corrective Services expand its eligibility criteria for the Victims Notification Register to include a person against whom a family and domestic violence related offence has been committed by the prisoner (at any time) and a person who has a current family and domestic violence restraining order against the prisoner.

28. <http://www.correctiveservices.wa.gov.au/_files/victim-services/vnr-brochure.pdf>.

29. <http://www.victimsofcrime.vic.gov.au/home/after+court/victims+register/>.

Criminal injuries compensation

The *Criminal Injuries Compensation Act 2003* (WA) governs Western Australia's criminal injuries compensation scheme. The scheme allows for up to $75,000[1] in compensation to be paid to victims (and certain close relatives in the event of the death of a person in consequence of the commission of an offence) for specified loss or injury. The state usually seeks to recover any compensation paid to the victim from the offender who has been convicted of the offence.[2] In 2011–2012, $32m was paid in compensation to victims and $1.7m was recovered from offenders.[3] This section examines criminal injuries compensation in the context of family and domestic violence and discusses issues raised during consultations for this reference.

CLAIMS FOR CRIMINAL INJURIES COMPENSATION

Criminal injuries compensation may be claimed by a victim of a criminal offence or, if the victim is deceased, by a 'close relative' of the victim.[4] To qualify for compensation the victim must suffer injury or loss as a consequence of the commission of a proved offence[5] or, in limited circumstances, an alleged offence.[6] Compensation will cover injury in the form of bodily harm, mental or nervous shock,[7] or pregnancy and certain defined forms of loss arising from an injury.[8]

Applications for criminal injuries compensation must be made in writing to the Office of Criminal Injuries Compensation within three years of the commission of the offence.[9] Applicants must complete a standard application form and provide evidence (such as medical evidence, relevant police reports and records of expenditure) in support of their claim. In determining whether or not to make an award, or the amount of an award, the assessor may have regard to any factors or circumstances that he or she thinks are relevant.[10] In addition, assessors are not bound by rules of evidence[11] and may make such inquiries and investigations as they see fit.[12] In cases of domestic violence this may include making inquiries of agencies such as the Department for Child Protection and Family Support, the Western Australia Police, the Director of Public Prosecutions and the Department of Corrective Services to establish the history of the relationship between the victim and offender leading up to the offence, and the nature of the relationship (if any) following the offence.[13] An assessor may also direct a victim to undergo medical assessment[14] and failure to comply

1. In cases of multiple unrelated offences by one offender against the same victim over a period of time (as is often the case in a family and domestic violence context), compensation is capped to twice the maximum applicable to the last offence: *Criminal Injuries Compensation Act 2003* (WA) s 34.
2. See *Criminal Injuries Compensation Act 2003* (WA) Pt 6.
3. Office of Criminal Injuries Compensation, *Annual Report 2011–2012* (September 2012).
4. Close relative is defined to mean a victim's parent, grandparent, step-parent, spouse, de facto partner, child, grandchild or stepchild: *Criminal Injuries Compensation Act 2003* (WA) s 4.
5. *Criminal Injuries Compensation Act 2003* (WA) s 12.
6. For the purposes of compensation, an alleged offence is one where an accused has been found not guilty but the assessor is satisfied that the offence was committed by another person (s 13); the accused has been found not guilty on the basis of unsound mind (s 14); the accused is not fit to stand trial (s 15); the charge has not been determined (s 16); or no person has been charged (s 17): *Criminal Injuries Compensation Act 2003* (WA).
7. An award for mental or nervous shock may only be made where the victim also suffered bodily injury or became pregnant as a result of the commission of the offence; where the victim was the person against whom (or against whose property) the offence was committed; where a person (other than the victim) died and the victim was present then or immediately after; or where the victim was a parent or step-parent of the person who died as a result of the offence or was a close relative of the person who died and was living with the person at the time: *Criminal Injuries Compensation Act 2003* (WA) s 35(2).
8. Loss is defined to include actual and reasonable expenses arising directly from injury (or in relation to a report from a health professional in relation to the injury) including treatment, loss of earnings, and loss occasioned by damage to any 'personal item' worn by the victim when the injury was suffered. Loss includes future loss by way of expenses that are likely to be reasonably incurred for treatment of the injury: see *Criminal Injuries Compensation Act 2003* (WA) s 6. Where compensation is claimed by a close relative of a deceased victim, compensation for loss is confined to damages that might otherwise be awarded under the *Fatal Accidents Act 1959* (WA).
9. This time limit may be extended at the discretion of the assessor: *Criminal Injuries Compensation Act 2003* (WA) s 9.
10. *Criminal Injuries Compensation Act 2003* (WA) s 29.
11. *Criminal Injuries Compensation Act 2003* (WA) s 18(2).
12. *Criminal Injuries Compensation Act 2003* (WA) s 19(1).
13. See, eg, *Southworth* [2010] WACIC 3 where the fact that the applicant visited the offender in prison on several occasions after the offence and her ongoing support of the offender was taken into account as evidence against her claimed psychological problems that resulted from the offence. The victim was still compensated for minor physical injuries and the cost of obtaining medical reports to support her claim.
14. *Criminal Injuries Compensation Act 2003* (WA) s 20.

with such direction may lead to a reduction of the compensation award.[15]

The *Criminal Injuries Compensation Act* provides that claims must be determined expeditiously and informally[16] on the balance of probabilities.[17] The vast majority of claims are determined on the papers without the need for a hearing. This is an important improvement on the previous court-based compensation scheme for victims of family and domestic violence as it avoids the re-traumatisation that occurs as a result of requiring victims to give evidence in a court.[18]

The *Criminal Injuries Compensation Act* sets out certain circumstances that may (or must) result in refusal of a claim.[19] Those of relevance in the present context include where the award is likely to benefit the offender (s 36); where the victim failed to assist investigators (s 38); and where the victim's behaviour directly or indirectly contributed to his or her injury or death (s 41). The impact of these provisions on victims of family and domestic violence is discussed further below.

ISSUES RAISED IN CONSULTATIONS

During consultations the Commission was provided with a report produced by the Domestic Violence Legal Workers Network (DVLWN) describing certain perceived problems with how the current *Criminal Injuries Compensation Act* operates in relation to victims of family and domestic violence, and making arguments for specific reforms.[20] A number of these issues, and others raised in consultations, are discussed further below.

Relationship clause

Under s 36 of the *Criminal Injuries Compensation Act* if there is a relationship or connection between the offender and victim and by reason of that relationship any money paid to the victim is likely to benefit or advantage the offender, the assessor must not make the award. The DVLWN submitted that this clause fails to recognise the dynamics of family and domestic violence, including financial dependence, which may cause the victim to return to the relationship after the offence. It was argued that the receipt of an award of compensation may enable some women to leave an abusive relationship – a path that may not have been open to them before because of financial dependence.[21]

The Commission notes that, with the exception of Western Australia and the Northern Territory, all Australian jurisdictions have abolished this clause. Many have done so in specific recognition of the arguments noted above.[22] Data provided by the Office of Criminal Injuries Compensation reveal that this section is used rarely (approximately once or twice each year) and there have been only three refusals under s 36 in the past five years in cases that feature circumstances of family and domestic violence.[23] In consultations, the Chief Assessor explained that, in her opinion, s 36 was appropriate in many cases where victims of family and domestic violence continue to reside with the offender because her office will seek to recover from the offender any money awarded to the victim and that this can cause obvious tension in the household, potentially putting the applicant at further risk of harm.[24] She also noted that while the award may be refused on the basis of s 36, applicants may effectively reapply if they subsequently leave the relationship. In addition, it was stated that in appropriate cases, compensation awards may be placed in trust with the Public Trustee on behalf of a victim (effectively quarantining a payment from an offender while giving the victim some personal financial independence).[25]

In view of the rare occasions that applications are refused on this basis and the fact that alternative arrangements for payment of awards may be made in appropriate cases, the Commission is disinclined to propose that s 36 be repealed. However, the Commission notes that it is not clear whether applicants who have their awards for compensation rejected on the basis that they remain in a domestic relationship with the offender are routinely advised by the Office of Criminal Injuries Compensation that their application may be revived if they leave the relationship. The Commission, therefore, suggests

15. *Criminal Injuries Compensation Act 2003* (WA) s 20(3).
16. *Criminal Injuries Compensation Act 2003* (WA) s 18(1).
17. *Criminal Injuries Compensation Act 2003* (WA) s 4 '*satisfied* means satisfied on the balance of probabilities'.
18. Porter HL, *Criminal Injuries Compensation* (address to the Western Australian Federation of Sexual Assault Service Forum, Perth, 4 October 2005) 2.
19. In 2011–2012, 126 applications were refused out of the 1,809 applications that were finalised in that year: Office of Criminal Injuries Compensation, *Annual Report 2011-2012* (September 2012) 4. For an itemised list of reasons for refusal, see *Annual Report,* 9.
20. Domestic Violence Legal Workers Network (DVLWN), *Report on the Limitations of the Criminal Injuries Compensation Act 2003 (WA) in Relation to Victims of Sexual Offences and Domestic Violence* (undated).
21. Ibid 6-7. See also Jurevic L, 'Between a Rock and a Hard Place: Women victims of domestic violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law* [76].
22. Meyering IB, *Victim Compensation and Domestic Violence: A national overview, Australian Domestic and Family Violence Clearinghouse*, Stakeholder Paper No. 8 (2010) 8–9.
23. Office of Criminal Injuries Compensation, consultation (21 October 2013).
24. Ibid.
25. Ibid.

that the office ensure that this is communicated to the applicant in writing in every such case.

Contributory conduct

Section 41(a) of the *Criminal Injuries Compensation Act* provides that an assessor 'must have regard to any behaviour, condition, attitude, or disposition of the victim that contributed, directly or indirectly, to the victim's injury or death'. The assessor may refuse or reduce an award for compensation on this basis. In its report provided to the Commission, the DVLWN submitted that s 41(a) should be amended to make clear that the assessor must take into account the context of the conduct in respect of family and domestic violence.[26]

This issue was not raised by any others consulted for the reference and no evidence was offered showing this is a problem in practice.[27] Indeed, the Commission was advised by the Office of Criminal Injuries Compensation that only one claim involving family and domestic violence had been refused under s 41(a) in the past five years and this was because the victim initiated contact with the offender in breach of a restraining order.[28] It is understood that typically, if contributory conduct is found in the context of family and domestic violence, the result will be a reduction rather than refusal of the award.[29]

Reporting offence and assisting investigation

Section 38 provides that assessors must not make an award of criminal injuries compensation if they are of the opinion that the applicant

> did not do any act or thing which he or she ought reasonably to have done to assist in the identification, apprehension or prosecution of the person who committed the offence.

In relation to a victim of family and domestic violence, this would usually mean that the victim would need not only to report the offence to police, but also supply any necessary information required by the criminal justice system in respect of prosecuting the offence (including giving evidence at the trial of the offender if required).

The DVLWN report asserts the need for legislative guidance to ensure that assessors take account of the context of family and domestic violence in determining whether the applicant did all that was reasonably required to be done in the circumstances. It is noted that Victoria and Queensland have incorporated a number of specific provisions to provide guidance to assessors in the family and domestic violence context by requiring them to consider certain issues including whether the victim was being threatened or intimidated and whether the offender was in a position of power, influence or trust.[30]

Although the issue is mentioned in the DVWLN report, it appears to be raised in the abstract and the Commission has not received any complaints that assessors are not taking adequate account of the context of family and domestic violence in determining whether the applicant did all he or she could do in the circumstances. Indeed, there is evidence to the contrary in cases examined by the Commission.[31] The Chief Assessor, Helen Porter, has stated that the concept of reasonableness in s 38 'focuses upon the applicant' and as such 'it is open for an assessor to take account of the characteristics and the particular cultural context, age and other factors personal to the applicant in determining what that person might reasonably have done in all the circumstances'.[32] For example, in cases where an offence was committed when the applicant was a child, failure to report an offence to police will 'often be regarded as reasonable in the circumstances' and therefore not fatal to the claim.[33] This is particularly so in cases where the applicant had reported the offence to an adult who took no further action.

In the Commission's opinion, there is sufficient judicial guidance in the appellate law in Western Australia regarding the way in which s 38 is to be interpreted

26. DVLWN, *Report on the Limitations of the Criminal Injuries Compensation Act 2003 (WA) in Relation to Victims of Sexual Offences and Domestic Violence* (undated) 7.
27. In any event, it is noted that there is nothing in s 41 that would preclude the assessor from taking the context of family and domestic violence into account.
28. Office of Criminal Injuries Compensation, consultation (21 October 2013).
29. Ibid. See *JDQ* [2010] WADC 93 [47] where the award was reduced by one-third because the applicant had met with the offender in breach of a violence restraining order that prohibited her from having contact with the offender. There was also a violence restraining order in existence to protect the applicant from the offender and he breached this order by having contact with the applicant (which she agreed to) (though neither party had been charged with this offence).
30. See, eg, *Victims of Crime Assistance Act 2009* (Qld) ss 54(2)(c), 81(2)(c); *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(c) & (d), 53(2)(c) & (d). Similar provisions in New South Wales were removed in the recent overhaul of the Act.
31. See, eg, *CME* [2004] WACIC 9 where the assessor adopted a subjective approach to the question of whether the applicant's refusal to assist the investigating police officer was reasonable because the applicant believed the offender continued to pose a threat to her safety. The assessor considered the mental condition of the applicant, her fears for her safety and the medical evidence. He was not prepared to conclude that the applicant's refusal to assist in the prosecution of the offender was unreasonable in the circumstances.
32. Porter HL, *Criminal Injuries Compensation* (address to the Western Australian Federation of Sexual Assault Service Forum, Perth, 4 October 2005) 5.
33. Ibid 7.

and applied[34] and sufficient evidence in the available cases that assessors are actively considering the complexity of circumstances surrounding family and domestic violence from the standpoint of the applicant when determining whether his or her actions were reasonable.

Time limitation on claims

As noted earlier, s 9(1) requires that a claim for compensation be made within three years of the date of commission of the offence (or of the last offence if there is more than one offence in a series of offences). The DVLWN report suggests that this time limit may act to the detriment of victims of family and domestic violence who may delay a claim while they remain in the violent relationship, even in circumstances where the offender is imprisoned for the offence.[35] It further states that the provision in s 9(2) for an extension of time where the assessor considers such extension to be just is 'not a sufficient safeguard' to ensure that victims of family and domestic violence are not excluded from compensation. It recommends that either an automatic extension be applied in cases of family and domestic violence[36] or that provisions be inserted requiring assessors to consider whether a late application involves family and domestic violence, sexual assault or child abuse, or whether the offender was in a position of power, influence or trust.

Having examined this issue the Commission notes that the power to extend time in s 9(2) is broad enough to take into account issues of fear of retaliation or positions of power delaying a claim. Indeed, in cases of offences to minors (such as sexual abuse or trauma from family and domestic violence) a substantial extension of time to file is generally given.[37] This has also been the case in respect of victims of family and domestic violence. For example, in *Hinchcliffe*,[38] a claim filed almost nine years after the commission of the offence was admitted by an assessor on the basis of the physical and emotional power exerted over the applicant by the offender, even while he was serving time in prison for the offence.[39] In the circumstances, the Commission sees no compelling case for reform.

34. *Hinchcliffe v Hinchcliffe* [2010] WADC 78.
35. DVLWN, *Report on the Limitations of the Criminal Injuries Compensation Act 2003 (WA) in Relation to Victims of Sexual Offences and Domestic Violence* (undated) 9.
36. New South Wales has a 10-year limit for claims for compensation for offences committed in circumstances of domestic violence: *Victims Rights and Support Act 2013* (NSW) s 40(5).
37. See, eg, *LAD* [2013] WACIC 11.
38. [2010] WADC 78.
39. Ibid 78.

Reasons for decision

In accordance with s 27, if an assessor refuses to award compensation the assessor must provide reasons in writing to the applicant. Where compensation is awarded no reasons are required, unless they are requested in writing. The DVLWN report stated that 'it is often the case that clients can wait months to receive reasons'[40] and that this can impact upon the applicant's decision whether or not to appeal (which must be lodged within 21 days of the decision).[41] The report suggested that s 27(1) be amended to prescribe that, where requested in writing, reasons are provided within a specified timeframe.

Given the time limit for appeal, it may be considered that there is merit in the suggestion that a specified period of time for delivery of reasons for decision (where requested) be enshrined either in legislation or in policy. However, the appeal to the District Court is *de novo*[42] and, in addition, there is legislative provision for an extension of time where the District Court thinks such an extension is 'just'.[43] The Office of Criminal Injuries Compensation advised the Commission that where an applicant seeks reasons for the purpose of deciding whether or not to lodge an appeal it advises that the appeal be lodged within time and effort is made to ensure that comprehensive reasons are provided before the hearing date.[44] It was also noted that a legislative time limit for provision of reasons would place an unreasonable burden on the office, which has only three full-time assessors dealing with approximately 2,000 new cases each year (and a backlog of 1,192 cases at the time of writing).[45] In the circumstances the Commission is not persuaded that legislatively prescribing a time limit for provision of reasons for decision is appropriate or helpful.

40. DVLWN, *Report on the Limitations of the Criminal Injuries Compensation Act 2003 (WA) in Relation to Victims of Sexual Offences and Domestic Violence* (undated) 10.
41. *Criminal Injuries Compensation Act 2003* (WA) s 55(3).
42. As such, the appeal can conceivably proceed without reasons and new evidence, not before the assessor at the time of his or her decision, may be introduced. On appeal, the District Court may exercise the power of an assessor under specified sections of the *Criminal Injuries Compensation Act*; make any order open to an assessor under the Act; and confirm, vary or reverse the decision subject to appeal: *Criminal Injuries Compensation Act 2003* (WA) s 56(2).
43. *Criminal Injuries Compensation Act 2003* (WA) s 55(4).
44. Office of Criminal Injuries Compensation, consultation (21 October 2013).
45. Ibid. See also, Office of Criminal Injuries Compensation, *Annual Report 2011-2012* (September 2012) 4.

Awareness of right to claim compensation

Consultations revealed the need for greater awareness among domestic violence victims of the right to claim compensation.[46] The point of first contact with police was suggested as the best place for delivery of such information to avoid out-of-time applications, among other things. The Pilbara Community Legal Service suggested that an information pack should be provided to domestic violence victims at the time they make their statement to police.[47] They suggest that this will relieve the burden on the Western Australia Police Freedom of Information Unit, the Office of Criminal Injuries Compensation and community legal centres. The Commission believes there is merit in this approach but it would be useful to canvass the views of victim support groups and police in this regard and seeks submissions on the question below.[48]

The websites of the Office of Criminal Injuries Compensation and Victims of Crime also appear to be of limited assistance for applicants and should be augmented, particularly in light of the fact that more than 45% of applicants are unrepresented.[49] The Commission therefore makes the following proposal.

PROPOSAL 49

That the websites of the Office of Criminal Injuries Compensation and Victims of Crime be augmented with more detailed information about the requirements and processes for applications for criminal injuries compensation to assist unrepresented applicants.

QUESTION 28

Should police provide victims of crime with an information pack about criminal injuries compensation at the time they make their statement?

46. Pilbara Community Legal Service Inc, submission (19 August 2013) 1. See also Heidi Guldbaek, Women's Law Centre, consultation (26 August 2013).
47. Pilbara Community Legal Service Inc, submission (19 August 2013).
48. It is noted that there is no reason why such an approach should not apply to all victims of crime and the question reflects this.
49. Office of Criminal Injuries Compensation, *Annual Report 2011-2012* (September 2012) 8.

Awards placed in trust

During consultations with Aboriginal Family Law Services in Kununurra, an issue was raised about compensation awards being placed in trust on their clients' behalf. It was argued that, although there is power under the *Criminal Injuries Compensation Act*[50] to make such an order, there appeared to be no principles underpinning the decisions (eg, the decisions are not necessarily based on the legal capacity of the applicant).[51] Consultation with members of the Office of Criminal Injuries Compensation revealed that decisions to place an award payment in trust with the Public Trustee (upon conditions) are made on the basis not only of legal capacity, but also of vulnerability of the applicant. This approach was considered appropriate in view of the fact that the payment of the award is being paid by the state out of the public purse.[52] The case of *SJB* sets out the matters taken into account in the making of such an order and notes that 'orders relating to substituted or assisted decision making (such as an order to pay an award to the Public Trustee) should only operate where there is continuing evidence of incapacity. All such decisions should be open to review as is provided for in s 30(5) of the Act.'[53] The Office of Criminal Injuries Compensation advised that where it is considering making an award payment subject to trust, they will inform the applicant and enter into negotiations in relation to conditions and whether a portion of the funds should be payable immediately for certain purposes.[54]

Publication of data

An obvious problem with testing the claims made by many critics of compensation schemes in respect of their treatment of victims of family and domestic violence is that there are insufficient publicly available data to determine whether the particular sections that are claimed to be barriers to compensation for domestic violence victims in fact operate or are applied in that way. The practical impacts on victims of family and domestic violence of clauses upon which claims may be refused – such as the relationship clause (s 36), contributory conduct (s 41), reporting the offence and assisting investigators (s 38), and extension of time to file (s 9(2)) – are difficult to establish without such data. The Commission is aware that such data are currently collected by the Office

50. *Criminal Injuries Compensation Act 2003* (WA) s 30(2).
51. Aboriginal Family Law Services Kununurra, consultation (17 October 2013).
52. Office of Criminal Injuries Compensation, consultation (21 October 2013).
53. *SJB* [2012 WACIC 17, [15].
54. Office of Criminal Injuries Compensation, consultation (21 October 2013).

of Criminal Injuries Compensation; however, it notes that the data are not available in the annual reports published by the office. The Commission believes that public provision of this data would enable the community (and critics) to be better informed about whether, in practice, the operation of the Act is unfairly impacting upon victims of domestic violence and therefore makes the following proposal.

PROPOSAL 50

That the Office of Criminal Injuries Compensation publish in its annual report data about awards and refusals of compensation claims in circumstances of family and domestic violence.

Other matters

TRAINING

As explained in Chapter Two of this Paper, there is enormous concern among people working in the family and domestic violence service sector and within the legal system itself, that many professionals working in the legal system (eg, judicial officers, lawyers and police) do not properly understand the nature and dynamics of family and domestic violence. It was stated that this leads to inappropriate comments made to victims of family and domestic violence, and inappropriate and inconsistent decision making. Any negative experience in the legal system for victims is likely to discourage further access to legal interventions.

The Commission has made a number of proposals in this Paper designed to increase the level of understanding of family and domestic violence within the legal system including legislative objects and principles, an expanded legislative definition of family and domestic violence, and the establishment of a pilot integrated specialist family violence court.

In addition to these reforms, adequate training for professionals in the legal system is vital (and where possible it should be provided on an ongoing basis and be conducted by a wide variety of experts working in the area). The Commission also considers that there are likely to be appreciable benefits from magistrates working in specialist family violence courts being involved in the development (and even conduct of aspects) of training programs for other judicial officers.

The Commission has already made a proposal in relation to training for police officers.[1] It is proposed below that adequate training should be provided for judicial officers and lawyers in relation to family and domestic violence.

PROPOSAL 51

1. That the heads of jurisdiction in each Western Australian court ensure that regular training delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be provided for judicial officers in Western Australia who deal with matters involving domestic and family violence.
2. That judicial officers and others working in existing or new specialist family violence courts be involved in the development of training programs for judicial officers in relation to family and domestic violence.

PROPOSAL 52

That the Law Society of Western Australia ensure that there are Continuing Professional Development programs delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be made available to lawyers on a regular basis.

CLARE'S LAW (UK)

The United Kingdom Domestic Violence Disclosure Scheme (known as Clare's Law) is a pilot program facilitating the limited disclosure of information by police about a person's history of family and domestic violence. Clare's Law was mentioned to the Commission by the Women's Council for Domestic and Family Violence Services and was discussed in the media during the early stages of the Commission's reference.

The 14-month pilot program commenced in July 2012 and has recently undergone a process evaluation.

1. See Chapter Three, Proposal 5.

It has been operating in four separate locations. The evaluation was intended only to examine the processes adopted by the agencies involved in the pilot – it was not an outcome evaluation and makes no findings in relation to the impact of the scheme on victims and perpetrators of family and domestic violence or whether there has been any reduction in recidivism as a result of the scheme.[2] Nonetheless, it was reported that overall those involved in the pilot who had been interviewed believed the scheme was useful. The report states that the majority of people who received disclosures felt that the information was useful and helped them to make informed choices about their relationship.[3] Only 38 people who received information were spoken to by the evaluators so a degree of caution is warranted in relation to this observation.

The program was established administratively without the need for any legislative reform. The evaluation report notes that existing law in the United Kingdom enables police to disclose information to a person about his or her partner's prior violent offending if the provision of that information may assist in the protection of the person's safety. The pilot essentially tested two new processes: a 'Right to Ask' and a 'Right to Know'. The 'Right to Ask' process involves a member of the public initiating contact with the police and seeking information. The 'Right to Know' process involves police and other agencies disclosing information where it is apparent that the person is at risk of harm. A multi-agency group make determinations about disclosure and to approve disclosure there must be a 'pressing need' for disclosure, disclosure must be permitted under the law, and disclosure must be 'necessary and proportionate to protect the potential victim from future crime'.[4]

The evaluation report states that from July 2012 until September 2013 there were 386 applications for disclosure: 231 'Right to Ask' applications and 155 'Right to Know' applications (initiated by police officers or other partner agencies). Most applications concerned a woman's male partner. Seventy-five per cent of 'Right to Ask' applications were made by a person who had concerns about his or her partner and the rest were made by a concerned third-party (eg, parent, carer or guardian). Of the total 386 applications, 111 disclosures were made (29%).[5] On 26 November 2013 the Home Office announced that the disclosure scheme would be rolled out nationally from March 2014.[6]

Any potential benefits of a public disclosure scheme ought to be considered in the context of potential detriments from such a scheme. As is the case with other similar schemes (eg, the public sex offender register), there is a real risk that the disclosure process will provide a false sense of security to an applicant where there is no information to disclose. In addition, disclosure of a past history of family and domestic violence may carry with it a risk of its own if the person receiving the information decides to raise it with the perpetrator. Further, problems may arise if information received is passed on to other persons.

The absence of a prior recorded history of family and domestic violence does not mean that the person has not committed family and domestic violence in the past or will not do so in the future. Furthermore, the usefulness of any disclosure will be dependent on the nature of the information disclosed. If an applicant is only told that the person of interest has a history of family and domestic violence or a criminal conviction for a relevant offence, the disclosure may be misleading. A prior conviction may relate to an offence committed outside an intimate partner relationship (eg, an offence committed by one brother against another brother) or the prior conviction may have occurred many years earlier and the offender has since undertaken treatment intervention. Disclosure of prior offences upon request is a significant infringement on privacy and should only be contemplated if there is an identifiable benefit in terms of reduced domestic and family violence.

In the absence of further evidence about whether public disclosure schemes provide enhanced safety to victims of family and domestic violence, the Commission is doubtful whether a public disclosure scheme is appropriate in Western Australia, at least at this stage. Nevertheless, the Commission invites submissions about whether a public disclosure scheme should be considered in Western Australia and, if so, in what circumstances should disclosure be triggered or permitted. In answering this submission, the Commission asks agency respondents to bear in mind their existing information sharing and disclosure obligations (eg, where a person is at imminent or high risk of harm) and whether a public disclosure scheme as described above has the potential to shift

2. United Kingdom Home Office, *Domestic Violence Disclosure Scheme (DVDC) Pilot Assessment* (2013) 9.
3. Ibid 14.
4. Ibid 2.
5. Ibid 12.
6. Strickland P, *Clare's Law: The Domestic Violence Disclosure Scheme* (United Kingdom Parliament, House of Commons Library, Standard Note SN/HA/6250, 26 November 2013) 1.

resources away from these existing and necessary processes.

QUESTION 29

1. Should Western Australia consider the development of a family and domestic violence public disclosure scheme whereby members of the public can request information from the Western Australia Police about a named person and/or where government agencies can request that the Western Australia Police disclose information to another person?
2. If so, in what circumstances should a decision about disclosure be triggered (eg, by application only) and when should disclosure be permitted?

Chapter Six

Separate Family and Domestic Violence Legislation

Contents

Separate legislation

Up to this point, the Discussion Paper has examined and made proposals in relation to various aspects of the legal system that respond to or deal with family and domestic violence. These proposals address the Commission's term of reference that requires it to provide 'advice on the provisions which should be included in family and domestic violence legislation if it were to be developed (whether in a separate Act or otherwise) and 'to report on the adequacy thereof and on any desirable changes to the existing law of Western Australia and the practices in relation thereto'. The Commission's terms of reference also require it to consider the benefits (or otherwise) of having separate family and domestic violence legislation and, more specifically the utility of separating family and domestic violence restraining orders from the *Restraining Orders Act 1997* (WA). In this chapter the Commission considers two issues: whether there should be separate legislation for all family and domestic violence related legal matters and whether there should be separate legislation for family and domestic violence restraining orders.

SEPARATE LEGISLATION FOR ALL FAMILY AND DOMESTIC VIOLENCE RELATED LEGAL ISSUES

Before considering the merits of enacting wide-ranging separate family and domestic violence legislation, it is useful to examine what that legislation might conceivably include. On the basis only of the matters considered in this Paper, such legislation could potentially include the following:

- All criminal offences committed in the context of family and domestic violence (eg, homicide, offences of violence, sexual assaults, damage, kidnapping, deprivation of liberty, threats and stalking, and possibly also offences such burglary, robbery and stealing). These offences would remain in the *Criminal Code* (WA) for non-family and domestic related behaviour.

- All relevant provisions of the *Bail Act 1981* (WA), *Evidence Act 1908* (WA), *Criminal Investigation Act 2006* (WA), *Sentencing Act 1995* (WA), *Sentence Administration Act 2003* (WA), *Victims of Crimes Act 1994* (WA) and *Criminal Injuries Compensation Act 2003* (WA). All of the provisions in these Acts that are potentially relevant to family and domestic violence offences would need to be extracted from the existing legislation and repeated in new legislation (and reformulated where necessary).

The Commission received very limited support for legislation of this nature during consultations. Those who indicated that separate wide-ranging legislation for family and domestic violence would be beneficial argued that it would mark the seriousness of family and domestic violence for the community and the legal system. The Commission does not agree with this view: removing criminal offences from the *Criminal Code* and placing them into a specific family and domestic violence Act is more likely to have the opposite effect. Historically, as noted earlier in this Paper, family and domestic violence has been treated as a private matter and not always been viewed as seriously as other forms of criminal behaviour. A written submission received from a barrister with extensive experience in representing victims of family and domestic violence commented that:

> Separate legislation for criminal offences in a domestic context would also be a retrograde step for the reason that it may reinforce prejudices which still remain. Specifically, such a step may lead to the fostering of attitudes in the community that domestic violence is 'different' and 'less important' than offences committed by and against strangers.[1]

The Commission agrees and considers that the inclusion of family and domestic violence offences in separate legislation may well result in a regression whereby the community (including victims and perpetrators of family and domestic violence) would consider that family and domestic violence offending was somehow different to and of lesser significance or seriousness to other forms of criminal behaviour. The best illustration is murder. As a community do we really want a person to be charged with murder under a 'Family and Domestic Violence Act' instead of the *Criminal Code*? What message will this send to the family of the deceased?

While it might be suggested that separate family and domestic violence legislation would provide an easy way of accessing all relevant legislative provisions,

1. Helen Muhling, submission (26 September 2013).

the Commission highlights that such legislation would, in practice, be unmanageable. Agencies and individuals dealing with issues that potentially touch on family and domestic violence, but do not always do so, would be required to access two or more separate (if identical) provisions in Acts to understand their obligations and rights. For example, child protection matters under the *Children and Community Services Act 2004* (WA) might be separated so that all provisions dealing with potential child protection applications, where there is the presence or risk of family and domestic violence, would be included in the new separate Act but provisions applicable to other circumstances (eg, neglect, abandonment) would remain in the *Children and Community Services Act*. Of course, many provisions would need to be repeated because they are applicable across the board. The Commission is of the view that the potential breadth of separate family and domestic violence legislation is so large as to be unworkable as a single code. Further, questions may arise in relation to the statutory interpretation of identical provisions in different Acts; for example, about whether the overall contexts of the two separate Acts lead to different results. In all likelihood, any proper understanding of one Act would require understanding of the operation of its sister provision in the 'non-family' context. Consequently, the Commission doubts that a separate family and domestic violence 'code' would reduce the cost of administration of justice for courts, advisors, law enforcement officials, government and non-government agencies, victims and other participants in the justice system. Indeed, it may have the opposite effect.

Another potential benefit of separate family and domestic violence legislation was put forward during consultations; namely, that it would enable more accurate recording of data in relation to family and domestic violence. For example, all criminal offences committed in circumstance of family and domestic violence would be more easily captured. Likewise, decisions in relation to bail and sentencing for family and domestic violence related offences could be more easily tracked and accessed. This is a desirable objective. However, accurate data collection can be achieved by other means. As the Commission observes in Chapter Four, offences committed against persons with whom the offender is in a family and domestic relationship can be recorded in such a way as to enable this information to be tracked throughout the justice system. The Commission has sought submissions about the best way to achieve this.[2]

2. Chapter Four, Question 20.

The Commission highlights that no other Australian jurisdiction has wide-ranging separate family and domestic violence legislation.[3] It is, therefore, not possible to consider the outcomes or effectiveness of any such existing legislation in a comparable jurisdiction. Taking into account the matters discussed above, the Commission has concluded that separate legislation including all aspects of the legal system that deal with family and domestic violence is unwarranted and inappropriate.

SEPARATE LEGISLATION FOR FAMILY AND DOMESTIC VIOLENCE RESTRAINING ORDERS

In contrast to the position in relation to separate general family and domestic violence legislation (as discussed above), there are four Australian jurisdictions with separate legislation for family and domestic violence restraining orders (or protection orders): Queensland, Victoria, Northern Territory and Tasmania. In the other jurisdictions (like Western Australia) the legislation contains provisions relating to family and domestic violence but is broader providing protection for victims from other forms of violence.[4] In the four jurisdictions with specific family and domestic violence protection order legislation, different legislation exists in relation to the civil protection orders for violent and other behaviour in non-family and domestic relationships.

In this section the Commission outlines the position in the four Australian jurisdictions with separate legislation and considers arguments in relation to the need for separate family and domestic violence restraining order legislation in Western Australia.

Other jurisdictions

Queensland has the most recently enacted specific family and domestic violence restraining order legislation. The *Domestic and Family Violence Protection Act 2012* (Qld) replaced the *Domestic*

3. Although Tasmania's legislation in relation to civil protection orders is broader in its ambit than the legislation in other jurisdictions. This is discussed further below.
4. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) covers domestic and non-domestic abuse. An act of abuse is defined and it is specified that if an act of abuse is committed against a person with whom the other person is or was in a specified relationship it is classified as an act of domestic abuse: s 8(8). The *Domestic Violence and Protection Orders Act 2008* (ACT) establishes separate regimes for domestic violence orders, personal protection orders and workplace orders. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) has provisions dealing with apprehended domestic violence orders and apprehended personal violence orders

and Family Violence Protection Act 1989 and was introduced in response to the Queensland Government's strategy on family and domestic violence and to provide 'greater responsibility for the use of violence on perpetrators of violence' and 'increase the ability of the court to focus on the safety and wellbeing of victims'. The Act also incorporates 'contemporary understandings of domestic and family violence, particularly regarding the types of relationships and behaviour covered by the legislation'. It is also noted that the legislation was intended to be more accessible to the community.[5]

The old legislation (just prior to its repeal) provided that the purpose of the Act was to provide for the safety and protection of victims of domestic violence by enabling protection orders to be made.[6] It contained a limited definition of domestic violence (wilful injury, wilful damage, intimidation and harassment, indecent behaviour without consent and threats to commit any of this behaviour). Unlike the current legislation, there were no guiding principles included under the old Act. Since the *Domestic and Family Violence Protection Act* has only been in operation since September 2012 it is too early to judge its effectiveness and no evaluations or reviews have yet been undertaken in this regard.

The *Family Violence Protection Act 2008* (Vic) was introduced in response to the recommendations of the Victorian Law Reform Commission (VRLC) in its 2006 report on family violence laws. During parliamentary debates, it was explained that the VLRC had been asked to inquire into family violence laws because the previous legislation had been enacted almost 21 years earlier.[7] It has been observed that the Victorian legislation has been 'identified as the benchmark in family violence protection in Australia' and as anticipated (because of improved confidence in the system) there has been a considerable increase in reported incidents of family violence and an increase in family violence intervention orders granted.[8] However, it was also commented that this has placed an enormous strain on the system and that:

> We make assurances that the system will provide the safety net [victims] need, and then fail to deliver because its resources are spread so thin.[9]

One example provided was that although the Victorian State Coroner has recommended that victims support workers be available in all courts, this has not occurred due to a lack of available resources.[10] In addition, research conducted by Domestic Violence Victoria with victims of family violence found that their experiences of the justice system were varied. Some women reported positive interactions while others said that they 'found the process confusing, unsupportive and in a number of cases contributed to their feelings of vulnerability and victimisation'.[11]

A recent review of sentencing for breaching family violence intervention orders observed that between 2004–2005 and 2011–2012 'there was an 82.2% increase in [family violence intervention orders], with the most pronounced growth occurring since 2008–2009. Over the same period, there was a 72.8% increase in reported family violence incidents'.[12] It was contended by stakeholders that this significant rise could be attributed to two things: improved police procedures and 'legislative, court and support sector reforms'. It was suggested that these changes had increased the rate of reporting of family violence.[13] The increase in family violence intervention orders also appears to be a direct result of greater intervention by police – during the period described above, the number of orders initiated by family members was relatively constant but the number of police initiated orders increased by 196%.[14]

The Northern Territory introduced its *Domestic and Family Violence Act* in 2008. During the second reading speech it was stated that:

> These reforms mark an important step in bringing about genuine change in community attitudes and behaviour which I hope will make a difference to many families who live under the threat of violence.[15]

Prior to this legislation, the *Domestic Violence Act 1992* governed the restraining order scheme; however, that Act did not contain objects or a

5. Domestic and Family Violence Protection Bill 2011 (Qld) Explanatory Notes 1–2.
6. *Domestic and Family Violence Protection Act 1989* (Qld) s 3A.
7. Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2644–2645 (Mr Hulls).
8. MacDonald A, 'New Risks in Family Violence Reforms' (2013) 8 *Crime and Justice Insight* 42.
9. Ibid. In the Magistrates Court of Victoria's most recent annual report, it is stated that the court is 'experiencing significant growth and demand within the intervention order jurisdiction. Over the last 10 years, the number of family violence intervention order applications finalised has more than doubled': Magistrates Court of Victoria, *Annual Report 2012–2013* (2013) 52.
10. MacDonald, ibid 43.
11. Ibid.
12. Victorian Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report* (2013) 11.
13. Ibid 13.
14. The most marked increase occurring between 2007–2008 and 2011–2012: ibid 15.
15. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007 (Mr Stirling).

specific definition of 'domestic violence'. In 2009 the Northern Territory Legislative Assembly passed amendments to the *Domestic and Family Violence Act 2008* introducing a requirement for adults to report domestic and family violence to the police.[16] The mandatory reporting provision was evaluated in 2012;[17] however, that evaluation does not consider the effectiveness of the legislation as a whole.

The *Family Violence Act 2004* (Tas) commenced in 2005. Unlike other jurisdictions, the Tasmanian legislation criminalises certain types of family and domestic violence that would not otherwise constitute a contravention of the criminal law (eg, economic abuse and emotional abuse are defined as offences with specific elements and carry a penalty of up to two years' imprisonment).[18] In addition there are some specific provisions in relation to bail and sentencing issues but otherwise the Act predominantly deals with police family violence orders and family violence orders. A review of the legislation in 2008 observed that:

> By introducing dedicated legislation in 2004 the State Parliament of Tasmania … made a clear statement that a new response was required, and that a new effort and resources would be invested.[19]

The review was limited and dealt primarily with specific issues raised in relation to the provisions of the legislation. It was noted, however, that the available data shows that in 2006–2007 police attended an average of 418 family violence incidents per month and this had decreased in 2007–2008 to an average of 403 incidents per month (a decline of 3.5%).[20] While this is not a particularly significant reduction it is the opposite of what has occurred in Victoria.

This demonstrates one of the difficulties in evaluating whether new family and domestic violence legislation, policies or services are achieving the desired outcomes. If a reduction in family and domestic violence is the stated goal then a decline in the number of reported incidents of family and domestic violence may suggest that goal has been met. However, if increasing the confidence of victims to disclose and report family and domestic violence is the aim, an increase in reported incidents may indicate success. Because there is good evidence that family and domestic violence is underreported it is difficult to know whether reforms have impacted on the actual level of family and domestic violence that is occurring in the community or whether it has impacted on the level of reporting.

16. *Domestic and Family Violence Act* (NT) s 124A.
17. KPMG, *Evaluation of the Impact of Mandatory Reporting of Domestic and Family Violence* (prepared for the Northern Territory Department of Children and Families, 2012)
18. *Family Violence Act 2004* (Tas) ss 8 & 9.
19. Urbis, *Review of the Family Violence Act 2004 (Tas)* (2008) 1.
20. Ibid 2.

Reforming the *Restraining Orders Act 1997*

In earlier chapters of this Paper the Commission has made proposals for specific reform of the family and domestic violence restraining order system. It is acknowledged that each of these reforms could be implemented by amending the existing *Restraining Orders Act* and separating the provisions of that Act into discrete parts dealing with family and domestic violence restraining orders, other violence restraining orders, and misconduct restraining orders.[21] It is also noted that there are already specific provisions under the *Restraining Orders Act* that are now only applicable to family and domestic violence (provisions dealing with police orders and police powers).

The Commission's proposed inclusion of objects and principles in relation to family and domestic violence could be dealt with as objects and principles for a specific part or division of the *Restraining Orders Act*. This reflects the position in New South Wales where s 9 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) contains the objects of the Act in relation to domestic violence and includes principles that are not applicable to non-domestic violence. The Commission received one submission indicating that separate legislation is unnecessary (because it was argued the current restraining order legislation is sufficiently broad to deal with family and domestic violence restraining orders and other restraining orders).[22]

However, legislative amendments to implement the proposed reforms in this Paper would extend beyond simply creating a provision stating the objects and principles that are applicable to matters involving family and domestic violence. If the Act contained a separate Part for family and domestic violence, a number of provisions would be duplicated throughout the Act (some provisions would be identical for family and domestic violence and non-family and domestic violence matters while others would be different). As evident from the material in Chapter Three, the Commission has concluded that different or amended provisions and processes are required for family and domestic violence restraining orders (eg, objects and principles, definitions, grounds for making an order, extending the range of persons authorised to make

21. In fact, the proposals in this Paper have been structured in such a way as to enable reform to occur in the absence of separate legislation.
22. Helen Muhling, submission (26 September 2013).

an application, changes to forms, court mention dates, processes for obtaining relevant information from a range of agencies and processes around applications for cancellation of orders).

If the *Restraining Orders Act* is reformed to accommodate the proposals in this Paper, there is a clear need to separate family and domestic violence restraining orders by name from other violence restraining orders, at least for the purpose of data collection and analysis. The data referred to in Chapter Three from the Department of the Attorney General in relation to the proportion of violence restraining orders that are family and domestic violence related has been compiled on the basis of the information included on the application form by the applicant. The name of the order and the forms used by the court do not currently distinguish between family and domestic violence matters and other matters.

A new Act

A considerable number of people consulted expressed strong support for a new Act dealing with family and domestic violence restraining orders because it was considered that new legislation would increase the understanding of family and domestic violence in the legal system. The Commission agrees that new legislation would send a strong message to the community and those working in the legal system that family and domestic violence is being treated seriously and properly by Parliament, and will promote improved understanding and better practices within the legal system. The Commission contends that a separate Act will recognise that family and domestic violence is different to other forms of violence (eg, violence between persons whose lives are not intertwined by family relationships) and that it is different from behaviour underpinning misconduct restraining orders (often associated with neighbourhood disputes, typically concerning property, fencing and like issues).

The Commission also believes that separate new legislation would be more effective in promoting the proper application of objects and principles, because these objects and principles would appear upfront in the legislation. The up front inclusion of objects and principles is more likely to assist in reducing misconceptions about family and domestic violence and increasing the knowledge and understanding of the nature and dynamics of family and domestic violence throughout the system (and the community). A new Act is likely to be more easily accessible to members of the community and government and non-government organisations because the title of the Act will accurately reflect its subject matter. A specific family and domestic violence Act will also facilitate future reforms that may be necessary as contemporary understandings and experiences of family and domestic violence change.

Existing provisions of the *Restraining Orders Act* (as amended to reflect the proposals in this Paper) could be easily inserted into new legislation along with the new provisions dealing with objects and principles. It will, in the Commission's view, be clearer to have separate legislation dealing with all the relevant definitional matters, processes and procedures for family and domestic violence restraining orders rather than the current legislation incorporating two sets of provisions for every aspect of the restraining order system.

It is recognised that legislative reform alone is not likely to achieve dramatically improved outcomes for victims of family and domestic violence, nor is it likely to reduce the level of family and domestic violence in the community. In the absence of sufficient resources for appropriate services for both victims and perpetrators and system-wide changes in policies and practices (eg, judicial training and improved police procedures), there are limits as to what legislative reform can achieve. However, the Commission is of the view that separate new legislation is more likely to be accompanied by appropriate sector reforms and increased resources to ensure that the system as a whole responds effectively and appropriately to family and domestic violence. For all of these reasons, the Commission proposes that a new Family and Domestic Violence Protection Order Act be enacted.

This is an appropriate stage to respond to concerns raised by some stakeholders about the continued use of the term 'violence restraining order' for family and domestic violence matters. One magistrate indicated to the Commission that some respondents to violence restraining orders object strongly to the order being made because it refers to the word 'violence', especially if the alleged family and domestic violence does not include a physical or sexual assault. She felt that there would be less objections overall if the order did not expressly refer to violence. The Commission appreciates that it would be beneficial if more respondents consented to violence restraining orders because this will result in improved protection for victims of family and domestic violence and less re-traumatisation for victims who are required to give evidence in contested hearings.

On an even more fundamental level, the Commission can see merit in alternative terminology, in particular, the terms 'protection order' and 'intervention

order' (the term 'protection order' is used in Queensland[23] and the Australian Capital Territory,[24] and 'intervention order' in used in South Australia[25] and Victoria[26]). The Commission prefers the term 'protection order' because it is consistent with the key objective of reform – to enhance the safety of victims and their children – and shifts the focus from restraining perpetrators to protecting victims.

PROPOSAL 53

1. That a new Act, to be called the Family and Domestic Violence Protection Order Act, be enacted in Western Australia and include (among other things):
    a. Objects and general principles.
    b. A definition of family and domestic violence, a family and domestic relationship (and any other relevant terms).
    c. The grounds for making a family and domestic violence protection order.
    d. All court processes dealing with applications for and hearings of family and domestic violence protection orders.
    e. Police powers of investigation in relation to family and domestic violence.
    f. Police orders.
    g. Provisions dealing with the making of family and domestic violence or protection orders during other proceedings.
    h. Provisions dealing with information sharing between relevant government agencies dealing with family and domestic violence in the legal system.
2. That the provisions of the *Criminal Code* (WA) that refer to the definition of a family and domestic relationship for the purposes of the definition of circumstances of aggravation be amended to refer to the new definition under the newly enacted Family and Domestic Violence Protection Order Act.

23. *Domestic and Family Violence Protection Act 2012* (Qld) s 23. A protection order or temporary protection order is also referred to as a domestic violence order.
24. *Domestic Violence and Protection Orders Act 2008* (ACT) s 3. The term 'protection order' means a domestic violence order or a personal protection order.
25. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12.
26. *Family Violence Protection Act 2008* (Vic) s 4.

Appendices

Contents

Appendix A: Lists of proposals and questions

POLICE RESPONSE TO FAMILY AND DOMESTIC VIOLENCE

Proposal 1 (page 49)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person reports an act of family and domestic violence to a member of the Western Australia Police (or a person employed by the Western Australia Police) the person who receives the report is required to formally record the report and provide the person reporting the act of family and domestic violence with a report number.

Question 1 (page 49)

Are there any problems with the current practice of the Western Australia Police in regard to seeking corroborating evidence in relation to an alleged incident of family and domestic violence? If so, please provide examples.

Proposal 2 (page 50)

That where an accused is charged with breaching a violence restraining order by making contact with the person protected by the order via electronic means, the Western Australia Police ensure that sufficient information to demonstrate the content of that communication is included in the police brief for prosecution as early as possible.

Question 2 (page 52)

Are any changes to legislation and/or policy required to ensure that, for the most part, accused charged with an offence that includes an act of family and domestic violence as defined under the *Restraining Orders Act 1997* (WA), or an offence of breaching a violence restraining order or a police order, are arrested rather than summonsed? For example, should there be a legislative presumption that when an accused has been charged with an offence that includes an act of family and domestic violence or an offence of breaching a violence restraining order or a police order the accused must be arrested for the offence unless there are exceptional circumstances?

Proposal 3 (page 52)

That the definition of a senior officer under s 62D(8) of the *Restraining Orders Act 1997* (WA) be amended to provide that a senior officer is a police officer who is senior in rank to the officer making the application and is of or above the rank of sergeant.

Question 3 (page 53)

Should authorisation from a police officer of or above the rank of Inspector be required if it is considered necessary to remain on the premises for an extended period and, if so, what period should be specified for this purpose?

Proposal 4 (page 53)

That s 62D(3) of the *Restraining Orders Act 1997* (WA) be amended to provide that:

> A police officer making the application for approval to a senior officer must –
>
> (a) give the address, or describe the premises, to which it relates, and, if known, the person to whom it relates; and
>
> (b) state the grounds on which the police officer suspects that –
>
> (i) a person is on the premises; and
>
> (ii) a person has committed, or is committing, an act of family and domestic violence against another person.

Proposal 5 (page 55)

That the Western Australia Police provide more regular training to all police officers in relation to family and domestic violence and that this training be delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities.

Proposal 6 (page 58)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include an objects clause in relation to family and domestic violence restraining orders providing that the objects of the relevant part of the *Restraining Orders Act 1997* (WA) (or of any legislation) are:

a. to maximise safety for children and adults who have experienced family violence;
b. to prevent and reduce family violence to the greatest extent possible; and
c. to promote the accountability of perpetrators of family violence for their actions.

Proposal 7 (page 61)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include guiding principles covering the following areas:

a. that the safety of victims of family and domestic violence and children who are exposed to family and domestic violence should be the paramount consideration;
b. that family and domestic violence is a violation of human rights and unacceptable in any community or culture;
c. that while anyone can be a victim of family and domestic violence and family and domestic violence occurs in all sectors of society, family and domestic violence is predominantly committed by men against women and children;
d. that family and domestic violence extends beyond physical and sexual violence and may involve other coercive behaviour including emotional, psychological and economic abuse;
e. that family and domestic violence typically involves power imbalances and may involve ongoing patterns of abuse;
f. that family and domestic violence may escalate in frequency and severity after separation;
g. that family and domestic violence is underreported and that there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;
h. that not all victims of family and domestic violence wish to end their relationships, some simply want the violence to stop;
i. that the impact on children from being exposed to family and domestic violence is very detrimental;
j. that particular vulnerable groups may experience and understand family and domestic violence differently from other groups and may have additional or different barriers to reporting family and domestic violence or seeking assistance. Such vulnerable groups include Aboriginal people; people from culturally and linguistically diverse backgrounds; gay, lesbian, bisexual, transgender and intersex people; elderly persons; and people with disabilities;
k. that perpetrators should be held accountable and encouraged and assisted to change their behaviour;
l. that where both persons in a relationship are committing acts of violence, including for their self-protection, where possible the person who is most in need of protection should be identified; and
m. that victims should be treated with respect by the justice system in order to encourage victims to report acts of family and domestic violence and seek help.

Proposal 8 (page 65)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining order) be amended to provide for a new expanded definition of 'family and domestic violence'.

Question 4 (page 65)

1. In addition to the current behaviour covered by the existing definition of an 'act of family and domestic violence' under the *Restraining Orders Act 1997* (WA) should the definition expressly include:
   a. psychological abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing;
   b. economic abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing; and/or
   c. any other behaviour that coerces or controls a person and could reasonably be expected to cause that person to fear for his or her safety or wellbeing, and must it be ongoing?

2. Should the legislation provide specific examples of what constitutes family and domestic violence and, if so, should these examples include:
    a. examples of the conduct referred to 1(a) – (c) above and, if so, what;
    b. threatening to commit suicide or self-harm with intent to torment, intimidate or frighten the person; unauthorised surveillance, and, if so, what meaning should the definition attribute to unauthorised surveillance; and/or
    c. any other examples of conduct which is to be included or excluded?
3. Are there any other forms of behaviour that should be included or excluded in the definition of family and domestic violence or included or excluded in a list of examples of family and domestic violence?
4. Should the *Restraining Orders Act 1997* (WA) provide for a separate definition of emotionally abusive conduct and, if so:
    a. what meaning should the definition attribute to such conduct;
    b. must it be ongoing; and
    c. should the definition include a non-exhaustive list of examples of behaviour that may constitute such abuse?
5. Should the definition of family and domestic violence include exposing a child to family and domestic violence?

Proposal 9 (page 66)

That the definition of a family and domestic relationship under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be expanded to include the former spouse or former de facto partner of a person's current spouse or current de facto partner.

Proposal 10 (page 68)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that the grounds for making a violence restraining order are:

a. the respondent has committed family and domestic violence against the person seeking to be protected and the respondent is likely to again commit family and domestic violence against the person; or
b. a person seeking to be protected, or a person who has applied for an order on behalf of that person, has reasonable grounds to apprehend that the respondent will commit family and domestic violence against the person seeking to be protected.

Question 5 (page 68)

Should the additional requirement, under s 11A of the *Restraining Orders Act 1997* (WA), that the court is satisfied that a violence restraining order is appropriate in the circumstances be removed from the grounds for making a violence restraining order?

Proposal 11 (page 69)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that exposure to family and domestic violence means seeing, hearing or otherwise experiencing the effects of family and domestic violence, and a non-exhaustive list of examples that constitute exposure to family and domestic violence be included in the legislation.

Question 6 (page 71)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) specify different grounds for making an interim violence restraining order than making a final violence restraining order and, if so, what grounds should be specified?

Question 7 (page 73)

1. Should any changes be made to the criteria for making a police order under the *Restraining Orders Act 1997* (WA)?
2. Should a police order serve as an application for a violence restraining order and, if so, should the order only serve as an application if the person protected consents?

Proposal 12 (page 74)

That s 30E(4) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person to whom an explanation is to be given in relation to a police order does not readily understand English, or the police officer is not satisfied that the person understood the explanation, the officer is, as

far as practicable, to arrange for a trained interpreter to provide the explanation. If, after reasonable inquiries have been made by the police officer, a trained interpreter is not available another person may give the explanation to the person in a way that the person can understand.

Proposal 13 (page 75)

That s 30E(1) of the *Restraining Orders Act 1997* (WA) be amended to provide that a police officer who makes a police order is to prepare and serve, or arrange for another police officer to serve, the order.

Question 8 (page 76)

Should additional persons such as victims support workers (eg, persons who are employed by the Family Violence Service or Victims Support Service of the Department of the Attorney General and workers employed by non-government agencies) be prescribed as authorised persons for the purpose of telephone applications under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders)?

Proposal 14 (page 77)

That s 68(1) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when making a restraining order a court may extend the order to operate for the benefit of a person named in the order in addition to the person protected by the order and, further, that the power to extend the order for the benefit of a named person can be exercised without the named person having first lodged an application to the court in the prescribed form.

PROPOSAL 15 (page 79)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that 'authorised persons' be permitted to make an application for a violence restraining order on behalf of a person seeking to be protected.

Question 9 (page 79)

Should 'an authorised person' be defined as a person who has the written consent of the person seeking to be protected or should a range of persons be prescribed for this purpose (eg, Family Violence Service staff, Victim Support Service staff, victim advocates from non-government agencies)?

Proposal 16 (page 80)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that the Western Australia Police are required to notify the person protected by the order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the violence restraining order has been served.

Question 10 (page 80)

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that at the time of making a violence restraining order the court is to specify a period of time after which oral service is authorised?
2. Should the legislation provide that oral service is only authorised after the specified period of time if police have been unable to locate the respondent in person within that period?

Proposal 17 (page 81)

That the application form and form of affidavit for applications for violence restraining orders be revised to incorporate a broader range of questions or headings based upon any new definition of family and domestic violence as proposed by Proposal 8.

Proposal 18 (page 82)

1. That s 33 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that as soon as the registrar receives the respondent's endorsed copy of an interim violence restraining order indicating that the respondent objects to the final order, the registrar is to fix a mention date that is within seven days of receipt of the endorsement copy of the order.
2. That the forms required to be given to the person bound by an interim violence restraining order include that the person bound may apply to a court for variation of the order.

Proposal 19 (page 82)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that, as far as is practicable and just, ex parte applications for violence restraining orders be heard first in the morning before other court proceedings are commenced and otherwise, as far as is practicable, be given priority in the court list.

Proposal 20 (page 84)

1. That the Western Australia Police and the Department of the Attorney General develop a system that enables a court, where an application for a violence restraining order has been lodged, to provide the judicial officer hearing an ex parte application with a copy of or access to the criminal history of the applicant and the respondent and any record of past applications for violence restraining orders or violence restraining orders made involving either or both of the parties.
2. That the Department of the Attorney General develop an IT process enabling the Magistrates Court and the Family Court of Western Australia to have access to each other's records to determine if named parties are subject to orders in the other jurisdiction.
3. Any information provided or obtained under 1 and 2 above must be disclosed to all parties to the proceedings.

Question 11 (page 85)

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that the court has the power to request from relevant agencies the following information to be provided in the form of a certificate:
    a. The criminal record for both the applicant and the respondent.
    b. Existing and past violence restraining orders made against or in favour of each party or the person seeking to be protected.
    c. Whether a police order has been made against either party and, if so, the terms of the police order.
    d. Any current charges for both the applicant and the respondent.
    e. Whether the Department for Child Protection and Family Support has had previous involvement with the applicant or respondent in relation to child protection concerns arising out of family and domestic violence.
    f. Existing Family Court orders and current proceedings in the Family Court.
    g. The details of any Western Australia Police Domestic Violence Incident Reports concerning either the applicant or the respondent.
2. Are any modifications to the rules of evidence required to facilitate the provision and use of the information set out above in 1?

Proposal 21 (page 86)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a final violence restraining order remains in force for the period specified in the order or, if no period is specified, for two years.
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a violence restraining order may be made for a period of more than two years if the court is satisfied that there are reasons for doing so.

Proposal 22 (page 88)

1. That s 12 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when considering the conditions to be imposed by a violence restraining order the court is to have regard to the circumstances of the relationship between the applicant and the respondent (including whether the parties intend to remain living together or remain in contact).
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide, in addition to the current provisions in relation to the conditions that may be imposed, that every family and domestic related violence restraining order is to include the following conditions:
    a. That the person bound is not to commit family and domestic violence against the person protected by the order; and
    b. That the person bound is not to expose a child to family and domestic violence.

Question 12 (page 88)

Is any reform required to enable a court (and, if so, which court) to remove the name of a person bound by a family and domestic violence restraining order from a tenancy agreement?

Proposal 23 (page 90)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that if the person protected applies for a violence restraining order to be cancelled, the court is not to cancel the order immediately unless satisfied that there is no substantial risk to the safety of person protected.
2. Upon hearing an application to cancel a violence restraining order by the person protected by the order the court is to obtain from Western Australia Police, Family Violence Services and the Department for Child Protection and Family Support information relevant to the application since the violence restraining order was made.
3. Before a violence restraining order is cancelled or varied, the court is to ensure that the person protected has spoken with a victim support worker from the Family Violence Service, the Victim Support Service or a prescribed non-government agency.

Question 13 (page 90)

Should the legislation provide that if the hearing has to be adjourned to enable this information to be obtained, the court is to consider varying the conditions of the violence restraining order and the order should only be varied if the court is satisfied that to do so would not cause substantial risk to the safety of the person protected by the order?

Proposal 24 (page 91)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a court may vary or cancel a violence restraining order on its own initiative.
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a court may only vary or cancel a violence restraining order on its own initiative if the person protected by the order has been given an opportunity to be heard.

Question 14 (page 92)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include provisions that enable a court to include a condition that a person bound by a violence restraining order attend a treatment program, and if so, in what circumstances should this occur?

Question 15 (page 95)

1. Should s 61A of the *Restraining Orders Act 1997* (WA) be amended?
2. Should s 61A of the *Restraining Orders Act 1997* (WA) continue to apply equally to breaches of police orders and breaches of violence restraining orders?

Proposal 25 (page 96)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to enable circumstances where the person protected by a violence restraining order or police order has actively invited or encouraged the person bound to breach the order to be considered a mitigating factor in sentencing (but only where there is no other conduct on the part of the person bound by the order that would amount to family and domestic violence).

Proposal 26 (page 97)

That s 62 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that any contact between the person bound and the person protected by an order that occurs by reason of a person complying with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a restraining order.

Proposal 27 (page 97)

That the Department of the Attorney General investigate and consider options for providing information sessions and access to legal advice to respondents to violence restraining order applications at all court locations across the state.

Question 16 (page 98)

1. Should the *Restraining Orders Act 1997* (WA) be amended to provide that a misconduct restraining order can be imposed where the applicant and the respondent are in a family and domestic relationship so long as the court is satisfied that there has not been and there is unlikely to be any family and domestic violence committed against the person seeking to be protected?
2. Further, if the *Restraining Orders Act 1997* (WA) is amended as suggested in 1, above, should the legislation also provide that the making of a misconduct restraining order between the parties does not prevent the person protected by the order from applying for a violence restraining order at any time?

Question 17 (page 100)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide for 'consent orders' as an alternative to the current process of undertakings with the following characteristics:

a. A consent order is an order of the court and is to be specifically registered.
b. A consent order may include conditions to be complied with by the respondent to an application for a violence restraining order only or by both the respondent and the applicant.
c. The court making the consent order is to provide a copy of the order to the Western Australia Police.
d. Failure to comply with the conditions of a consent order can be enforced on the application of the person aggrieved (or by a police officer, child welfare officer or other authorised person on their behalf) and the non-compliance can attract specified sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
e. A court is to be satisfied that a person has failed to comply with the conditions of the consent order on the balance of probabilities.
f. A finding that a person has failed to comply with the conditions of a consent order is sufficient evidence to satisfy a court that there are grounds for a violence restraining order to be made out unless there are exceptional circumstances to decide otherwise.

Question 18 (page 100)

1. Are there any practical issues concerning the registration of interstate violence restraining orders under the *Restraining Orders Act 1997* (WA)?
2. Does the *Restraining Orders Act 1997* (WA) require any reform in relation to interstate orders?

Proposal 28 (paged 108)

1. That the definition of 'violent personal offence' in s 63B of the *Restraining Orders Act 1997* (WA) be expanded to include criminal damage by fire (s 444), disabling by means of violence in order to commit an indictable offence (s 292); stupefying in order to commit an indictable offence (s 293); acts with omission to cause bodily harm with intent to harm (s 304); and acts intended to cause grievous bodily harm (s 294).
2. That the *Criminal Code* (WA) be amended to provide for a higher statutory penalty for the offences of criminal damage under s 444 (other than criminal damage by fire), deprivation of liberty under s 333, threats under ss338A–C, and assault causing death under s 281 if the offence is committed in circumstances of aggravation as defined under s 221.
3. That if 2 above is implemented, s 63B of the *Restraining Orders Act 1997* (WA) should, for the sake of clarity, be amended to remove the offences of deprivation of liberty under s 333 and threats under ss338A–338C of the *Criminal Code*.

Question 19 (page 108)

Should the proposed amended s 63B of the *Restraining Orders Act 1997* (WA) be transferred into the *Sentencing Act 1995* (WA) or the *Criminal Code* (WA) or remain in the *Restraining Orders Act 1997* (WA)?

Question 20 (page 109)

Should the Western Australia Police be required to record, as a circumstance of aggravation alleged in relation to a particular offence as part of the offence description, whether the victim and the accused were in a family and domestic relationship? If so, should this be recorded:

a. in the statement of material facts;
b. in the prosecution notice; or
c. elsewhere?

Question 21 (page 111)

Should the maximum penalty for the offence of assault causing death under s 281 of the *Criminal Code* (WA) committed in circumstances of aggravation be 20 years' imprisonment?

Proposal 29 (page 112)

That the Western Australian government conduct a review into the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of abusive or threatening behaviour undertaken by electronic means.

Proposal 30 (page 116)

That clause 2(2a) of Part D, Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial officer or authorised officer must consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.

Proposal 31 (page 116)

That before setting or amending protective bail conditions for an offence involving family and domestic violence, the judicial officer or authorised officer must consider whether there is an existing interim or final violence restraining order between the accused and the victim of the offence and, if so, the court is to ensure that the conditions of bail and the conditions of the violence restraining order are compatible unless to do so would pose a risk to the safety of the victim.

Proposal 32 (page 116)

That s 16A(3) of the *Bail Act 1981* (WA) be repealed.

Proposal 33 (page 118)

That funding be provided to the Family Violence Service (and other relevant agencies such as Victim Support Services) to enable bail risk assessment reports to be prepared for the purpose of considering bail conditions for all cases involving specified family and domestic violence offences unless the accused does not object to the inclusion of full protective bail conditions being imposed (ie, that no contact at all is permitted between the accused and the victim).

Question 22 (page 118)

Should the *Bail Act 1981* (WA) explicitly provide that a court hearing a bail application in relation to an accused who has been charged with specified family and domestic violence related offences can request a bail risk assessment report to be prepared?

Proposal 34 (page 118)

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every family and domestic violence related offence includes the accused's national criminal record as soon as is practicable after the person is charged.

Proposal 35 (page 120)

That the Department of the Attorney General and the Department of Corrective Services jointly undertake an audit and a review of the outcomes of all existing Western Australian treatment programs for family and domestic violence offenders.

PROPOSAL 36 (page 121)

That when responding to the review of the *Sentencing Act 1995* (WA) the Western Australia government specifically consider whether any proposed reforms provide adequate options for family and domestic offenders and whether any additional reforms are required to ensure that the available sentencing options are appropriate.

Proposal 37 (page 122)

That the Department of the Attorney General develop an IT process that enables all family and domestic violence restraining orders to be included in one database and accessible by the Prisoners Review Board.

Proposal 38 (page 124)

That after two years has elapsed since the GPS tracking system for dangerous sexual offenders under the *Dangerous Sexual Offenders Act 2006* (WA) commenced, the Department for Corrective Services undertake a review of the effectiveness of GPS tracking including consideration of:

a. The number of offenders subject to GPS tracking;

b. The cost of GPS tracking per offender;

c. The number of offenders who interfered with the device;

d. The circumstances in which alerts were received by the monitoring unit and the effectiveness of the responses to these alerts; and

e. Whether GPS tracking should be expanded to other persons including family and domestic violence offenders and persons bound by violence restraining orders and, if so, in what circumstances.

Proposal 39 (page 125)

That s 63A of the *Restraining Orders Act 1997* (WA) be amended to include the offences of acts intended to cause grievous bodily harm or prevent arrest under s 294 of the *Criminal Code* (WA) and kidnapping under s 332 of the *Criminal Code* (WA).

Proposal 40 (pages 126-127)

That ss 63 and 63A of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that:

a. If a person is charged with a specified offence, the court is to make an interim violence restraining order and the determination of whether the interim order should be made into a final order is to occur at the time of the determination of the charge.

b. If a person is convicted of a specified offence, the court is to make a final violence restraining order.

   i. If the offence is a violent personal offence as currently defined under s 63A (or as defined under Proposal 39 above) the violence restraining order is to be imposed for life.

   ii. In any other case, the court has discretion to determine the duration of the violence restraining order; however, the court is required to consider the length of any sentence imposed for the offence including the time the offender will spend in custody serving a sentence of imprisonment.

c. That before making an interim or final violence restraining order under (a) or (b) above the court is to provide the person who would be bound by the order and the person who would be protected by the order with a reasonable opportunity to be heard in relation to the making of the order.

d. The court is not to make an order under (a) or (b) above if it is satisfied that the order is unnecessary for the protection of the person who would be protected by the order.

Question 23 (page 127)

In addition to the offences currently covered by s 63A of the *Restraining Orders Act 1997* (WA), what other offences should be specified for the purposes of the above proposal?

Question 24 (page 128)

Are there any difficulties in practice for victims of family and domestic violence being declared as special witnesses under s 106R of the *Evidence Act 1906* (WA) and having access to the special arrangements for giving evidence provided for special witnesses?

Question 25 (page 129)

Should the *Evidence Act 1906* (WA) be amended to provide that a prior inconsistent statement made by an alleged victim of a family and domestic violence related offence is admissible to establish the truth of its contents and, if so, in what circumstances should this be permitted?

SPECIALIST FAMILY VIOLENCE COURTS

Proposal 41 (page 132)

1. That the Western Australia Police policy on family and domestic violence stipulate that an accused who has been charged with a family and domestic violence related offence and who is not in custody must, as far as is practicable, be required to attend court for the first appearance at the next available sitting of the relevant Family Violence Court in the metropolitan area.

2. That the Western Australia Police ensure that police officers are informed of this requirement as part of their regular training in relation to family and domestic violence.

Proposal 42 (page 133)

That the Department for Child Protection and Family Support enable the officer who is part of the Family Violence Court case management team to attend court (one day per week) in each court location.

Proposal 43 (page 135)

That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

Proposal 44 (page 136)

That the Family Violence Courts operating at Midland, Joondalup, Perth, Rockingham, Armadale and Fremantle and the Barndimalgu Court in Geraldton be prescribed as speciality courts under the *Sentencing Act 1995* (WA).

Question 26 (page 137)

Should a pilot integrated specialist Family Violence Court be established in Fremantle Magistrates Court to deal with all family and domestic violence related criminal offences (including bail, sentencing and trials) and all family and domestic violence related violence restraining order applications (including ex parte applications and contested hearings)?

INTERACTION OF VIOLENCE RESTRAINING ORDER PROCEEDINGS WITH THE FAMILY COURT

Proposal 45 (page 144)

1. That the Department of the Attorney General develop an IT process that enables the Children's Court to access the records of the Magistrates Court and the Family Court of Western Australia.
2. That the parties to the *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009) review and revise the protocols to ensure that they adequately enable appropriate and effective information sharing; include the Children's Court of Western Australia; and ensure adequate information and training is provided to staff to properly request and provide the information provided for in the protocols.

VICTIM RIGHTS

Proposal 46 (page 150)

That the definition of a victim under s 2 of the *Victims of Crime Act 1994* (WA) be expanded to include a wider range of persons who may be harmed as a result of an offence (in particular, parents and guardians of children).

Question 27 (page 150)

1. Which categories of persons should be included in the expanded definition of a victim under the *Victims of Crime Act 1994* (WA)?
2. Should the *Victims of Crime Act 1994* (WA) include a complaints mechanism to enable a victim to lodge a complaint about his or her treatment by the legal system and other relevant agencies and, if so, how should such complaints be dealt with?

Proposal 47 (page 151)

That the Supreme Court, District Court, Magistrates Court and Children's Court of Western Australia update or develop their practice directions to ensure that, absent directions to the contrary, all copies of written victim impact statements are returned to the judge's associate (or judicial support officer) immediately after the sentencing proceedings are concluded. Furthermore, the practice directions should specify that any electronic copies that have been provided to the prosecution or defence are to be deleted at the completion of the sentencing hearing.

Proposal 48 (page 151)

That the Department of Corrective Services expand its eligibility criteria for the Victims Notification Register to include a person against whom a family and domestic violence related offence has been committed by the prisoner (at any time) and a person who has a current family and domestic violence restraining order against the prisoner.

CRIMINAL INJURIES COMPENSATION

Proposal 49 (page 156)

That the websites of the Office of Criminal Injuries Compensation and Victims of Crime be augmented with more detailed information about the requirements and processes for applications for criminal injuries compensation to assist unrepresented applicants.

Question 28 (page 156)

Should police provide victims of crime with an information pack about criminal injuries compensation at the time they make their statement?

Proposal 50 (page 157)

That the Office of Criminal Injuries Compensation publish in its annual report data about awards and refusals of compensation claims in circumstances of family and domestic violence.

OTHER MATTERS

Proposal 51 (page 158)

1. That the heads of jurisdiction in each Western Australian court ensure that regular training delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be provided for judicial officers in Western Australia who deal with matters involving domestic and family violence.
2. That judicial officers and others working in existing or new specialist family violence courts be involved in the development of training programs for judicial officers in relation to family and domestic violence.

Proposal 52 (page 158)

That the Law Society of Western Australia ensure that there are Continuing Professional Development programs delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be made available to lawyers on a regular basis.

Question 29 (page 160)

1. Should Western Australia consider the development of a family and domestic violence public disclosure scheme whereby members of the public can request information from the Western Australia Police about a named person and/or where government agencies can request that the Western Australia Police disclose information to another person?
2. If so, in what circumstances should a decision about disclosure be triggered (eg, by application only) and when should disclosure be permitted?

SEPARATE LEGISLATION

Proposal 53 (page 168)

1. That a new Act, to be called the Family and Domestic Violence Protection Order Act, be enacted in Western Australia and include (among other things):
    a. Objects and general principles.
    b. A definition of family and domestic violence, a family and domestic relationship (and any other relevant terms).
    c. The grounds for making a family and domestic violence protection order.
    d. All court processes dealing with applications for and hearings of family and domestic violence protection orders.
    e. Police powers of investigation in relation to family and domestic violence.
    f. Police orders.
    g. Provisions dealing with the making of family and domestic violence or protection orders during other proceedings.
    h. Provisions dealing with information sharing between relevant government agencies dealing with family and domestic violence in the legal system.
2. That the provisions of the *Criminal Code* (WA) that refer to the definition of a family and domestic relationship for the purposes of the definition of circumstances of aggravation be amended to refer to the new definition under the newly enacted Family and Domestic Violence Protection Order Act.

Appendix B: Family and Domestic Violence

Report by Professor Donna Chung, Head of Social Work, Curtin University

Domestic violence has been acknowledged as a major social problem since the early 1990s by politicians and policy makers and its cost to a range of government and non-government agencies and the economy has been highlighted. In response to this problem, over the last 15 years there has been increasing development of agencies working closely in partnership, including information sharing and case management, which reflects the emphasis being placed on the need for all agencies to respond more effectively to family and domestic violence. This requires child protection, health and women's support services, law enforcement, courts and corrective services to work collaboratively in order to respond effectively and ultimately prevent such violence from occurring.

This paper presents some of the key aspects about family and domestic violence (FDV) which highlight the extent of the problem, why it occurs and continues to be a major social problem, and how it impacts on those people experiencing FDV.

DEFINING DOMESTIC AND FAMILY VIOLENCE

The definition of domestic violence has expanded as research knowledge has evolved. Historically it was understood primarily as the use of physical violence by a male against his female partner. Much more is now known about domestic violence and it includes a wide range of controlling and coercive behaviours which are criminal and non-criminal. In the vast majority of situations domestic violence involves a male partner perpetrating violence and abuse towards a female partner/ex-partner.[1]

Contemporary definitions of domestic violence include up to three main features:

- a list of behaviours and acts that constitute the problem,
- the intention of such behaviours, and
- the effects on those victimised.

For example:

> Domestic violence can include abusive, intimidating and violent behaviour carried out by an adult against a partner or former partner to control, dominate and put down that person. It can cause fear, physical, and/or psychological harm and is most often perpetrated by a man against a woman.

The current Commonwealth Government definition of domestic violence is as follows:

> Domestic violence refers to acts of violence that occur between people who have, or have had, an intimate relationship. While there is no single definition, the central element of domestic violence is an ongoing pattern of behaviour aimed at controlling a partner through fear, for example by using behaviour which is violent and threatening. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over women and their children, and can be both criminal and non-criminal.
>
> Domestic violence includes physical, sexual, emotional and psychological abuse. (COAG, 2013, p.2).

Domestic violence is also referred to as 'intimate partner violence', the key element being it is violence and abuse perpetrated by a partner towards his or her partner or former partner. It is also characterised as being a continuing pattern of behaviour not a single incident or event; rather it is an established pattern intended to control the behaviour of another.

1. There are instances of domestic violence in heterosexual relationships where the female is the perpetrator and male is the victim, to date these are known to represent about 5 to 15% of all cases and have differing dynamics and effects compared with male to female violence. Domestic violence also occurs in same sex relationships. This paper refers only to male to female violence in heterosexual relationships as this is where the majority of research has been undertaken and it is not accurate to generalise to other relationship types. In this paper I will therefore refer to the perpetrator as 'he' and the adult victim as 'she'.

In Australia the term 'family violence' is increasingly used in policy documents and practice. Internationally, the term 'family violence' was used as an umbrella term to include a variety of abusive relationships within the context of the nuclear family; for example, domestic violence and child abuse. In Australia the term family violence has a specific meaning which is 'more typically inclusive of violence perpetrated by a range of family or community members, not just male partners, to capture, in particular, the experiences of Indigenous women' (Murray & Powell 2011, p.3). The preference for family violence by some Indigenous practitioners and academics reflects that domestic violence does not occur within the context of nuclear family settings and may include violence between extended family members and it should take account of the intergenerational trauma experienced by most Indigenous community members which has its roots in the legacy of colonisation, cultural dislocation and forced removals of children. This is not to disregard the importance of gender because as academics such as Cripps point out women and children remain the primary victims of such violence. The Indigenous family violence perspective provides a focus on healing and community led responses that enable local experiences and context to be central.[2] Consequently, in recognition of Indigenous Australians' experiences, there has been a shift in terminology from domestic violence to 'family and domestic violence' or in some states such as Victoria to 'family violence'.

Behaviours associated with FDV include:

- Physical violence and the threat of such violence as well as the damage of property around the victim. The threat of violence is generally enough to intimidate and control victims as they believe the perpetrators will carry out their threats as they have often done so in the past.
- Psychological and emotional abuse such as continued put downs; degradation; verbal abuse; and threats such as threatening to hurt the victim, hurt others close to the victim, disclose information or publicly humiliate the victim in some way. In relation to psychological abuse the focus of the abuse and insults frequently relates to a woman's appearance, intelligence, capacity as a parent and/or employee and being a poor or unacceptable partner/wife.
- Sexual violence such as coercive and pressured sexual relations, rape and sexual assault, the production and distribution of sexualized images of the victim without consent and forcing the victim to be exposed to pornography against his or her will.
- Economic abuse that might include not giving women access to adequate money for living expenses, using women's money without their authority and preventing women being able to work and be economically independent. This form of abuse can be exacerbated particularly for women without citizenship status who are economically dependent on their partner/husband.
- Social abuse refers to when perpetrators prohibit victims from seeing family and friends either by restraint or by abusing her family and friends so that they cannot visit nor have contact with her, both of which effectively isolate the victim from social support. Another form of social abuse is spiritual abuse whereby victims are prevented from practising their own faith or undertaking important cultural practices.

The majority of the research suggests some common effects for female victims of FDV which are outlined below.

> *Mental health and wellbeing effects,* most commonly reduced confidence, low self-esteem, anxiety and depression as well as continuing to live in fear, high rates of substance dependency/misuse, self-harming behaviours, eating disorders, suicidal ideation and attempts, sleep disturbances and disorders and post-traumatic stress disorder (Ramsay et al 2009; VicHealth 2004).
>
> *Physical health effects* such as premature death, disability, illness, physical injuries (treated and untreated), harm to reproductive health and sexually transmitted infections (STIs) (Ramsay et al 2009; VicHealth 2004).
>
> *Social and economic effects* include social isolation from family and friends and social withdrawal, reduced capacity and productivity at work leading to reduced or limited income, reduced confidence with parenting and other care responsibilities, homelessness and transience after escaping a violent partner (Lindhorst & Beadnell, 2011).

It is also important to note that FDV does not cease when the woman and children escape the situation. The time of separation is the most dangerous for women and children, and violence is likely to escalate.

2. This is discussed further under the explanations for domestic and family violence.

This is referred to as post-separation violence. The most commonly understood reason is that at this time the perpetrator is not in control of the situation and so the means by which he aims to reassert control are in fact an increased use of violence and an increase in the severity of violence (Brownridge et al., 2008). In attempts to regain control perpetrators may stalk the victim or stalk and abuse the victim's family, friends and colleagues all in an effort to locate the victim and regain control over her. Stalking is the main risk factor for intimate partner and domestic homicides (Dobash et al 2004). Intimate partner homicides most often occur post-separation (AIC 2013).

Other forms of post separation violence and abuse that may be less visible include being abusive during times of child contact handover, which can include not collecting and returning the children to their mother at agreed times; or harassing the children about what their mother is doing, who she is seeing and where they are living. Post separation controlling behaviours can also include unnecessarily drawing out the time to complete separation related processes such as financial settlements upon separation and family court procedures which prevent her from being able to plan for the future and cease seeing her ex-partner.

WHY DOES FDV OCCUR? – EXPLANATIONS OF FDV

Explanations of FDV are wide-ranging. They can be categorised into the following perspectives: individual pathology; stressors and individual risk; intergenerational transmission and social learning theories; gendered explanations; Indigenous family violence theories; and coercive control.

1. Individual pathology theories

Individual pathology implies that there is some inherent psychological problem that results in a person becoming a perpetrator or victim of FDV. These explanations have their roots in early medical science, particularly psychoanalysis (Sarason and Sarason 1993). More recently pathology theories have focused on identifying predictors of FDV and characteristics of men who might be predisposed to violent behaviour and women who might be prone to be the targets of violence. These include identifying individual personality disorders and patterns of interpersonal interactions.

In a review of research Holtzworth-Munroe, Bates et al. (1997) conclude violent men experience more psychological distress, are more likely to exhibit personality disorders, have more attachment/dependency problems, show more anger and have more alcohol problems than non-violent men.

Individual pathology theories often look to families of origin for explanations of a disorder. Attachment theories and object relation theories have gained prominence in FDV with studies showing a correlation between poor attachment styles and the need for control (Babcock, Jacobson et al. 2000; Zosky 1999; Tweed and Dutton 1998; Holtzworth-Munroe, et al 1997; Prince and Arias 1994; Saunders 1992). Attachment theory suggests men who develop a variety of poor attachment styles in childhood are more inclined to need to either maintain control or regain perceived loss of control in intimate relationships.

Babcock, Jacobson, Gottman and Yerrington's study appears to reinforce Tweed and Dutton's study that suggests two distinct types of men who use violence – instrumental and expressive. Those with dismissive attachment styles seem more likely to engage in instrumental violence (that is violence to maintain power over a partner) whereas those with fearful or preoccupied styles of attachment appear to engage in expressive violence (that is using violence as a way of trying to re-gain perceived loss of control in response to fears of abandonment). O'Hearn and Davis (1997) suggest that women with preoccupied or fearful attachment styles are more likely to be victims of abuse.

Individual pathology approaches have a focus on identifying predictors and characteristics. They have been critiqued for not sufficiently, if at all, taking into account structural, social and political factors, and gender constructions along with inherent power differences.

2. Social stressors and individual risk

Social and personal stress, and an inability to control one's anger are other areas focusing on individual traits to explain FDV. Stress theories draw on psychological catharsis, conflict and container theories suggesting conflict is a healthy part of human nature which if not periodically released will lead to an explosion (Strauss, Gelles & Stienmetz 1981). In short, stress builds up until it reaches a point where it must be released and this release can take the form of a violent outburst. Once stress is released there would be a period of calm before

the stress begins to build once again. The emphasis on poor anger management and impulse control reduced FDV to only being about anger – a behaviour that requires modification through learning new strategies to increase impulse control and provide appropriate strategies of anger management. This understanding of FDV is not comprehensive – it assumes it is episodic, ignoring the range of behaviours present in FDV such as ongoing psychological abuse or deliberatly socially isolating a partner, all of which are not about changing 'anger outbursts'.

3. Intergenerational transmission of FDV and social learning theory

Intergenerational theories of violence are popular in the literature as evidenced by Seth-Purdie's report that stated, "one of the most important risk factors is the child's experience of violence, as parental punishment or abuse, or as a characteristic of the relationship between parents" (1995-1996:26). Some studies have demonstrated a correlation between experiencing abuse as a child directly or indirectly and experiencing violence as an adult either as a victim or as a perpetrator (Irwin 1999; Avakame 1998). The intergenerational theory should not be interpreted as a deterministic theory; rather it suggests that children who experience a range of violent and/or abusive acts are prone to adjustment problems which can be associated with violence and/or abuse as an adult. Higgins and McCabe using retrospective data from 175 Australians found that "adjustment problems increased as the number of different maltreatments increased" (2000:15). Similarly Irwin in her study of Australian women found that "the severity of childhood trauma partially predicts proneness to violent and nonviolent victimization in adulthood" (1999:1106).

The intergenerational theory of FDV is underpinned by Bandura's social learning theory. This theory when applied to FDV suggests that observing violence by the perpetrator, as a method of gaining control, is interpreted by the observer as a successful strategy and therefore cognitively adopted, encouraging the use of violence to 'get' what you want. On the other hand, observing the results of violence on the victim can lead to a cognitive appraisal of inability to control and lead to withdrawal and/or learned helplessness. This theory is appealing often due to its simplicity but it is not well founded. Therefore, whilst there is evidence that FDV occurs across generations, it cannot be simply understood as someone repeating behaviour he or she observed. Another caution with considering intergenerational explanations is that often the research involves participants currently experiencing FDV and asking retrospectively about their childhoods. It therefore does not include adults who experienced FDV in their family of origin who have not gone on to be involved in violent relationships.

4 Gendered explanations

Feminist explanations centre on the gendered dynamics of FDV, particularly patriarchal attitudes and beliefs about entitlement, male ownership and control of female partners. The focus has been on male structural power which enables individual men to have power over individual women in the public and private domains. FDV is therefore a mechanism that oppresses women and maintains male power over women. Men's use of violence and abuse is understood as a choice and a powerful means of maintaining gender inequality between the couple and forcing the woman to remain in the relationship through coercive and intimidating tactics. Feminists also advocated for the criminalisation of domestic violence (Murray & Powell 2011) as important to raise awareness of the seriousness of the problem and pressed for law enforcement and criminal justice responses to stop FDV. A criticism of the patriarchal analyses of intimate partner violence is that it does not explain why all men are not violent and abusive to female partners (Hamberger and Renzetti 1996).

Feminist analyses have led researchers to identify several social factors that contribute to FDV. It has been established that such violence occurs in societies due to the overarching gender inequalities between men and women as well as community attitudes that condone violence against women or view it as a private matter. FDV is more prevalent in societies where there is greater gender inequality and where there are strict gender codes and expectations (VicHealth 2007; World Health Organisation 2010).

5. Indigenous family violence theories

Indigenous Australian researchers and black feminists from South Asia, the United Kingdom and North America have been critical of feminist theorists. They argue that they do not take account of the position of non-white, non-western women. In Australia a number of Indigenous women writers such as Kyllie Cripps have examined the specificities of Indigenous family violence. Cripps (2008) rightly argues that there is no single cause that can account for FDV generally; however, there are a multiplicity of factors which can explain the higher levels of Indigenous family violence and the extent of victimization experienced by Indigenous Australians.

In consolidating the available research evidence Cripps (2008) argues there are two categories of factors contributing to Indigenous family violence.

> Group 1 factors include: colonization; policies and practices; dispossession and cultural dislocation; and dislocation of families through removal; these have been experienced specifically by Indigenous people and their communities. Group 2 factors include: marginalization as a minority; direct and indirect racism; unemployment; welfare dependency; past history of abuse; poverty, destructive coping behaviours; addictions; health and mental health issues; low self esteem and a sense of powerlessness; these latter factors are seen as contributing to high levels of distress and can occur separately or in multiples in any population, impacting on one's experience of violence. (Cripps 2008, p.533)

Cripps' approach highlights the complex array of factors impacting on families and communities and how they compound considerably the effects of violence. This highlights why single agencies or single approaches will not be successful in redressing this complex social problem.

6. Coercive control

Some of the newest thinking about FDV provides the most comprehensive insights. The leading scholar in this area Professor Evan Stark outlines the limitations of current domestic violence descriptions and interventions and presents the concept of coercive control. Stark's work, which has its history in gendered explanations, provides a cohesive way of linking the social context and structure with an understanding of the behaviour of individuals perpetrating FDV and being victimized. This overcomes the chasm that has often existed between individualistic and social structural explanations. Drawing on clinical and research evidence Stark (2007) argues that coercion and control are the most common and devastating forms of intimate violence more so than physical violence. Stark argues that the emphasis on physical violence in legislation and law enforcement, and health and welfare services led to a focus on this form of violence in risk assessment and interventions where 'lower levels' of physical violence became associated with perpetrators being assessed as 'low risk'. Specific episodes of physical violence then become the basis for intervention. This ignored the significant and cumulative harm of coercive control and the dynamics of such control as they are continual and not episodic like physical violence. It also inadvertently undermined women's capacity to speak of controlling behaviour as the dominant understanding was that FDV was physical violence. Stark (2007, p.21) defines coercive control as

> A strategic course of self-interested behaviour designed to secure and expand gender-based privilege by establishing a regime of domination in personal life.

Stark describes the means that perpetrators use to control victims. He argues that there are four interrelated tactics to coercive control: violence, intimidation, isolation and control. It is the continuing and systematic way in which this is done that leads to women's experience of entrapment. Stark compares the process of coercive control to that of hostages' feelings of entrapment. In describing how perpetrators control women which keeps them trapped in abusive relationships, Stark (2007, p.23) describes the impact of intimidation.

> Intimidation is used to complement or in lieu of assault to keep abuse secret and to instill fear, dependence, compliance, loyalty and shame. Offenders induce these effects in three ways primarily – through threats, surveillance and degradation. Intimidation succeeds because his threats are made credible by what he has done in the past or his partner believes he can or will do if she upsets or disobeys him. If violence raises the physical costs of resistance, intimidation deflates the victim's will to resist.

The coercive control regime is experienced as continuous by women, eroding their identity, self-esteem and resistance to the ongoing intimidation, humiliation and control. Stark's (2007) work shows very clearly the reasons to the often asked question, 'Why doesn't she just leave?' Over time women have been dominated by perpetrators feeling shame, fear and paralysis. Stark's approach is based on the assumption that there are gendered power differences in the heterosexual relationship and that the perpetrator exploits these through using a range of continuous tactics of violence and abuse.

Research indicates that women leave the perpetrator a number of times before it is final. Whilst this can be due to a lack of other accommodation options for some women and children, other women have a strong hope that their partner is capable of change. In this case it is often only after this hope has faded for women that they are able to finally end the relationship. It can also be because some women feel they are unable to survive independently or he has convinced them that this is a form of disloyalty which is indicative of coercive control. Stark's work shows that women do not remain in violent relationships because 'it is normal to them' or 'not that serious', rather they are often the victims of entrapment whereby their will and resistance has been eroded.

Rather than the dominant question being, 'Why doesn't she leave?', the question our community needs to ask is 'Why is that man allowed to continue to behave abusively and violently to his partner and children?'.

HOW COMMON IS FDV AND WHICH GROUPS IN THE COMMUNITY ARE AFFECTED?

There are various statistics quoted about the extent of FDV in Australia. FDV statistics are drawn from two main categories: Population Surveys and Agency Statistics. Population surveys provide estimated rates of violence in a given community or population. Agency statistics are generated from agencies' records (eg, police, courts, hospitals, women's refuges, child protection), and provide information about the numbers of people presenting as victims and/or perpetrators of FDV, and various factors about individuals (such as age, gender, etc.). In this area it is important to acknowledge that all statistics are a conservative or underestimate of the actual incidence due to the sensitive nature of the topic.

The incidence and prevalence of FDV

Prevalence is the total number in the population ever affected by FDV and incidence refers to the number of people affected in the past 12 months. The most accurate Australian data is drawn from two sources: the ABS Personal Safety Survey (PSS) (2006) and the Australian component of the International Violence Against Women Survey (IVAWS) (Mouzos & Makkai 2004).

Incidence data

In the 12 months prior to the PSS, a larger percentage of men (10.8%, n= 779,800) reported being victims of physical violence than did women (5.8%, n= 443,800). However, the relationship between the perpetrator and victim differs between men and women. Amongst men's reports of physical violence, a stranger was the perpetrator in 65% of cases. The perpetrator was a partner or former partner for 31% of women and 4% of men. In short, men experience more physical violence than women but it is at the hands of strangers and not FDV. When we focus on violence from an intimate partner or ex- partner it is far more common for women.

The PSS showed that in the past 12 months, those experiencing violence from a partner or former partner were 2.1% of women and 0.4% of men.

Prevalence data

IVAWS findings show over a third of Australian women reported at least one form of violence from an intimate male partner during their lifetime. The PSS (2006) indicates 40% of women reported at least one incident of physical or sexual violence since the age of 15.

ABS statistics do not include some significant forms of FDV such as psychological abuse and coercive control, financial abuse and social isolation. In Canada the statistics are differentiated so that levels of FDV can be reported more accurately. The most recent survey showed that 6% of Canadian women had experienced violence from a current or former partner in the past five years. In relation to the impact on other family members, 11% of these women reported that their partner or former partner also used violence against her family members (Statistics Canada 2009).

The most recent Australian Institute of Criminology Homicide Monitoring Report for 2008-2010 highlights the most serious cases of FDV.

There were 185 domestic homicides nationally (representing 34% of all homicides). This includes:

- Intimate partner homicide (66%, n=122)
- Filicide (parent/step killing child) (12%, n=22),
- Parricide (child kills parent) (11%, n=20), and
- Siblicide (sibling killing) (2%, n=4).

In relation to intimate partner homicides 89 of the 122 victims (73%) were female.

The Indigenous domestic homicide rate was four times greater than that for the non-Indigenous population, 42% of which were intimate partner homicides.

HELP SEEKING AND WHY AGENCY STATISTICS ARE THE TIP OF THE ICEBERG

Agency statistics provide some indication of people presenting with concerns about FDV. A limitation of these statistics is that they only show *how many* people *report* violence *or seek help*, not the *total* number of people affected by FDV. For example, research indicates fewer than 50% of women who had experienced FDV reported the assault to the police (Grech & Burgess 2011). The PSS showed that amongst women experiencing FDV, only 10% had a violence restraining or intervention order on a current partner; this increased to 25.3% for previous partners. The general consensus is that there is under-reporting of FDV to formal support services for a number of reasons which include:

- Stigma and shame about being a victim of FDV
- If it is the first incident of physical violence then it is thought it might be a once off event
- If there is an absence of physical violence the situation might not be identified by the woman as FDV
- Lack of knowledge about available sources of formal help
- Previous attempts at seeking help were not effective so there is a reluctance to seek future help
- Fear that if the perpetrator or his family or friends finds out it could make the situation worse
- Fear that if there is FDV the woman may have her children removed by child protection for not being able to keep them safe
- Fear that if she escapes with her children that her family or friends could be threatened or abused by the perpetrator
- Pressure from family members not to seek formal help.

The critical point to consider in these instances is that it does not matter the extent to which the woman's concerns are likely to be realised (e.g. it might be unlikely that child protection would remove the children from her care,). At that time it is her perception or belief and it does prevent her from seeking help.

Even with high levels of under-reporting, agency statistics showed:

- 9% of NSW police call–outs are due to FDV, involving an estimated 625,000 police investigation hours (*NSW Auditor General's Report on Responding to Domestic and Family Violence* 2012).
- FDV is the most commonly reported reason for accessing homelessness services in Australia across the population (26%), particularly amongst female clients (36%). As a direct result of current and past experiences of FDV, the majority of people seeking homeless services are female (59%) (AIHW 2012).
- FDV is one of the major reasons why children and families are reported to child protection authorities (AIHW 2011).

Who is affected by FDV?

FDV occurs amongst all groups in Australian society, but all groups are not equally affected. There are higher rates of FDV reported amongst those groups where there is greater social disadvantage (Humphreys, 2007). There is debate in the literature about why FDV rates are disproportionately higher amongst those groups who are more socially disadvantaged. For example, it has been argued that the most disadvantaged are under the gaze of state authorities so are more likely to be identified, whereas more affluent perpetrators can use non-criminal forms of abuse such as psychological abuse and coercion which are less likely to be reported or come to the attention of the authorities.

In relation to age, research and agency statistics indicate it is women aged 25-40 years who are the group most likely to access help from services. The highest rates of reported violence are amongst young women, 18-24 years (ABS 2006), however, they may be less likely to seek out services at that time. Women in the older age groups (over 45 years) report lower levels of violence which is consistent with criminal justice data showing the older age groups have lower levels of involvement with FDV. Whilst physical violence is thought to decrease as couples age, it can also be that there is a then established pattern of coercive control which means there is 'less reliance' by the perpetrator on physical violence for control.

Indigenous women and women from culturally and linguistically diverse backgrounds who are living with FDV also face the often daily experience of racism, discrimination and exclusion due to language barriers.

Researchers are increasingly examining how the multiple and intersecting oppressions of gender and race/culture impact on women experiencing FDV. Their capacity to name their experiences as FDV and seek support to live free from violence is influenced by their social location. Consequently, many of the women in these two groups are living with FDV for longer periods of time and in some instances with extremely high levels of social isolation.

In Australia and Canada the research shows that Indigenous women and children experience FDV at unacceptably high rates. Data is notoriously difficult to capture with accuracy as mainstream surveys may not accurately include the cultural context of FDV through the data questions, nor might they include a large enough sample of Indigenous participants for the data to be meaningful or generalised.

National Aboriginal and Torres Strait Islander Social Survey (NATSISS) is the survey that specifically captures Indigenous population experiences of physical violence. The 2008 survey reported on the incidence of physical violence and threatened physical violence in the previous 12 months. It was found that 25% of Indigenous women reported experiencing such violence, 19% the threat of physical violence, and 9% were both threatened and subjected to physical violence. Ninety-four percent of women reported they knew the perpetrator of the most recent incident of physical violence; these included a current or previous partner (32%) and family member (28%). Half of the women who sustained an injury in their most recent incident of physical assault visited a health professional and 60% reported the incident to the police (ABS 2013). This represents a higher rate of police reporting compared with the rest of the population (ABS 2006).

In relation to women from culturally and linguistically diverse (CALD) backgrounds, they face particular barriers in seeking help to address FDV. There is agreement in the literature that CALD women are living with FDV but there is disagreement as to whether it is at a higher rate when compared with the remainder of the population. Menjivar and Salcido's (2002) review of the literature suggests that the incidence of domestic violence is no higher among refugee communities than it is in the mainstream population (see also Rees & Pease, 2006). Whereas Perilla, Bakeman and Norris (1994) have argued that women from immigrant and refugee backgrounds are particularly at risk of experiencing FDV. What is increasingly clear, however, is that 'domestic and family violence manifests through universal patriarchal foundations, as well as with culturally and socially mediated causes' (Rees & Pease, 2006, p. 49). Key to concerns for those in policy and practice is how to best support CALD women's access to live safely. This does require provision of support which is culturally responsive and sensitive. For example, practitioners being aware of how women without citizenship are particularly vulnerable to remaining in FDV situations as they do not have access to independent income and may also not speak the language which continues to be a substantive barrier. Recently arrived CALD women may have no or very little family and social support which can prevent them seeking help as well as the threat of losing whatever support they have should they try and leave their violent partner.

Refugees resident in Australia may also have histories of significant trauma, as do other groups such as Indigenous Australians. Taking this trauma into account is critical in understanding people's behaviours and reactions to FDV. To further add to these considerations, researchers have argued it is important to not treat CALD women and children as a homogenous group but take into account the differing cultural backgrounds and perspectives.

HOW DOES FDV IMPACT ON WOMEN AND CHILDREN?

There is now substantial research evidence about the effects of FDV on women and children in the short and long term. There are wide ranging effects on women that are material and financial (e.g. unstable housing, employment and income); health impacts (including premature death, physical injuries, greater depression, anxiety, suicidal ideation and attempts compared with the general population); and interpersonal (including low self esteem, social isolation, parenting capacity and maternal alienation). Intimate partner violence is the major contributor to death, disability and illness amongst women aged 15-44 years, greater than any physical health risk factor (Vic Health 2004).

FDV also impacts upon women's mothering and their relationship with their children (Thiara et al 2006; Mullender et al 2002; Morris, 2009; Radford & Hester 2006). Research highlights how many violent men manipulate the relationship between mothers and children (Mullender et al 2002; Humphreys et al 2006; Morris, 2009) as part of the perpetrators' tactics of coercive control (Stark 2007). There is much literature now which points to the ways in which abusive men use child contact arrangements to continue to further

abuse and control women and to undermine the relationships between children and mothers (Aris, Harrison and Humphreys, 2002; Radford and Hester 2006). Research shows many mothers are aware living with FDV is affecting their parenting. This can include living with ongoing anxiety and fear about balancing the risk of violence to themselves with protecting the children.

Research shows those seeking support for FDV experience significant levels of chronic abuse (Coker et al, 2000; Goodman et al, 2003; Fanslow & Robinson 2010). Robinson (2006) showed that 70% of victims believed they would be killed or injured by their current or former partners. Intimate partner homicide reviews identify intense jealousy and high levels of control as major risk indicators (Richards and Baker, 2003; Regan et al, 2007) that is consistent with patterns of coercive control. Women who report high levels of control are more likely to report multiple forms of abuse (Stark 2007). Harassment and stalking post-separation also feature large in victims' experiences and when coupled with physical violence is significantly associated with murder or attempted murder (Richards and Baker, 2003). Actual or imminent separation is the most dangerous time for women and is shown to be factor in 65-75% of domestic violence homicides (Wilson and Daly, 1993). Child-related topics of conflict – threats to take children or child contact disputes – are common precipitating factors in the murder of women and children in the context of FDV (see Richards and Baker, 2003).

There is also mounting research on the extent and depth of FDV violence on children. Studies consistently show that children are present in at least 50% of households where there is FDV (ABS 2006, Cripps 2008, Statistics Canada 2009). Originally there was much attention paid in the literature to making distinctions between children directly witnessing violence and abuse, and children being in the care of those experiencing FDV, with the presumption that the latter was 'less serious'. The term primary and secondary victim was also adopted for children to denote directly being abused or being present when others were abused. These were based on an 'episodic' understanding of FDV – which presumes an absence of violence and abuse when there is not physical violence or verbal abuse occurring. In reality, as Stark's (2007) coercive control shows, the abuse and control is ever present and children are as aware of this as adults. Mothers describe having to control the children's behaviour so as not to upset or trigger their partner's abuse. Not only do women describe themselves as 'walking on eggshells', their children are also often 'walking on eggshells', all with the aim of trying to prevent further violence and abuse. Therefore, it is now acknowledged that children are victims of FDV if they are living in the household as they are aware and vigilant about also trying to prevent its continuation. All of these processes demonstrate the means by which coercive control is enacted with family members.

Additionally the children may be physically and sexually abused by the perpetrator. The effects on children include social and behavioural difficulties (such as difficulty making friends, behaviour problems in class, aggression and social withdrawal); and disrupted schooling due to changes in school, school absences or being excluded as a result of behaviour (Bagshaw & Chung 2001; Mullender 2004). One study shows children who have had an adverse childhood experience, such as FDV, are more likely as adults to experience mental health problems, such as depression, anxiety, suicidal ideation and attempts (Afifi, Enns, Cox, Asmundson, Stein & Sareen 2008). A study of children's attendance at accident and emergency found repeat attendance rates were significantly higher amongst those children whose female caregivers reported experiencing FDV (Bair-Meritt et al 2008). If mothers escape FDV children can experience loss of family, friends and local networks in order to remain safe. This can mean transience, changing schools and loss of family income all of which impact on the child. However, it should be stated that the effects of FDV on children are not insurmountable and that the most valuable means for reducing long-term harm is a strong mother-child relationship.

PEOPLE ARE NOT LIVING WITH THE 'SINGLE PROBLEM' OF FDV

People experiencing FDV do not present with the single issue of 'FDV'. Their lives are often complex as often they may also be experiencing poverty, mental ill health, disability and/or drug and alcohol dependencies. These multiple issues compound and cannot be neatly divided across agencies to deal with each separately. Research evidence of alcohol and drug treatment populations consistently shows 60-80% of women receiving support for problematic substance use have suffered FDV (Call & Nelson 2007, Downs et al. 1993, Humphreys et al 2005, Thompson and Kingree 1998). Approximately 50% of men receiving alcohol-related services have perpetrated FDV (Foran & O'Leary 2008, Galvani 2004). Since a significant number of these men and women are likely to be parents, their children will therefore be living in a home environment negatively affected by parental alcohol and drug problems and domestic abuse.

There are very few specialised services that can address these multiple complex issues for families. However, without addressing one issue other interventions will be less effective. For example, a woman having a violence intervention order on a man with a history of violence and a long standing dependence on drugs and alcohol is not going to feel assured of her safety as his behaviour is not only high risk but unpredictable and the consequences of a breach are not likely to be a deterrent. The need to understand and respond more effectively to the complexity of people experiencing FDV remains the biggest challenge to stopping FDV and promoting women's and children's safety.

REFERENCES

Afifi, Tracie O; Enns, Murray W; Cox, Brian J; Asmundson, Gordon J G; Stein, Murray B; Sareen, Jitender (2008) Population attributable fractions of psychiatric disorders and suicide ideation and attempts associated with adverse childhood experiences. *American Journal of Public Health.* 98(5). Pp 946-952.

Aris, R., Harrison, C. and Humphreys, C. (2002) *Safety and Child Contact: An analysis of the role of child contact centres in the context of domestic violence and child welfare concerns*, London: Lord Chancellor's Department.

Australian Bureau of Statistics (2006) *Personal Safety Survey 2005*. Commonwealth Government of Australia. Cat. no. 4906.0. Canberra: ABS.

Australian Bureau of Statistics (2013) *National Aboriginal and Torres Strait Islander Social Survey, 2008. Experiences of Physical Violence Feature Article*. Catalogue Number 4714.0 (Accessed 25/11/13) <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4714.0Feature%20Article12008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=>.

Australian Institute of Criminology (2013). Homicide in Australia: 2008–09 to 2009–10. *National Homicide Monitoring Program Annual Report* AIC Monitoring Reports. Canberra: AIC.

Australian Institute of Health and Welfare (2011). *Government-funded specialist homelessness services: SAAP National Data Collection annual report 2009–10*. Cat. no. HOU 246. Canberra: AIHW.

Australian Institute of Health and Welfare (2012). *Specialist Homelessness Services 2011–12.* Cat. no. HOU 267. Canberra: AIHW.

Avakame, E. (1998). Intergenerational Transmission of Violence, Self-Control, and Conjugal Violence: a comparative analysis of physical violence and psychological aggression. *Violence and Victims* 13(3): 301:316.

Babcock, J., N. Jacobson, et al. (2000). Attachment, Emotional Regulation, and the Function of Marital Violence: differences between secure, preoccupied, and dismissing violent and non-violent husbands. *Journal of Family Violence*. 15(4): 391:409.

Bagshaw D & Chung D (2001) The needs of children who witness domestic violence: A South Australian study. *Children Australia* 26 (3), pages 9-17.

Bair-Merritt, M; Feudtner, C; Localio, A ; Feinstein, J; Rubin D; & Holmes, W. (2008) Health care use of children whose female caregivers have intimate partner violence histories. *Archives of pediatrics & adolescent medicine*. 162(2). Pp 134-9.

Bandura, A. (1977) *Social Learning Theory*. Englewood Cliffs, NJ: Prentice Hall.

Brownridge, D. A., Ko Ling Chan, Hiebert-Murphy, D., Ristock, J., Tiwari, A., Leung, W.-C., & Santos, S. C. (2008). The Elevated Risk for Non-Lethal Post-Separation Violence in Canada: A Comparison of Separated, Divorced, and Married Women. *Journal of Interpersonal Violence, 23*(1), 117-135.

Call C.R. & Nelsen J.C. (2007) Partner abuse and women's substance problems', *Affilia*, vol. 22, issue 4, pp. 334-346.

Coker, A. L., Davis, K. E., Arias, I. A., Desai, S., Sanderson, M., Brandt, H. M., et al. (2002). Physical and Mental Health Effects of Intimate Partner Violence for Men and Women. *American Journal of Preventive Medicine,* 23(4), 260-268.

Council of Australian Governments (2013) *National Plan to Reduce Violence Against Women and their Children*. Canberra.

Cripps, K (2008). Indigenous family violence: A statistical challenge. *INJURY Int. J. Care Injured*. 3955, 525-535.

Dobash, R. E., Dobash, R. P., Cavanagh, K., & Lewis, R. (2004). Not an Ordinary Killer; Just an Ordinary Guy: When Men Murder an Intimate Woman Partner. *Violence Against Women, 10*(6), 577-605.

Downs W, Miller B & Panek D (1993). Differential patterns of partner-to-woman violence: A comparison of samples of community, alcohol abusing and battered women, *Journal of Family Violence*, vol. 8, issue 2, pp. 113-35.

Fanslow, J., & Robinson, E., (2010) Help-Seeking Behaviors and Reasons for Help Seeking Reported by a Representative Sample of Women Victims of Intimate Partner Violence in New Zealand. *J Interpers Violence.* 25(5), 929-951.

Foran HM & O'Leary KD (2008) Alcohol and intimate partner violence: A meta-analytic review. *Clinical Psychology Review*, vol. 28, issue 7, pp. 1222-1234.

Galvani S 2004, Responsible disinhibition: Alcohol, men and violence to women. *Addiction, Research and Theory*, vol. 12, issue 4, pp. 357-371.

Goodman, L. A., Koss, M. P., & Russo, N. (1993). Violence against women: Physical and mental health effects. Part I: Research findings. *Applied and Preventive Psychology, 2*, 79-89.

Grech, K. & Burgess, M,. (2011) *Trends and patterns in domestic violence assaults: 2001 to 2010*. Issue paper no.61. NSW Bureau of Crime Statistics and Research.

Hamberger, L. and C. Renzetti (1996). *Domestic Partner Abuse*. New York, Springer.

Higgins, D. and M. McCabe (2000). Multi-type maltreatment and the long term adjustment of adults. *Child Abuse Review*. 9(1): 6:18.

Holtzworth-Munroe, A., L. Bates, et al. (1997). A Brief Review of Research on Husband Violence: maritally violent versus non-violent men. *Aggression and Violent Behavior* 2(1): 65:99.

Humphreys, C., Regan, L., River, D. and Thiara, R. (2005) Domestic Violence and Substance Use: Tackling Complexity, *British Journal of Social Work*, 35 (7):1-18.

Humphreys, C., Mullender, A., Thiara, R. & Skamballis, A. (2006) Talking to My Mum': developing communication between mothers and children in the aftermath of domestic violence. *Journal of Social Work.* Vol. 6, No. 1, 53-63.

Humphreys, C. (2007). A Health Inequalities Perspective on Violence Against Women. *Health and Social Care in the Community 15*(2), 120-127.

Irwin, H. (1999). Violent and Non-violent Revictimization of Women Abused in Childhood. *Journal of Interpersonal Violence* 14(10): 1095:1110.

Lindhorst, T., & Beadnell, B. (2011). The Long Arc of Recovery: Characterizing Intimate Partner Violence and Its Psychosocial Effects Across 17 Years. *Violence Against Women, 17*(4), 480-499.

Menjívar, C., & Salcido, O. (2002). Immigrant women and domestic violence common experiences in different countries. *Gender & Society, 16*(6), 898-920.

Morris, A. (2009) Gendered dynamics of abuse and violence in families: considering the abusive household gender regime. *Child Abuse Review*, Vol. 18:6 pp 414-427.

Mouzos, J., & T. Makkai (2004) *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey* (IVAWS). Canberra: Australian Institute of Criminology.

Mullender, A. et al (2002) *Children's Perspectives on Domestic Violence*. London: Sage.

Mullender, A. (2004) *Tackling domestic violence: providing support for children who have witnessed domestic violence*, Home Office Development and Practice Report No.33.

Murray, S. and Powell, A. (2011) *Domestic Violence: Australian Public Policy*. Melbourne: Australian Scholarly Publishing.

New South Wales Auditor-General's Report (2012) *Responding to domestic and family violence*. Sydney, NSW.

O'Hearn, R. and K. Davis (1997). Women's experience of giving and receiving emotional abuse. *Journal of Interpersonal Violence*. 12(3): 375:391.

Perilla, J. L., Bakeman, R., & Norris, F. H. (1994). Culture and domestic violence: The ecology of abused Latinas. *Violence and victims, 9*(4), 325-339.

Prince, J. and I. Arias (1994). The Role of Perceived Control and The Desirability of Control Among Abusive and Non-abusive Husbands. *American Journal of Family Therapy* 22(2): 126:133.

Radford, L. & Hester, M. (2006) *Mothering through domestic violence*. London: Jessica Kingsley Publishers.

Ramsay, J., Carter, Y., Davidson, L., Dunne, D., Eldridge, S., Hegarty, K.,Feder, G. (2009). *Interventions to reduce or eliminate violence and promote the physical and psychosocial well-being of women who experience intimate partner abuse*. John Wiley & Sons.

Rees, S., & Pease, B. (2006). *Refugee Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities*. Melbourne: Immigrant Women's Domestic Violence Service.

Regan, L., Kelly, L., Morris, A., & Dibb, R. (2007) *If only we'd known: an exploratory study of seven intimate partner homicides in Engleshire.* Child & Woman Abuse Studies Unit, London.

Richards, L. and Baker, A. (2003) *Findings from the Multi-agency Domestic Violence Murder Reviews in London*, report prepared for the ACPO Homicide Working Group, London Metropolitan Police.

Robinson, A. L. (2006). Reducing Repeat Victimisation among High-Risk Victims of Domestic Violence: The Benefits of a Coordinated Community Response in Cardiff, Wales. *Violence Against Women: An International and Interdisciplinary Journal, 12(8)*, 761-788.

Sarason, I. and B. Sarason (1993). *Abnormal Psychology: The problem of maladaptive behaviour*. New Jersey, Prentice Hall.

Saunders, D. (1992). A Typology of Men who Batter: three types derived from cluster analysis. *American Journal of Orthopsychiatry.* 62 (2): 264:275.

Seth-Purdie, R. (1995-1996). *Domestic Violence: In Search of well informed policy.* Canberra, Dept of the Parliamentary Library.

Stark, E. (2007). *Coercive control: How men entrap women in personal life*. Oxford: Oxford University Press.

Statistics Canada. (2009). Family Violence in Canada: A statistical profile.

Strauss, M. Gelles, R. Steimetz, S. (1981) *Behind Closed Doors.* New York, Anchor Books.

Thiara, R.K., Humphreys, C., Skamballis, A. & Mullender, A. (2006) *Talking to My Mum: Developing Communication between mothers and children in the aftermath of domestic violence*. London: Big Lottery Fund.

Thompson MP & Kingree J (2006) The roles of victim and perpetrator alcohol use in intimate partner violence outcomes, *Journal of Interpersonal Violence*, vol. 21, issue 2, pp. 163-177.

Tweed, R. and D. Dutton (1998). A comparison of impulsive and instrumental subgroup of batters. *Violence and Victims.* 13(3): 217:230.

VicHealth (2004) *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence*. VicHealth. Melbourne.

VicHealth. (2007). *Preventing violence before it occurs: a framework and background paper to guidethe primary prevention of violence against women in Victoria*. Carlton: VicHealth.

Wilson, M., & Daly, M. (1993). Spousal homicide risk and estrangement. *Violence and victims*. 8(1), 3-16.

World Health Organization. (2010). *Healthy Workplaces: A Model For Action: For Employers, Workers, Policy-Makers and Practitioners.* WHO. Geneva.

Zosky, D. (1999). The Application of Object Relations Theory to Domestic Violence. *Clinical Social Work Journal* 27(1): 55:69.

Appendix C: List of people consulted

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Butcher, Vicki – Director Case Practice Metro, Department for Child Protection and Family Support
Buzzard, Amy – Executive Officer, Victims of Crime Reference Group
Cassam, Kara –Community Correction Officer, Department of Corrective Services
Cergui, Shelley – Aboriginal Legal Service of Western Australia (Kununurra)
Chape, Mary – Aboriginal Legal Service of Western Australia (Family Law Unit)
Chung, Professor Donna – Head of Social Work, Curtin University
Chung, Soo–Ming – Family and Domestic Violence Advisory Group, Department of Health
Clark, Mary – Southern Communities Advocacy Legal and Education Service Inc (SCALES)
Clarke, Stephen – Manager, Family Violence Intervention Services, Department of the Attorney General
Cock, Judge Robert – Chairman, Prisoners Review Board
Collins, Peter – Director of Legal Services, Aboriginal Legal Service of Western Australia
Cooke, Tori – Anglicare
Cooper, Anita
Cowley, Mary – Chief Executive Officer, Aboriginal Family Law Services
Cox, Dorinda
Cox, Sonja – Director Operational Performance, Policy and Planning, Department of Corrective Services
Davenport, Senior Constable Caron – Western Australia Police
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Fairclough, Joan – Victim Support Services (Centacare)
Falohun, Santina – Manager, Refuge Broome
Fernandez, Dennis –Lawyer, Legal Aid WA (Criminal Unit)
Fletcher, Catherine – Office of the Director of Public Prosecutions (Gender Bias Review Committee)
Foley, Detective Sergeant Stephen – Victims of Crime Reference Group
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Guthrie, Rob – Assessor, Criminal Injuries Compensation

Hannan, Jennifer – Chief Executive Officer, Anglicare

Harring, Samantha – Department of Corrective Services (Geraldton)

Hartwig, Angela – Chief Executive Officer, Women's Council for Domestic and Family Violence Services (WA)

Hatch, Harvey – Manager, Victims Support and Child Witness Service

Hawkins, Magistrate Jennifer – Magistrates Court Joondalup

Heath, Chief Magistrate – Magistrates Court Perth

Henry, Lee – Family and Domestic Violence Advisory Group, Department of Health

Hensler, Elspeth – Barrister, Francis Burt Chambers

Hickson, Richard – Principal Solicitor, Albany Family Violence Prevention Legal Service

Higgie, Linda – Disability Services Commission

Hoffman, Jennifer – Commissioner for Victims of Crime, Department of the Attorney General

Hogan, Magistrate Pam – Central Law Courts of Western Australia

Hovane, Michael – Manager Family Violence Services, Legal Aid WA

Hovane, Vicki

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Johnson, Alicia – Anglicare (Broome)

Jonda – Support Worker, Refuge Broome

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Jordan, Sue – Family and Domestic Violence Advisory Group, Department of Health

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Kendall, Tamara – Family and Domestic Violence Senior Officers Group (Department for Child Protection and Family Support)

Kerin, Kylie – Legal Aid WA(Kununurra)

Kerin, Paul – Manager, Family Court Counselling and Consultancy Services

King, Michael Magistrate – Magistrates Court Armadale

King, Margaret – Aboriginal Family Legal Services (Kununurra)

King–Macskasy, Evan – Counsellor

Kingston–Wee, Jason – Legal Aid Western Australia

Lawrence, Brian – Assistant Commissioner Youth Justice, Department of Corrective Services

Lawrence, Magistrate Geoff – Magistrates Court Geraldton

Lefebvre, Lynne – Department for Child Protection and Family Support (Broome)

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Lyons, Jade – Family and Domestic Violence Advisory Group, Department of Health

Maj, Kylie – Ombudsman WA

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McCormack, Darren – Acting Director Sentence Management, Department of Corrective Services

McDonald, Alan – Community Court Member Barndimalgu Court (Geraldton)

McGlade, Hannah – Victims of Crime Reference Group

McGorman, Sandra – Family and Domestic Violence Advisory Group, Department of Health

McGow, Amanda – Principal Solicitor, Southern Communities Advocacy Legal and Education Service Inc (SCALES)

McGrath, Joe – Director of Public Prosecutions

McIntosh, Linda – Program Facilitator, Communicare

McKinney, Chelsea – Senior Policy Officer Justice, Disability Services Commission

McKrill, Rob – Family and Domestic Violence Advisory Group, Department of Health

Millan, Roger – Clinical Governance Manager, Department of Corrective Services

Milne, Sergeant Phil – Prosecutor, Western Australia Police (Midland)

Mitchell, Sherrilee – Director Family and Domestic Violence Unit, Department for Child Protection and Family Support

Monaghan, Principal Registrar David – Family Court of Western Australia

Mooney, Elizabeth – Victims of Crime Reference Group

Moore, Anne – Family and Domestic Violence Senior Officers Group (Women's Council for Domestic and Family Violence Services (WA)

Moore, Kyalie – Specialist Court Coordinator, Barndimalgu Court (Geraldton)

Munday, Jacqui – Case Management Coordinator, Family Violence Services (Joondalup)

Mungar, Patrick – Gosnells Community Legal Centre

Nadalin, Katia – Domestic Violence Legal Unit, Legal Aid WA

Neal, Jacob – Anglicare (Kununurra)

Nevill, Donna – Victim Support Services (Geraldton)

Neylon, Alex – Women's Law Centre

Newman, Inspector Paul – Office of Deputy Commissioner Operations, Western Australia Police

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O'Beirne, Karryn – Regional Manager, Department of Corrective Services

O'Callaghan, Jenny – Family and Domestic Violence Advisory Group, Department of Health

O'Neill, Dr Ann – Victims of Crime Reference Group

Ostaszewskyj, Pauline – Senior Child Protection Worker, Family Domestic Violence and Department Child Protection (East Kimberley)

Owen, Rob – Aboriginal Legal Service of Western Australia (Criminal Unit)

Panayi, Matt – Legal Aid WA (Kununurra)

Parker, Tamara – Department for Child Protection and Family Support (Midland0

Parker, Andrew – Lawyer, Legal Aid WA (Criminal Unit)

Patterson, Hamish – Aboriginal Family Legal Service (Kununurra)

Patterson, Yvonne – Director, Court Counselling and Victim Support, Department of the Attorney General

Peden, Sue – Family and Domestic Violence Senior Officers Group (Disability Services Commission)

Perriam, Chris – Family and Domestic Violence Advisory Group, Department of Health

Pillay, Vivienne – Multicultural Women's Advocacy Service

Platt, Vicki – Legal Aid WA (Broome)

Porter, Helen – Chief Assessor, Criminal Injuries Compensation

Reason, Maria – Case Worker, Family Violence Service (Joondalup)

Reid, Jonathon – Aboriginal Legal Service of Western Australia (Family Law Unit)

Reynolds, Judge – President, Children's Court of Western Australia

Reynolds, Megan – Case Management Coordinator, Family Violence Service (Perth)

Richards, Leah – Manager Adult Policy and Standards, Department of Corrective Services

Richardson, Magistrate Susan – Magistrates Court Rockingham

Roberts, Mary – Ombudsman WA

Robins, Steven – Deputy Commissioner Adult Custodial Services, Department of Corrective Services

Rosenberg, Detective Sergeant Tony – Officer in Charge, Family Violence State Coordination Unit, Western Australia Police

Rousetty, Nawdy – Coordinator Domestic Violence Legal Unit, Legal Aid WA

Rose, Debra – Family and Domestic Violence Advisory Group, Department of Health

Rusden, Jessica – Aboriginal Family Legal Services (Broome)

Ryan, Sister Mary – Victim Support Service (Centacare)

Scott, Michelle – Commissioner for Children and Young People

Sellanthambu, Xavier – Aboriginal Legal Service of Western Australia (Geraldton)

Sharratt, Magistrate Steve – Magistrates Court Broome

Shaw, Debra – Family and Domestic Violence Senior Officers Group (Department of Education)

Smith, Detective Inspector Eric – Family Violence State Coordinator, Western Australia Police

Snell, Jennifer – Victims of Crime Reference Group

Steel, Elisha – Communicare

Svanberg, Eva – Aboriginal Legal Service of Western Australia (Geraldton)

Tarrant, Associate Professor Stella – Gender Bias Review Committee

Thackray, Chief Judge Stephen – Family Court of Western Australia

Thompson, Michael – Department of Corrective Services (Kimberley)

Tobin, Paul – Aboriginal Legal Service of Western Australia (Broome)

Verrier, Leanda – Victims of Crime Reference Group

Vose, Magistrate Stephen – Children's Court

Vukovich, Ivy – Family and Domestic Violence Advisory Group

Wakelin, Noami – Aboriginal Family Legal Services

Webb, Magistrate Donna – Magistrates Court Kununurra

Wells, Detective Sergeant Adrian – Family Violence State Coordination Unit, Western Australia Police

White, Mary – Ombudsman WA

Wilkinson, Ted – Legal Aid WA (Broome)

Wolden, Alana – Aboriginal Legal Service of Western Australia (Criminal Unit)

Woods, Deputy Chief Magistrate Libby – Magistrates Court Perth

Workman, Lynda – Community Corrections Officer, Department of Corrective Services (Joondalup)

Young, Lucy –Lawyer, Legal Aid WA (Criminal Unit)

List of written submissions received

Hovane, Vicki (email to the Commission dated 12 September 2013)

King-Macskasy, Evan (email to the Commission dated 1 October 2013)

Klimek, Richard (letter to the Attorney General dated 18 July 2013)

Muhling, Helen (letter to the Commission dated 26 September 2013)

Piercy, Rhonda (letter to the Attorney General dated 18 July 2013)

Pilbara Community Legal Service Inc (letter to the Commission dated 19 August 2013)