

Law Reform Commission of Western Australia

Enhancing Family and Domestic Violence Laws

FINAL REPORT

Project No. 104

June 2014



The Law Reform Commission of Western Australia

Commissioners

Chair: Mr R Douglas BA (Hons), LLB (Hons) (ANU)

Members: Mr A Sefton BComm LLB (Hon) (ANU)
Dr A Zimmermann LLB, LLM (PUC-Rio), PhD (Monash)

Executive Officer Ms HJ Kay, LLB, LLM (UWA)

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Law Reform Commission of Western Australia
Level 12, Westralia Square
141 St Georges Terrace
Perth WA 6000
Australia

Telephone: +61 8 9264 1340

Facsimile: +61 8 9264 6114

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Acknowledgements

Principal Project Writer: Victoria Williams BCom, LLB, LLM, (UWA)

Research Assistants: Breony Allen
Chloe Gall

Technical Editor: Cheryl MacFarlane

Executive Assistant: Sharne Cranston

Foreword

In August 2013, the Law Reform Commission received final terms of reference from the Attorney General, the Hon Michael Mischin MLC, to consider:

- (a) the benefits of separate family and domestic violence legislation;
- (b) the utility and consequences of legislation for family and domestic violence restraining orders separate to their current location in the *Restraining Orders Act 1997*; and
- (c) the provisions which should be included in such legislation were it to be developed (whether in separate legislation or otherwise).

In December 2013, the Commission published its Discussion Paper presenting 53 specific proposals for reform and raising 29 questions for discussion. That Paper followed consultation with more than 150 individuals concerned with family and domestic violence (both outside and within government); observations of courts in Midland, Joondalup, Perth and Geraldton; consultations in Broome and Kununurra; receipt of five written submissions; and considerable research and deliberation. The Commission also 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, which it published as an annexure to the Discussion Paper.

The Discussion Paper sought submissions by the end of January 2014, and the Commission ultimately received 43 written submissions, and conducted a number of additional consultations to resolve matters arising from the submissions.

Many of the submissions were detailed, thoughtful and extensive, and it was evident that the organisations and individuals preparing them had gone to considerable lengths to consider and respond to the questions and proposals put by the Commission in its Discussion Paper. Given the summer recess, many organisations and individuals sought extensions of time within which to respond and with the support of the Attorney General, the Commission granted these extensions. The final submission was not received until 14 April 2014.

The Commission reports at a time when the number of reported family and domestic violence incidents

has increased substantially in both absolute and per capita terms, being close to 45,000 incidents in 2012. Given the significance of, and the obstacles to the making and maintenance of, such a complaint, that number very likely underreports the true extent of family and domestic violence.

The Commission has formed the view that separating legislation concerning family and domestic violence restraining orders from restraining orders in other contexts is, on balance, desirable. Rearrangements of legislation will not, of course, prevent the incidence of family and domestic violence. However, a repeated theme of the submissions made to the Commission was that the origins, nature and dynamics of such violence are sometimes ill-understood by those who must implement and enforce the law. It is the Commission's view that the distinct identification of family and domestic violence restraining orders will assist, as part of a number of reforms, in focussing attention upon the particular nature of such violence. In particular, a new separate Act will permit and promote a clearer and stronger articulation of the distinct legislative objects and principles in relation to family and domestic violence.

However, the Commission has also formed the view that separating the criminal law aspects of family and domestic violence from the general criminal law, whether in the Criminal Code or elsewhere, is undesirable. Restraining orders offer a civil law response to prevent family and domestic violence. The breach of the state's criminal law, whether associated with breach of a restraining order or otherwise, should remain under the aegis of the general criminal law. In particular, it is important to continue to discourage any perception that criminal acts conducted in a family or domestic environment are in some way less serious than those in other contexts. Indeed, as is clear from the Commission's recommendations for the reform of aspects of criminal law, domestic and family violence should often be treated as an aggravating, not an ameliorating, factor.

The effect of family and domestic violence restraining orders is not free from criticism either in the difficulty or ease of their grant. Complaint is made both that such orders are sometimes wrongfully denied when

the circumstances favour the applicant, and also that they are sometimes granted *ex parte*, with an inadequate foundation but with severe consequences for the person bound, who may be subject to the order for many months before a contested hearing considers the merits of the application.

Tragically, even where family and domestic violence restraining orders are granted, they are not always effective to prevent further acts of family and domestic violence, even to the point of homicide.

As is apparent from this Report, the reforms proposed will not eliminate this blight from Western Australian families. The reforms have the more modest goal of facilitating the protection of victims, ensuring the more prompt and just determination of contested claims, and ensuring that those charged with the administration and enforcement of the law have adequate training and information to discharge their considerable responsibilities.

An issue which attracted considerable attention in the submissions received, and in the deliberations conducted, by the Commission was the ambit of family and domestic violence. There was a considerable diversity of views about how best to characterise family and domestic violence, what conduct should be understood to fall within its boundaries, and the extent to which conduct that is not 'violence' as traditionally comprehended should be included.

On the one hand, there is a body of literature (which Professor Chung's paper appended to the Discussion Paper helpfully surveys) which observes that family and domestic violence can be understood to comprehend not only acts of physical violence, but also controlling and coercive behaviour which may transcend acts of physical violence, or even threats of physical violence, by establishing a regime in an intimate or family relationship in which the victim is controlled by fear. 'Economic' abuse and 'emotional' abuse have been identified as types of this broader exercise of power within a family and domestic environment.

However, it may also be observed that the legal consequences for conduct which is characterised as family and domestic violence may be severe: a restraining order may prevent a person restrained from access to home, children, kin and possessions. Since many orders are made in the absence of the person bound (that is, *ex parte*), the respondent's account is often not heard for some time after the order has been issued. Further, the ultimate consequence for a breach of restraining order is criminal sanction. As with all laws, the state must ensure that the ambit of conduct which is prevented,

restrained or penalised is capable of being clearly understood; that is both just (because a citizen should be able to identify conduct which the law proscribes before it occurs) and prudent (because the restraining effect of an unclear law is likely to be impaired). Consequently, it is important that the definition of 'family and domestic violence' be clear and capable of application.

The Commission considered a number of approaches which have been adopted in other Australian jurisdictions. The Commission ultimately concluded that categorising conduct as 'economic abuse' or 'emotional abuse' was less effective than identifying the character of the offending behaviour; that is, behaviour which intimidates coerces or controls, and which a person in the position of the victim would reasonably apprehend would adversely affect his or her safety or wellbeing. So much is consistent with the nature of domestic and family violence which Professor Chung's paper identifies. It focuses attention on the nature of the conduct, and the way in which it would be reasonably apprehended.

The breadth of the 73 recommendations proposed by the Commission defy easy summary in a foreword. However, the reforms directed to the proposed new objects clause, the consistent treatment of family and domestic violence in the state's criminal law, the increase in the information available to judicial officers making what are usually *ex parte* orders, and the proposed reforms in the application for, service of, and efficient and swift final disposition of applications for restraining orders are particularly commended.

The Commission acknowledges, and is indebted to, all those who generously gave their time, experience and expertise, in attending consultations and preparing careful and considered submissions. The process of law reform depends upon the thoughtful and time-consuming preparation of submissions by persons who directly experience the operation of the state's laws, and there is no substitute for their experience, care and engagement.

Victoria Williams produced this comprehensive Report in an extremely abridged timeframe, further abridged by the extensions which were given to submitting parties, and only partly ameliorated by an extension of time. Her careful research and distillation of diverse and often competing views, her thoroughness in consultations, research and analysis, her commitment to ensuring that the Commission's thinking is thoroughly researched, well balanced and reflective of the submissions are of the first order. In particular, in a report such as

this, her care in taking into account the voices of victims as well as comprehending and analysing the (sometimes competing) views of the agencies, organisations and individuals who work in this difficult and often distressing area of the law is gratefully acknowledged.

Executive Officer Heather Kay and Executive Assistant Sharne Cranston, and subsequently Stephen Boylen and Sarah Burnside, provided diligent and gratefully received project management, research and support for the project writer and Commissioners during the preparation of the Report.

As always, the Commission is dependent upon and indebted to our technical editor Cheryl MacFarlane for the swift, detailed and thorough attention to the professional presentation of the Report.

The Commission is grateful for the continuing support of the Attorney General and his Department, particularly in accommodating an extension of time within which to complete the Report and in transitioning to new administrative arrangements during the preparation of this Report.

The Commission makes the carefully considered recommendations set out in this Report in the hope and expectation that they will contribute to reducing the incidence and continuing adverse impact of family and domestic violence within the state.

Richard Douglas
Chairman

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 specific issues in relation to Western Australia's family and domestic violence laws had been raised in the public domain before the Commission received the terms of reference. These included concerns in regard to the offence of assault causing death where the offence had been committed in circumstances involving family and domestic violence; the findings from the coronial investigation into the death of Andrea Pickett; sentencing practices for repeated breaches of violence restraining orders; and the apparent reluctance of criminal courts to impose violence restraining orders following a conviction for a family and domestic violence related offence.¹ These issues demonstrated a degree of disquiet within the family and domestic violence service sector and broader community in regard to the civil and criminal justice responses to family and domestic violence. When undertaking its initial research and consultations the Commission's

attention was directed, to some extent, by these concerns.

THE COMMISSION'S APPROACH TO THE TERMS OF REFERENCE

The terms of reference require the Commission to, among other things, 'consider the benefits (or otherwise) of having separate family and domestic violence legislation'. This question is independent from the requirement to separately consider the utility and legal consequences of separating family and domestic violence restraining orders from the *Restraining Orders Act 1997* (WA).

In order to answer the first term of reference the Commission determined that it was necessary to review a wide range of laws that deal with family and domestic violence before considering whether Western Australia would be better served by incorporating all of the relevant laws into one new Act. More specifically, the second term of reference—whether family and domestic violence restraining orders should be separated from the *Restraining Orders Act*—required an examination of the current restraining order legislation and how it applies to family and domestic violence. The more general third term of reference (ie, providing advice on 'the provisions which should be included in family and domestic violence legislation if it were to be developed') also required consideration of a broad range of current Western Australian laws that deal with family and domestic violence.

As a consequence, the Commission commenced addressing the terms of reference by examining the current restraining order system, the criminal justice response to family and domestic violence, and other legal issues related to family and domestic violence before it answered the specific terms of reference that deal with separate legislation. This approach was adopted because it is not appropriate to determine if separate legislation (whether general family and domestic violence legislation or specific family and domestic violence restraining order legislation) is warranted before determining what reforms (if any) are required to existing laws and how those reforms might be best accommodated within the current legislative regime. In other words, it is important

1. For further discussion of these issues, see Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No. 104 (December 2013) ('LRCWA Discussion Paper') 3–4.

to consider what could be achieved by enacting separate legislation that could not be achieved by amending current legislation.

In contrast, at this final reporting stage of the reference, the Commission addresses those terms of reference that require consideration of the benefits (or otherwise) of enacting separate legislation before it addresses specific reforms and provisions that could be included in any separate family and domestic violence legislation.

THE SCOPE OF THE REFERENCE

The Commission's terms of reference cover the entire legal process from the response by police to incidents of family and domestic violence, the civil restraining order system, the criminal justice process from charge to expiration of sentence, and other matters such as a victim's right to compensation. The Commission explained in its Discussion Paper that given the potential breadth of its terms of reference it would concentrate on those aspects of the legal system that appeared to be causing the greatest difficulty or concern. Bearing in mind the time period allocated for this reference it has not been possible to examine in detail every area of law that might conceivably impact or involve family and domestic violence.²

It is also vital to acknowledge that the ability of the legal system to reduce family and domestic violence and protect victims and children from harm is limited. Specifically, not all victims disclose or report family and domestic violence to police or others working in the legal system. For those victims who are unwilling or unable to report family and domestic violence, it is important to recognise that the legal system cannot directly address their safety and other support needs. However, the Commission appreciates that an effective and appropriate legal response to family and domestic violence is likely to encourage victims to report incidents to police and engage with the legal system.³

The Commission's recommendations for reform in response to its terms of reference represent only one element of an appropriate whole-of-government response to addressing family and domestic violence. As stated in one submission:

2. LRCWA Discussion Paper, 4–5.
3. Relationships Australia highlighted that the appropriateness of the legal system's response to victims is vital in terms of ensuring that victims engage with the legal system: Relationships Australia, Submission No. 29 (28 February 2014) 1–3. However, it was also mentioned that barriers to disclosure of family and domestic violence may include fear of harm, being physically prevented from reporting the violence and threats to harm or take children.

The intergenerational transmission of trauma caused by family and domestic violence cannot be remedied by legislative change alone.... Given the complexity of family and domestic violence, any reliance upon both the civil and criminal justice systems to deliver the real change that is required is to provide victims with false hope.⁴

Preventative measures which seek to address and minimise the risk of family and domestic violence occurring, and the provision of adequate services to members of the community experiencing family and domestic violence who do not access the legal system, are just as important as any legal reforms. Appropriate and adequate service provision is particularly important for vulnerable groups in the community such as Aboriginal people,⁵ people from culturally and linguistically diverse backgrounds, people with disability and people living in remote and regional areas. As noted in the Discussion Paper, a number of people consulted by the Commission emphasised the need for additional resources for service provision.⁶

Likewise, a number of submissions received by the Commission in response to its Discussion Paper have raised broad issues concerning the response of government and non-government agencies to family and domestic violence. For example, the Aboriginal Social Workers Association of Western Australia argued that there should be 'a separate strategic framework surrounding the Aboriginal and Torres Strait Islander (ATSI) issues of family and domestic violence' and that 'finances and services' should be specifically directed towards this framework.⁷ Relationships Australia highlighted that the coordinated Family and Domestic Violence Response Teams only respond to *reported* family and domestic violence and, in contrast, general service delivery for people who experience family and domestic violence is disjointed. Furthermore, it suggested that the Common Risk Assessment and Risk Management Framework should be used by all counselling and support services irrespective of

4. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 2.
5. In this Report the Commission uses the term 'Aboriginal people' to refer to Aboriginal and Torres Strait Islander people.
6. LRCWA Discussion Paper, 5.
7. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014) 2. The Commission discussed the current strategic policies of the Western Australian government in relation to family and domestic violence in Chapter One of its Discussion Paper: see LRCWA Discussion Paper, 20–4. In particular, it is noted that the role of the Family and Domestic Violence Senior Officers' Group ('the SOG') is to 'plan, manage and monitor a strategic across-government response to family and domestic violence in Western Australia': see <<http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/StateStrategicPlanning.aspx>> (accessed 7 April 2014).

whether the service is specifically targeted at family and domestic violence.⁸

Additionally, Relationships Australia called for an increase in family and domestic violence media campaigns to enhance primary prevention and increase community awareness.⁹ One magistrate also advocated for an increase in public awareness campaigns and, specifically, for the school curriculum to include a unit 'focusing on developing healthy inter-personal relationships'.¹⁰ Furthermore, these submissions argued for the implementation of 'comprehensive primary interventions which drive a seismic shift in attitudes by men and women, but primarily men, as to the acceptability of family and domestic violence' as well as the provision of intervention programs for perpetrators and victims across the board.¹¹ The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network emphasised that the Western Australian government should 'prioritise responding to and addressing violence against women by ensuring adequate funding is available'.¹²

The Commission also received a comprehensive submission from members of the family of Andrea Pickett.¹³ As mentioned in the Discussion Paper, the State Coroner's findings following the investigation of the death of Andrea Pickett emphasised a number of system failures surrounding her death at the hands of her estranged husband.¹⁴ Specifically, in the context of the Commission's terms of reference,

8. Victim representatives also highlighted that people living with 'covert forms' of family and domestic violence 'may not identify themselves as victims' of family and domestic violence and therefore appropriate mechanisms to assess risk and screen for this form of family and domestic violence are important: Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 2.
9. Relationships Australia, Submission No. 29 (28 February 2014) 3. Victim representatives also supported continuing public education campaigns in relation to family and domestic violence (including in relation to the restraining order system): Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 2.
10. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 10. The Commission notes that this submission was informed by consultations held with representatives from Legal Aid Western Australia (South Hedland), Aboriginal Legal Service of Western Australia (South Hedland), Aboriginal Family Law Service (South Hedland), Pilbara Community Legal Service, Western Australia Police (South Hedland) and Victims Support Services (South Hedland).
11. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 3.
12. Women's Council for Domestic and Family Violence Services (WA) and the Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 35. This submission also argued that the provision for adequate resources should be included in legislation.
13. Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014).
14. LRCWA Discussion Paper, 3.

it was noted that the State Coroner found that the investigation by police of reported incidents of family and domestic violence by Andrea Pickett was lacking. During the coronial investigation, the Western Australia Police submitted that improvements had been made to relevant policies and procedures; however, the effectiveness of these changes was not examined during the coronial investigation.¹⁵ Further, the State Coroner found that the offender's parole supervision following his release from prison did not provide adequate protection for Andrea Pickett.¹⁶ During consultations for this reference, the Western Australia Police advised that the State Coroner's recommendations in relation to information sharing between the police and the Department of Corrective Services had been implemented.

The submission from Andrea Pickett's family includes a number of recommendations for independent, systemic and qualitative audits or reviews of various processes, policies and procedures of government departments and agencies (including the Western Australia Police, the Department of Corrective Services, the Prisoners Review Board, the Department for Child Protection and Family Support, and the Department of the Attorney General). Significantly, the submission argues that:

Since Andrea's inquest findings there have been no public and independent inquiry, audit or accountability mechanism to address whether the WA Government, Police and other relevant agencies have responded adequately and effectively to the learnings, findings and recommendations flowing from her murder and inquest.¹⁷

Underpinning the recommendations in the submission from Andrea Pickett's family is the need for independent review and accountability, and a commitment by government to allocate sufficient resources on an ongoing basis to properly respond to family and domestic violence in this state.

The submission also expresses concerns about the narrow scope of the Commission's reference and advocates for greater consideration of these broader issues. In addition, the submission contends that the Commission did not pay sufficient attention to 'issues

15. Ibid 46–7. As a consequence of the issues raised in relation to the police investigation of family and domestic violence by the State Coroner, the Commission posed a question in its Discussion Paper to elicit further information about whether there are any current problems in regard to the Western Australia Police seeking corroborating evidence in relation to alleged family and domestic violence: see LRCWA Discussion Paper, Question 1. This is discussed in Chapter Three of this Report.
16. Ibid 121.
17. Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014) 3.

and experiences of Aboriginal and Torres Strait Islander women and children'.¹⁸ The Commission is aware of the many complex issues surrounding and contributing to family violence in Aboriginal communities.¹⁹ However, many of these issues cannot realistically be primarily addressed through legislative reform and extend beyond the scope of this reference.²⁰ Wherever possible and appropriate the Commission has taken into account specific issues facing Aboriginal people in formulating its recommendations for reform.²¹

While the Commission appreciates the importance of the wide range of issues stemming from the circumstances of Andrea Pickett's murder, the Commission is required to address the terms of reference that have been provided to it by the Attorney General.²² The matters raised in the submission are far reaching and would require a substantially broader inquiry over an extended period of time than this reference permits.

The Commission is aware that the Ombudsman is currently undertaking an investigation of its

18. Ibid 2.

19. These include historical factors (eg, colonisation, dispossession, the stolen generation and cultural breakdown); socio-economic disadvantages (eg, substance abuse, unemployment, poverty, poor education, lack of adequate housing and poor physical and mental health); historical distrust of police, government agencies and courts; lack of culturally appropriate services; geographical isolation; intergenerational violence; and barriers to seeking assistance including connections to family, culture and community.

20. The Commission notes that in its broad ranging inquiry into Aboriginal customary laws (undertaken from 2000 until 2006) it made a number of recommendations in response to family violence in Aboriginal communities including the provision of community-based and community-owned Aboriginal family violence intervention and treatment programs; enhanced provision of services for counselling, education, treatment and short-term crisis accommodation for Aboriginal men; and ongoing reporting and evaluation of programs and initiatives dealing with family violence in Aboriginal communities: see LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No 94 (2006) Recommendations 91, 92, 93.

21. For example, the recognition of the particular vulnerability of Aboriginal communities in relation to family and domestic violence in the recommended new legislation; culturally specific training for police, judicial officers and lawyers; and the requirement for courts to consider the proposed living arrangements for parties to protection order proceedings when determining the terms of a protection order, largely in recognition of the reality in which victims and perpetrators remain together in Aboriginal communities (and to encourage greater recourse to protection orders for Aboriginal victims).

22. Pursuant to s 11(3) of the *Law Reform Commission Act 1972* (WA) on a reference given to the Commission by the Attorney General, the Commission is required to 'examine critically the law with respect to the matter mentioned in the reference' and 'report to the Attorney General on the results of the examination of that law and make any recommendations with respect to the reform of that law, that it considers to be desirable'. The Commission is entitled to submit proposals for the review of any area of law to the Attorney General; however, the Commission does not have the power to initiate its own reference (see ss 11(1) & (2)).

own motion into 'issues associated with Violence Restraining Orders (VROs) and their relationship with family and domestic violence fatalities'.²³ In addition, the Ombudsman has had a general function to review family and domestic violence fatalities since 1 July 2012. This function includes:

- Reviewing the circumstances in which and why child and [family and domestic violence] deaths occur;
- Identifying patterns and trends that arise from reviews of child and [family and domestic violence] deaths; and
- Making recommendations to public authorities about ways to prevent or reduce child and [family and domestic violence] deaths.²⁴

The Commission has forwarded, with permission, the submission from the family of Andrea Pickett to the Ombudsman. Following the completion of the Ombudsman's own motion investigation, the Commission suggests that the Western Australian government further consider whether a broader review of the way in which government agencies respond to family and domestic violence at an operational level should be conducted. Most importantly, the Commission emphasises that adequate resourcing of all aspects of the system is required including for the provision of services by both government and non-government agencies. In addition, adequate resources are required to ensure that, if the recommendations in this Report are implemented, the legal system is complemented by a strong effective service system that supports victims of family and domestic violence to navigate and utilise the legal options available to obtain protection from family and domestic violence.

23. See <<http://www.ombudsman.wa.gov.au/Publications/News.htm>>.

24. See <http://www.ombudsman.wa.gov.au/Review%20of%20Certain%20Deaths/review_of_certain_deaths.htm>.

Methodology

DISCUSSION PAPER

On 19 December 2013 the Commission released and launched its Discussion Paper, *Enhancing Laws Concerning Family and Domestic Violence*. The Discussion Paper included 53 proposals for reform and a further 29 questions which had been formulated after extensive research and consultations. From mid-August 2013 until the beginning of November 2013 the Commission undertook consultations with over 150 individuals from a wide range of government and non-government agencies. In addition, the Commission observed the operation of the Family Violence Courts in Midland, Joondalup and Perth, and the Barndinalgu Aboriginal Family Violence Court in Geraldton. Further regional input was obtained from consultations with various stakeholders in Broome and Kununurra in 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 that report is annexed to the Discussion Paper.¹

The Commission requested that submissions in response to its proposals (and questions) be provided by 31 January 2014. This deadline was set because the Commission was required to provide its final report to the Attorney General by the end of March 2014. Understandably, given the relatively short period of time available and the particular time of the year, a considerable number of individuals and agencies requested an extension of time to provide submissions. The Commission granted extensions until the end of February 2014 in order to accommodate the practical difficulties being experienced by a number of individuals and agencies in meeting the deadline. As a consequence, the Commission requested an extension of time from the Attorney General for completion of this Report. This request was approved and the Commission was granted an extension to provide this Report to the Attorney General by 31 May 2014. A number of other individuals and agencies subsequently contacted the Commission and requested further

time to provide a submission. In recognition of the difficulties associated with the time and duration of the submission period, and given the important nature of this reference, the Commission has accommodated all requests for extensions and has considered all submissions received, including those provided to the Commission as late as April 2014.

The Commission acknowledges that the timing of the submission period may have discouraged some individuals and agencies from providing a submission.² It is not possible to know whether further submissions would have been received had the submission period been open for a longer period of time. The Commission received a total of 43 submissions and the final submission was received on 14 April 2014.

Following detailed analysis of all of the submissions received, further consultations were required with some individuals and agencies in order to clarify matters raised in submissions or to obtain additional information. Additional consultations for this Report were undertaken with a number of individuals and agencies. A full list of all individuals consulted throughout this reference is included in Appendix D.

ABOUT THIS REPORT

As noted above, the Commission has received 43 submissions from a wide range of agencies and individuals. A considerable number of these submissions were extremely comprehensive³ and the Commission is grateful for the extensive work

1. See Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No. 104 (December 2013) Appendix B.

2. While expressing gratitude for granting of an extension of time in which to provide its submission, the Family Law Practitioners' Association of Western Australia argued that 'other parties with a potentially valuable submission to make may have been adversely effected by the timing and duration of the submission period': Family Law Practitioners' Association of Western Australia (Inc), Submission No. 33 (4 March 2014) 2.

3. In particular, the Commission notes that the joint submission of the Women's Council for Domestic and Family Violence Services and the Domestic Legal Workers Network was endorsed by 12 separate agencies: Women's Council for Domestic and Family Violence Services (WA) and the Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). Also, the submission from Legal Aid Western Australia was informed by staff working in urban, regional and remote parts of the state in the areas of family law, criminal law, civil law, specialist family and domestic violence services and child protection: Legal Aid Western Australia, Submission No. 35 (7 March 2014).

undertaken by many individuals and agencies in the preparation of their submissions. A list of submissions is included in this Report in Appendix C. All submissions received have been carefully considered by the Commission in formulating its final recommendations for reform in this Report.

This Report is divided into five chapters. Chapter One provides an overview of the Commission's approach to reform including a discussion of the key themes and objectives for reform. This chapter also includes reference to the terminology used in this Report. Chapter Two addresses the Commission's recommendation in relation to separate family and domestic violence legislation and the objects, principles and key definitions to be included in new legislation. The specific reforms recommended in relation to the police response to family and domestic violence and the civil protection order system are contained in Chapter Three. Chapter Four deals with the criminal justice system's response to family and domestic violence from the commencement of a criminal charge to the expiration of any sentence imposed for an offence. The final chapter deals with other legal issues in relation to family and domestic violence including the intersection of the civil protection order jurisdiction with family law proceedings, the criminal injuries compensation scheme and other areas in regard to victims' rights.

This Report is intended to be read in conjunction with the Commission's Discussion Paper, which contains a more detailed discussion of the relevant issues and the need for reform. In particular, the Discussion Paper provides an overview of the relevant national and state policy initiatives in the area of family and domestic violence as well as a discussion of the nature and extent of family and domestic violence. These topics are not repeated in this Report. The Commission has made a total of 73 recommendations in this Report and a list of recommendations is set out in Appendix A.

Chapter One

The Commission's Approach

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Terminology

Bearing in mind the different laws considered in this reference, it is important to define a number of essential terms that are used in this Report. This section sets out these definitions along with a brief discussion of issues raised in submissions in relation to the terminology adopted by the Commission in its Discussion Paper.

As explained in its Discussion Paper, the Commission has adopted gender neutral terminology in this reference in recognition of the fact that some victims of family and domestic violence are male and some perpetrators are female.¹ Having said that, the Commission acknowledges the unequal gender distribution of victims and perpetrators and that family and domestic violence is mainly perpetrated by men against women. The Commission also notes that Relationships Australia argued in its submission that phrases such as 'violent relationship' or 'abusive relationship' should not be used because it implies mutual responsibility for the violence and reduces perpetrator responsibility.² These phrases were used on six occasions in the Commission's Discussion Paper. Nevertheless, the Commission understands the sentiment expressed by Relationships Australia and has not used these phrases in this Report

FAMILY AND DOMESTIC VIOLENCE

The Commission's terms of reference use the phrase 'family and domestic violence'. In its Discussion Paper the Commission explained that the term 'family and domestic violence' is defined differently depending on the context. For example, the definition adopted by the Department for Child Protection and Family Support is different to the current legislative definition of an 'act of family and domestic violence' under the *Restraining Orders Act 1997 (WA)*.³ For the purposes of this Report, the Commission adopts the applicable

legal definition of 'family and domestic violence' under Western Australia law. In some instances this will be by way of reference to the current definition under the *Restraining Orders Act* but, in others, the term 'family and domestic violence' will incorporate the definition recommended by the Commission in this Report.⁴ Depending on the context, the Commission will make it clear which definition is being used.

Victim and perpetrator

The term '**victim**' is used in this Report to refer to a person who has been subjected to family and domestic violence and the term '**perpetrator**' is used to refer to a person who has committed family and domestic violence (irrespective of whether that person has been charged with an offence or held criminally responsible for any behaviour). In other words, 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 because not all applicants are victims and not all respondents are perpetrators. This is an important distinction. For example, when the Commission highlights in its objectives for reform that the safety of victims should be the principal consideration in any reform agenda, 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 who commit family and domestic violence to account.

1. However, direct references to cited work and/or submissions may refer to victims as female and perpetrators as male.
2. Relationships Australia, Submission No. 29 (28 February 2014) 2.
3. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No. 104 (December 2013) ('LRCWA Discussion Paper') 27.

4. See Chapter Two, Key Definitions: Family and domestic violence.

RESTRAINING ORDER PROCEEDINGS

As will become apparent in this Report, the Commission recommends the use of different language in respect to family and domestic related violence restraining orders. The new recommended term is 'family and domestic violence protection orders'.⁵ The Commission received three submissions explicitly supporting the use of the term 'protection order'.⁶ For example, Relationships Australia argued that the term 'protection order' more accurately reflects the purpose of the order and that the orders are designed to protect victims from more than physical violence. However, a submission received from victim representatives from the Victims of Crime Reference Group expressed concern that the term 'protection order' may discourage victims from seeking orders because it might be viewed as an 'admission that they cannot protect their families'. Instead, it was suggested that consideration be given to the terms 'intervention order' or 'safety order'.⁷ The Commission appreciates the argument; however, it is not convinced that the suggested alternative terms are immune from similar concerns. The term 'safety' is closely analogous to the term 'protection' and the term 'intervention' might also imply that intervention was required because the victim was unable to provide for the safety of their family. Depending on the particular perspective of the discussion, the terms 'violence restraining order' and 'family and domestic violence protection order' will both be used in this Report.

The term '**violence restraining order**' is used in this Report in reference to the current law and process under the *Restraining Orders Act* (and also more generally when discussing similar orders in other jurisdictions).⁸ The term '**family and domestic violence protection order**' is used when discussing the Commission's recommendations for reform.

5. See Chapter Two, Recommendation 1. Relationships Australia, Submission No. 29 (28 February 2014) 20; Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 21; Magistrate Deen Potter, Submission No. 43 (14 April 2014).
6. Relationships Australia, Submission No. 29 (28 February 2014) 20; Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 21; Magistrate Deen Potter, Submission No. 43 (14 April 2014).
7. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014).
8. As noted in the LRCWA Discussion Paper, different terminology is used in other states and territories. For example, 'protection order' is used in Queensland and the Australian Capital Territory; 'apprehended violence order' in New South Wales; 'domestic violence order' in the Northern Territory; 'family violence order' in Tasmania; 'intervention order' in South Australia; and 'family violence intervention order' in Victoria: LRCWA Discussion Paper, 28. In some instances, references to the alternative terms used in other jurisdictions are unavoidable (eg, where there is a direct quote or reference to a specific legislative provision).

Applications for 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 '**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'. The Geraldton Resource Centre argued that the term 'person seeking to be protected' should be replaced with the term 'person in need of protection' because it would 'make it clear that there is a responsibility on the community, including the police and the judiciary to pro-actively take steps to protect the victim' of family and domestic violence.⁹ It was also noted that this is the term used in New South Wales.¹⁰ The Commission does not agree with this submission because the term 'person in need of protection' assumes that the person is a victim of family and domestic violence which clearly may not always be the case. The current distinction between the 'person seeking to be protected' and the 'person protected' under the *Restraining Orders Act* is considered appropriate.

The term 'applicant' is not specifically defined but is used in various sections of the *Restraining Orders Act*. In this Report, for ease of reference the term '**applicant**' is used to refer to the person seeking to be protected by a restraining order. The term '**respondent**' is defined in s 3 as the person against whom an order is sought and the Commission adopts this meaning. Therefore, the terms 'applicant' and 'respondent' are used in reference to applications for 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).

9. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 52.
10. The term 'person in need of protection' is only used in s 35 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) which deals with the determination of the appropriate conditions of an order once it has been decided that an order should be made. The term 'protected person' is used throughout the Act and means 'the person for whose protection an apprehended violence order is sought or made' (s 3).

Persons protected by and persons bound by an order

Irrespective of whether the Commission is discussing the current law under the *Restraining Orders Act* or its recommendations in this Report, the term '**the person protected**' is used to refer to the person on whose behalf the order is made and 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 or 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 explained in its Discussion Paper, the Commission undertook extensive consultations primarily to ensure that its proposals for reform responded to those aspects of the legal system most in need of improvement and were informed by the views of individuals with day-to-day experience and expertise in relation to the way in which the legal system responds to family and domestic violence. Three consistent themes were identified, and given that many of the Commission's proposals and questions were designed to address these issues, it is useful to summarise these themes for the purposes of this Report.

LACK OF AWARENESS AND UNDERSTANDING OF FAMILY AND DOMESTIC VIOLENCE

The Commission observed in its Discussion Paper that 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.¹ Inconsistency in decision-making and lack of understanding of the nature of family and domestic violence was a frequent complaint during the Commission's consultations for this reference. In particular, the Commission was told by a number of people that there is a wide divergence in approaches by judicial officers, police and lawyers and the main reason for this is differing levels of understanding about the nature and dynamics of family and domestic violence among professionals working in the legal system.

In particular, the Commission was told that some judicial officers have made inappropriate comments with the effect that the victim may be re-traumatised and/or discouraged from accessing legal avenues for

protection in the future. Further, the Commission was informed that some judicial officers still hold the view that family and domestic violence is not as serious as other forms of violence, and that some 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. 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. 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 backgrounds, people with disabilities and Aboriginal people, especially those from remote areas) and a lack of appreciation of the detrimental impact of children's exposure to family and domestic violence.

Complaints about lack of understanding and inconsistent responses were also levelled against the police (although there was strong support for members of the Western Australia Police specialist Family Protection Units and the Family Violence State Coordination Unit²). In particular, the Commission was 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 and that there is nothing that can be done because it is only 'your word against his'. Some stakeholders also referred to problems encountered when lawyers who are inexperienced with family and domestic violence inappropriately recommend negotiated outcomes (eg, entering into an undertaking rather than proceeding with an application for a violence restraining order).

There were also some comments made (although to a far lesser extent) in relation to staff who work for victim support agencies. Specifically, 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

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 30–2. See, eg, 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; Australian Law Reform Commission/New South Wales Law Reform Commission (ALRC/NSWLRC), *Family Violence – A National Response* (2010) [31.1]; Victorian Law Reform Commission, *Review of Family Violence Law*, Report (2006) [6.21], [12.19].

2. This was reiterated in submissions. Anglicare expressly acknowledged the 'outstanding responses' of the specialist police officers in the Family Protection Units: Anglicare, Submission No. 28 (25 February 2014) 17.

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.

The Commission expressed its concern about the significant reporting by stakeholders of a lack of awareness and understanding of family and domestic violence among judicial officers, police and other professionals working in the legal system in Western Australia. Nonetheless, the Commission recognised that there are many professionals with expertise, experience and interest in the area of family and domestic violence. In formulating proposals for reform the Commission endeavoured to find solutions to maximise access to the knowledge and understanding that currently exists and to increase the level of knowledge and understanding in the system generally.

The views expressed during consultations have been repeated in many of the submissions received in response to the Commission's Discussion Paper. In its submission, Legal Aid expressly endorsed all three of the Commission's key themes.³ In a submission received from a justice of the peace it was confirmed that there is a 'variation in the approach to family violence caused by divergent levels of understanding of the dynamics of family and domestic violence'.⁴ Relationships Australia stated that 'we concur with the view that within the legal system there are disparate and varying understandings of' family and domestic violence. It also explained that women who had attended its programs have 'reported feeling "judged", "not believed", "blamed" and "intimidated" by judicial officers'.⁵ This submission mentioned examples, including one case where a magistrate responded to a woman who was applying for a violence restraining order as a consequence of physical abuse – 'can't you two just sort it out for yourselves?'⁶

The Geraldton Resource Centre also provided case examples. In one of these examples, a woman obtained an interim violence restraining order after her former partner had smashed her mobile phone, forced her and her 18-month-old son into a room, pushed her against a wall, placed his hands around her throat and pushed the infant across the room in an attempt to lunge towards her. According to this submission, at the final order hearing the magistrate

3. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 6.
4. Martin Chape JP, Submission No. 10 (29 January 2014) 3.
5. Relationships Australia, Submission No. 29 (28 February 2014) 6.
6. Relationships Australia, Submission No. 29 (28 February 2014) 5.

was not inclined to make a final order and stated that because the applicant and the respondent had a son together, she would need to find a way to work with him and she 'needed to get on with it'. After legal argument she was granted a final order but only for a period of three months.⁷

INFORMATION GAPS

During its consultations, the Commission received a strong message from stakeholders 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 its case. Taking into consideration that the parties may not be legally represented and that victims of family and domestic violence may be particularly vulnerable and traumatised, placing the onus on the parties to gather and provide all relevant available information is not conducive to informed decision-making.⁸

The types of information in relation to violence restraining order proceedings that are reportedly not always available include: the criminal records of both parties; records of prior violence restraining orders made between the parties or with other persons; previous police domestic violence incident reports; whether a police order has been issued against one of the parties; 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 Department for Child Protection and Family Support. This is despite the fact that the *Restraining Orders Act 1997* (WA) requires a court in determining whether to make a violence restraining order to have regard to most of this information.⁹

One specific example referred to the Commission during consultations is where a court has made an interim ex parte violence restraining order against one party without knowing that a violence restraining

7. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 59.
8. LRCWA Discussion Paper, 33–4.
9. Section 12 of the *Restraining Orders Act 1997* (WA) provides that a court is to have regard to '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'; 'any family orders'; 'other current legal proceedings involving the respondent or the person seeking to be protected'; 'any criminal record'; and 'any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise'.

order has already been made in favour of that party (or vice versa).

Likewise, the Commission was informed that during other legal proceedings (eg, bail and sentencing hearings) the court is not always properly informed of all relevant information. Examples included insufficient information in relation to the nature and context of alleged or proven breaches of violence restraining orders and the absence of national criminal histories in relation to family and domestic violence related offending for sentencing purposes.

In its Discussion Paper the Commission made a number of proposals designed to either facilitate a more proactive approach by courts to obtaining information or to improve the quality of information presented to courts by others.¹⁰ In adopting this approach the Commission was informed by practices utilised in the Family Court as well as the approach of the Australian Law Reform Commission and New South Wales Law Reform Commission (ALRC/NSWLRC) in their comprehensive report on family violence. That report highlighted that 'legal and other responses to family violence are improved if information is provided and of better quality from the outset'¹¹ 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'.¹² The Commission has received very strong support in submissions for this overall approach.

DUPLICATION

The final key theme that emerged from the Commission's consultations and research was duplication of family and domestic violence related legal proceedings. In its Discussion Paper, the Commission noted that duplication may occur in a number of circumstances including:¹³

- Where victims and perpetrators of family and domestic violence are required to participate and give evidence in criminal proceedings in relation 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.

- 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.

It highlighted that duplication of legal proceedings causes a number of significant problems including re-traumatisation for victims who are required to repeat their accounts of violence; additional stress, time and cost for parties; duplication of resources within the legal system for judicial officers, lawyers and other agencies; delays caused by the adjournment of one legal proceeding to await the outcome of the other; and potentially inconsistent orders and decisions made by different courts.

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 to enable the determination of questions of fact in relation to family and domestic violence to occur only once or as rarely as possible. The Commission observed that the ideal 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). However, it expressed the view that the constitutional, infrastructure and resourcing requirements for such a model are, in reality, prohibitive.¹⁴ Further, 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. Therefore, it formulated its proposals for reform with the goal of reducing as far as possible the level of duplication (while ensuring that the legal rights of parties are not compromised).

10. See, eg, LRCWA Discussion Paper, Proposals 2, 20, 34, 37, 45 and Question 11.

11. ALRC/NSWLRC, *Family Violence – A National Response* (2010) 61.

12. *Ibid* [30.2].

13. LRCWA Discussion Paper, 34–6.

14. *Ibid* 36.

Objectives for reform

In its Discussion Paper the Commission formulated five objectives for reform designed broadly to reflect what the Commission aimed to achieve through its proposed reforms and to address the major areas of concern identified during consultations and research.¹ As noted, these objectives are interrelated because reform options designed to achieve a particular end may, at the same time, accomplish other outcomes. The Commission received two submissions explicitly endorsing its five objectives for reform.² Legal Aid commented that ‘articulating clear objectives and principles for reform’ provides a ‘framework to guide law reform and policy development and a benchmark against which any new policy proposals and legislative changes can be tested and evaluated’.³ In addition, Legal Aid argued for the inclusion of an additional objective and the Commission has included a sixth objective for reform below.⁴

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

Enhancing the safety of persons who have experienced or are at risk of family and domestic violence is, in the Commission’s view, the principal objective for reform.⁵ Legal Aid observed that

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) (‘LRCWA Discussion Paper’) 37–9.
2. Relationships Australia, Submission No. 29 (28 February 2014) 37; Legal Aid Western Australia, Submission No. 35 (7 March 2014) 3.
3. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 3.
4. Legal Aid also argued that a further theme or principle should be that any law and policy reform is evidence-based and, further, that there should be a separate approach for children. The Commission agrees that reforms should be evidence-based; however, it does not consider that this represents an ‘objective’ for reform or that it is correctly categorised as a principle under legislation. In regard to children, the Commission specifically recognises the particular needs and vulnerability of children in its formulation of general legislative principles: see Chapter Two, Principles.
5. It was noted in the LRCWA Discussion Paper that victim safety is at the forefront of many legislative regimes in other jurisdictions 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’. Also s 7 of the *Domestic Violence and Protection Orders Act 2008* (ACT) provides that in deciding an application for a domestic violence protection

the Commission’s proposals for reform represent ‘a conscious paradigm shift of the [family and domestic violence] restraining orders to primarily belonging within a protective jurisdiction, where the principal focus is the protection and safety of vulnerable victims of [family and domestic violence] – particularly children’.⁶

In the Commission’s view, the violence restraining order system has always had as its foundation the need to provide protection for those at risk of future violence because the purpose of the order is to restrain a person from engaging in specific behaviour in order to reduce the likelihood of future violence. In addition, the system does not, of its own accord, seek to punish perpetrators for past conduct. However, in practice the restraining order system has been approached to a large extent as a civil dispute between two parties and for that reason it is often highly adversarial.

By stipulating that the safety of victims and children is the principal consideration, reforms should necessarily focus on legislative and practical measures that seek to ensure the accurate identification of those who have experienced or are at risk of future family and domestic violence (and those at risk of committing it). This lends itself to a less adversarial approach to family and domestic violence restraining order matters, so that relevant and reliable information is available to and/or accessible by courts in reaching the appropriate decision.

In addition, the provision of an effective, respectful and supportive legal response will further enhance victim safety by ensuring that victims have confidence to seek assistance by reporting family and domestic violence to police and/or by applying for a violence restraining order. As the Commission commented in its Discussion Paper, improving the knowledge and understanding of the nature and dynamics of family

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’.

6. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 4.

and domestic violence within the legal system is one way of achieving a more effective response and increasing confidence in the system.⁷ In addition, this goal is more likely to be achieved by reducing duplication within the system and the resulting re-traumatisation of victims. In other words, it is not only important to ensure that there are appropriate legislative provisions to enable orders to be imposed for the protection of victims but also it is vital for the system to respond in a supportive and sensitive manner so that victims continue to utilise the remedies available under the law.

Furthermore, it is not only the restraining order system that has a role to play in relation to victim safety. The response to family and domestic violence related offences (including breaches of violence restraining orders) is also important and victim safety must weigh heavily in decision-making in regard to bail conditions and sentencing (including parole). Having said that, it is recognised that other factors are relevant in the criminal justice context such as punishment, deterrence and rehabilitation.

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

As observed in the Discussion Paper, an overarching objective of reform is to reduce family and domestic violence.⁸ One way of achieving this is to increase perpetrator accountability and endeavour to support perpetrators to change their behaviour. Measures to increase perpetrator accountability can be undertaken at a service system level (eg, Department for Child Protection and Family Support caseworkers engaging with perpetrators or police referring perpetrators to support services). In the context of the Commission's terms of reference there are legal system responses that may increase perpetrator accountability such as violence restraining orders and criminal sanctions (and mandated or voluntary programs within these legal spheres).

The Commission does not suggest that participation in perpetrator programs will result in a reduction or cessation of violent behaviour;⁹ however, it

7. LRCWA Discussion Paper, 37.

8. Ibid 38.

9. As will be discussed further in this Report, an evaluation of the specialist Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court in Geraldton has been undertaken. These specialist courts require offenders to attend treatment programs. According to a media report, the results of the review indicate that the courts are failing and the recidivism rate for participants is higher than in mainstream courts: Banks A, 'Domestic Violence Courts Fail', *The West Australian* (Perth), 12 April 2014. The Commission has been

appears unlikely that most perpetrators will cease their behaviour in the absence of intervention. Furthermore, engagement of perpetrators in programs may assist in enhancing victim safety because behaviour of the perpetrator during the program can be monitored by relevant agencies and taken into account in providing assistance to victims and formulating appropriate safety plans. For the same reasons, it is important that sentencing options for family and domestic violence offenders are effective and are designed, as far as possible, to reduce reoffending. Wherever possible these options should be structured to maximise the safety of the victim. It is also important that interventions for perpetrators are culturally appropriate and that relevant programs are available for persons with disability and for perpetrators who are themselves children.

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

As outlined above, the Commission is of the view that the safety of victims of family and domestic violence is the principal objective for reform. However, as Legal Aid confirmed, this does 'not mean that fairness and the protection of individual rights are not important considerations'.¹⁰ In this context, it is vital to acknowledge that not every person who applies for a violence restraining order is a victim of family and domestic violence and not every respondent is a perpetrator.

As noted in the Discussion Paper, the current restraining order system is not without its critics in terms of its overuse or abuse.¹¹ Although it is true that most applications for violence restraining orders are properly made, sometimes they are unmeritorious or otherwise used for tactical purposes in family law litigation.¹² And yet, many lawyers consider

refused access to the report of this review and therefore is unable to make any assessment of the effectiveness of these programs in terms of reducing reoffending in the Western Australian context. For further discussion, see Chapter Four, Specialist family violence courts.

10. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 5.

11. LRCWA Discussion Paper, 38.

12. Parkinson P et al, 'Post-Separation Conflict and the Use of Family Restraining Orders' (2011) 33 *Sydney Law Review* 1, 32–3. See also P Parkinson et al, 'The Views of Family Lawyers on Apprehended Violence Orders After Parental Separation' (2010) 24 *Australian Journal of Family Law* 313, 315; Hickey J & Cumines S, 'Apprehended Violence Orders: A survey of magistrates' (Sydney: Judicial Commission of New South Wales, 1999) 37. One regional magistrate expressed the view that some applicants may file an application for a violence restraining order as an alternative to seeking Family Court orders or to obtain outcomes in Family Court proceedings: Magistrate Dianne Scadden, email consultation (21 May 2014).

that violence restraining orders, in particular those applied for after proceedings have been instituted in a family law dispute, may actually exacerbate conflict and decrease the prospects of the parties reaching agreement, with a consequent impact upon legal costs.¹³

Because an interim violence restraining order can be made on the uncorroborated evidence of the applicant, the potential for abuse is very real. One example repeatedly mentioned to the Commission during its consultations is where 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 justice 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

Western Australia's *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 agencies along with non-government organisations and individuals.¹⁴ A key initiative in this regard is the Family and Domestic Violence Response

Teams – a partnership between the Department for Child Protection and Family Support, the Western Australia Police and non-government family and domestic violence services. These teams undertake a joint triage and assessment process for reported incidents of family and domestic violence. The Family Violence Courts in the metropolitan area and the Barndimalgu Aboriginal Family Violence Court in Geraldton are examples of interagency collaboration between agencies in the justice context.¹⁵ 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.

The Commission is of the view that integration and coordination between agencies (which necessarily requires a degree of information sharing) is critical for any legal response to family and domestic violence to ensure appropriate decision-making in order to enhance victim safety and increase perpetrator accountability. It is also vital that there is integration and coordination between courts because victims and perpetrators are often required to participate in multiple legal proceedings in relation to family and domestic violence.

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

One of the key themes discussed earlier in this Chapter is the lack of awareness and understanding of the nature and dynamics of family and domestic violence and the resulting inconsistency in decision-making and approaches of professionals working in the justice system. Apart from the potential of this inconsistency to result in inappropriate decisions it also means that the legal system has the potential to itself become a further barrier to victims seeking help. The need to improve the overall level of understanding within the legal system is an important goal of reform. Knowledge can be enhanced by appropriate legislative provisions that identify the most important facets of family and domestic violence and that require consideration of these matters in decision-making along with adequate training and education and increased use of specialisation.

13. Parkinson P et al, 'The Views of Family Lawyers on Apprehended Violence Orders After Parental Separation' (2010) 24 *Australian Journal of Family Law* 313, 329. See also Parkinson P et al, 'Post-Separation Conflict and the Use of Family Restraining Orders' (2011) 33 *Sydney Law Review* 1, 34.

14. Government of Western Australia, *Western Australia Strategic Plan for Family and Domestic Violence 2009–2013* (2009) 2–3.

15. As noted earlier, according to a media report these courts have not been successful in terms of reducing offending but the Commission has not been given access to the evaluation report and is, therefore, unable to make any assessment of the accuracy of this observation or of the findings actually made.

6. Maximise timely legal responses

In its submission, Legal Aid argued that timeliness should be included as a further objective for reform because it is a critical aspect of ensuring protection for victims and children as well as for ensuring procedural fairness for both parties.¹⁶ The Commission agrees and notes that a number of its proposals for reform reflected this objective in any event.¹⁷ However, the objective of timeliness must be considered in conjunction with the objective of providing fair and just legal responses to family and domestic violence. In some instances, applicants or respondents will need time to obtain evidence, seek legal representation or seek advice from relevant support services. However, facilitating the resolution of violence restraining order applications and hearings as soon as is reasonably practicable is an important aim of reform.

16. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 5.

17. See LRCWA Discussion Paper, Proposals 18, 19, 24.

Chapter Two

Separate Family and Domestic Violence Legislation

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Separate legislation

As outlined in the Introduction of this Report, the Commission's terms of reference require it to consider, among other things, the benefits (or otherwise) of having separate family and domestic violence legislation. Additionally, and more specifically, the terms of reference require the Commission to consider the utility of separating family and domestic violence restraining orders from the *Restraining Orders Act 1997* (WA). For its Discussion Paper, the Commission did not address these terms until it had first examined in detail current relevant Western Australian legislation and associated practices. The Commission took this approach because it is not appropriate to first determine if separate legislation is warranted before deciding what reforms (if any) are required to existing laws and how those reforms might be accommodated within the current legislative regime. However, now that the Commission has formulated its approach to reform across the legal system as a whole, it is in a position to address the terms of reference in regard to separate legislation at the outset.

SEPARATE LEGISLATION FOR ALL FAMILY AND DOMESTIC VIOLENCE RELATED LEGAL ISSUES

In its Discussion Paper, the Commission concluded that wide-ranging separate family and domestic violence legislation is not appropriate.¹ It noted that such legislation could potentially include all family and domestic violence related criminal offences; relevant provisions of various criminal justice legislation (eg, *Bail Act 1982* (WA), *Evidence Act 1906* (WA), *Criminal Investigation Act 2006* (WA), *Sentencing Act 1995* (WA), *Sentence Administration Act 2003* (WA)); and relevant provisions of the *Victims of Crimes Act 1994* (WA) and the *Criminal Injuries Compensation Act 2003* (WA). This would inevitably mean that many provisions would be replicated under new separate family and domestic violence legislation but still remain in existing legislation for non-family and domestic violence related matters.

In reaching this conclusion, the Commission took into account a number of factors and these are discussed in detail in its Discussion Paper.² One matter that strongly influenced the Commission was the consequences of removing family and domestic violence criminal offences from the *Criminal Code* (WA). Although a small number of stakeholders argued that removing family and domestic violence criminal offences from the *Criminal Code* would mark the seriousness of this type of offending, the Commission disagreed and expressed the view that this approach is more likely to have the opposite effect (ie, that family and domestic violence offences are different to, and of lesser significance than, forms of criminal behaviour). In determining that separate wide-ranging family and domestic violence legislation is inappropriate, the Commission also took into account that such legislation would be so lengthy as to be unworkable as a single code and that no other Australian jurisdiction adopts this approach.

Only a small number of submissions received by the Commission addressed this issue. In its submission, the Department of the Attorney General stated that 'it would have grave concerns about any proposal to remove [family and domestic violence] related crime from the *Criminal Code*'.³ One magistrate agreed with the Commission's concern that separating family and domestic violence offences may lead to the perception that it is considered less serious than other criminal behaviour.⁴ Moreover, if there were compelling arguments in favour of or significant support for wide-range separate family and domestic violence legislation the Commission would have expected to receive submissions advocating for such an approach. This is not the case. Accordingly, the Commission maintains its view that wide-ranging separate family and domestic violence is inappropriate.

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 164.

2. Ibid 163–4.

3. Department of the Attorney General, Submission No. 21 (19 February 2014) 3.

4. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 9.

SEPARATE LEGISLATION FOR FAMILY AND DOMESTIC VIOLENCE RESTRAINING ORDERS

Currently, the *Restraining Orders Act* applies to family and domestic violence related restraining orders, as well as restraining orders for other types of violence that occur outside a family and domestic relationship. Additionally, the Act provides for misconduct restraining orders (generally for less serious forms of unacceptable behaviour) for persons in non-family and domestic relationships. There are some provisions in the Act specifically targeted at family and domestic violence (eg, a specific definition of family and domestic violence; violence restraining orders to protect children who have been exposed to family and domestic violence; police orders; and police functions in relation to family and domestic violence).

In contrast to the position in Western Australia, there are four Australian jurisdictions with separate legislation for family and domestic violence restraining orders: Queensland, Victoria, Northern Territory and Tasmania.⁵ In these jurisdictions, different legislation exists in relation to orders for violent and other behaviour in non-family and domestic relationships. As far as the Commission is aware no reviews or evaluations have been undertaken that directly address the effectiveness of enacting separate legislation for family and domestic violence restraining orders.

In its Discussion Paper, the Commission examined the relevant provisions of the *Restraining Orders Act* and made various proposals for reform. Following this, it considered whether Western Australia would benefit from separate family and domestic violence restraining order legislation. The Commission acknowledged that 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. This is the approach adopted in some jurisdictions; for example, s 9 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) contains the objects of the Act in relation to domestic violence and s 10 includes the objects of the Act in relation to personal violence. The Commission took into account the various arguments and was persuaded that separate new family and domestic violence restraining order legislation would

be appropriate for Western Australia. It was proposed that a new Family and Domestic Violence Protection Order Act should be enacted.⁶

The main basis for this proposal was that a new dedicated Family and Domestic Violence Protection Order Act 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 that it would result in an improved understanding of family and domestic violence and better practices within the legal system.⁷ The Commission also took into account that a new separate Act would promote a clearer and stronger articulation of legislative objects and principles in relation to family and domestic violence because these provisions would appear upfront and apply to the entire Act. This, in turn, would enhance knowledge and understanding of family and domestic violence in the system and in the community. 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. Such an Act is more likely to be accompanied by appropriate service sector reforms and increased resources. It is also highlighted that a practical benefit of separating family and domestic violence restraining orders from other restraining orders is that more accurate data can be collected and monitored in relation to such orders.

The proposal stipulated that a new Act should include, among other things, objects and general principles; definitions of 'family and domestic violence' and 'a family and domestic relationship'; the grounds for making a family and domestic violence protection order; all court processes dealing with applications for and hearings of family and domestic violence protection orders; police powers of investigation in relation to family and domestic violence; police orders; provisions dealing with making family and domestic violence protection orders during other proceedings; and information sharing provisions. It was also proposed that the definition of 'a family and domestic relationship' for the purposes of the definition of circumstances of aggravation under the *Criminal Code* should be aligned to the definition of 'a family and domestic relationship' under the new Act.⁸

The Commission received 18 submissions directly responding to its proposal for a new Family and Domestic Violence Protection Order Act. Only two

5. For a more detailed description of the position in these jurisdictions with regard to separate legislation, see LRCWA Discussion Paper, 164–6.

6. LRCWA Discussion Paper, Proposal 53.

7. Ibid 167–8.

8. Ibid 168.

of these submissions opposed the proposal, both on the basis that the current legislation is adequate.⁹ The Western Australia Police also argued that the enactment of new legislation will require considerable changes to its policies and guidelines, and additional training will be required (and it was noted that funding has not been provided for this purpose). However, the submission indicated its support for many of the Commission's other proposals for legislative reform. It is the Commission's view that, if these reforms are implemented, amendments to Western Australia Police policy and guidelines and additional training will be required in any event (albeit to a lesser extent).

The remaining 16 submissions all supported the Commission's proposal with a number also advocating for additional provisions to be included in the new Act.¹⁰ In its submission, the Department of the Attorney General stated that there is a 'strong case' for separate family and domestic violence restraining order legislation and reiterated a number of the arguments relied on by the Commission in support of separate legislation. For example, the Department stated that separate legislation could signify that Parliament considers family and domestic violence 'an issue of such magnitude as to warrant its own legislation'; enable the provision of specific principles and objects; provide an indication to judicial officers of Parliament's intention that the specific characteristics of family and domestic violence should be taken into account in decision-making; support future policy development; and support 'development over time of increasing

jurisdictional flexibility'.¹¹ The Geraldton Resource Centre submitted that separate family and domestic violence protection order legislation

may help to send a clear message to judicial officers, police and the community at large that [family and domestic violence] is unacceptable, and that it is an issue of such importance that the legislature is devoting special attention to it. The government will be seen to be taking a stance against [family and domestic violence], which could potentially have a positive effect on community attitudes and on victim willingness to come forward/disclose what is happening to them.¹²

Legal Aid also agreed that separate legislation would 'send a clear message that the Government and community take [family and domestic violence] sufficiently seriously to warrant its own separate focus' and it may also 'facilitate specialisation of judiciary, court participants and processes more suitable to' family and domestic violence (eg separate identification and listing of family and domestic violence matters).¹³

One magistrate expressed support for the Commission's proposal and agreed that 'separate legislation is more likely to be accompanied by increased resources which are vital to support the court in ensuring that the objects of the legislation are met'.¹⁴ Further, that magistrate endorsed the Commission's view that separate legislation 'will recognise that family and domestic violence is different to other forms of violence'.¹⁵ While commenting that the provisions in the current *Restraining Orders Act* are generally sufficient, another magistrate agreed that a new Act 'has the potential to raise the level of seriousness of family and domestic violence in the community's collective consciousness. Further, separate legislation may attract specific funding for support services'.¹⁶

The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network strongly supported the Commission's proposal but also argued that a new Act should include a number of broader provisions, including reference to the *National Plan to Reduce Violence against Women and*

9. A Murad, Submission No. 7 (28 January 2014) 6; Western Australia Police, Submission No. 26 (27 February 2014) 28.

10. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Hayley Barbarich, Submission No. 8 (28 January 2104); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department of the Attorney General, Submission No. 21 (19 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014); Magistrate Deen Potter, Submission No. 43 (14 April 2014).

11. Department of the Attorney General, Submission No. 21 (19 February 2014) 3.

12. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 51.

13. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 70.

14. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 21.

15. Ibid.

16. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 9.

Children, 2010–2022;¹⁷ the allocation of a budget for implementation; training for various officials; a requirement for protocols and guidelines to be developed; the establishment of specialised police and prosecutorial units; details of preventative measures; the provision of comprehensive and integrated support services; the collection of statistical data; the provision of free legal aid and court support; and the establishment of a specific mechanism to monitor the implementation of the legislation. These suggestions were largely based on model provisions from the *United Nations Handbook for Violence against Women Legislation*.¹⁸

While the Commission appreciates the importance of a number of the additional issues suggested for inclusion in any new legislation, it does not consider that matters concerning the provision of services and budget allocation are appropriate for inclusion in legislation dealing with family and domestic violence protection orders. Mandating the provision of particular services or the allocation of funding is arguably only appropriate if such provisions are directed to a particular department or agency. In the context of the Commission's proposed legislation, there is no single government agency with the responsibility for providing funding or services in the area of family and domestic violence (ie, responsible agencies include the Department for Child Protection and Family Support, the Department of Corrective Services, the Department of the Attorney General and non-government agencies). Such a responsibility rests on the government as a whole. However, the Commission agrees that any new legislation should (as is frequently the case under Western Australian Acts) provide for a statutory review after a period of five years after implementation.

Other areas suggested as suitable for inclusion in the new Act are addressed in later chapters of this Report (eg, provisions concerning timely and expedited proceedings; the relationship between protection orders and other legal proceedings; issues concerning tenancy agreements; pro-arrest and pro-prosecution policies; enhanced sanctions for repeated/aggravated offences of domestic violence; and intervention programs for perpetrators; and alternative sentencing).

17. For a discussion of the *National Plan to Reduce Violence against Women and their Children 2010–2022* and its implementation, see LRCWA Discussion Paper, 16–18.

18. Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, *Handbook for Legislation on Violence against Women* (2009). The Commission notes that this model legislation deals with all forms of violence against women and not just family and domestic violence.

A number of submissions argued that specific recognition of issues affecting children should be recognised in any new legislation. Two of these submissions contended that any legislative principles should include recognition that dependent children living in a situation of family and domestic violence will be adversely affected by family and domestic violence irrespective of whether they have witnessed or heard any acts of violence or abuse.¹⁹ While supporting the Commission's proposal, the Commissioner for Children and Young People referred to the developmental vulnerabilities of children and young people and suggested that specific provisions dealing with protection orders imposed against children may be worthy of inclusion under the new Act.²⁰ Likewise, Youth Legal Service submitted that there 'must be a separate framework for children who are perpetrators'.²¹ The Commission addresses this issue below in its discussion of legislative principles.

Bearing in mind the strong support received from submissions, the Commission maintains its view that the enactment of specific family and domestic violence protection order legislation is appropriate for Western Australia. The recommendation below outlines the principal areas that the Commission considers should be included in the new legislation. In later chapters of this Report, specific provisions are recommended in relation to each of these areas. Appendix B represents a list of all recommendations that relate to the provisions of the new Act.

The Commission also recommends below that the provisions of the *Criminal Code* referring to the definition of a family and domestic relationship for the purpose of defining circumstances of aggravation be amended to refer to the definition under the newly enacted Family and Domestic Violence Protection Order Act. Furthermore, the Commission recommends that consequential amendments be made to the *Restraining Orders Act*. There are a number of existing provisions that relate solely to family and domestic violence (eg, definition of 'an act of family and domestic violence', definition of 'a family and domestic relationship', police orders, obligation to investigate family and domestic violence, and police powers of search and entry). These provisions will need to be repealed or amended to reflect their inclusion in the new Act. Similarly,

19. Maggie Woodhead, Submission No. 4 (17 January 2014) 9; Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014) 7.

20. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 22.

21. Youth Legal Service, Submission No. 18 (18 February 2014) 33.

there are general provisions under the *Restraining Orders Act* that currently apply to both family and domestic violence related matters and non-family and domestic violence related matters. Not all of these provisions are subject to recommendations in this Report and, as such, it will be necessary to ensure that all relevant provisions are replicated under the new Act.

RECOMMENDATION 1

The Family and Domestic Violence Protection Order Act

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) the objects of the Act;
 - (b) recognition of key features of family and domestic violence;
 - (c) principles;
 - (d) the grounds for making a family and domestic violence protection order;
 - (e) the definition of 'family and domestic violence' and 'a family and domestic relationship';
 - (f) all court processes dealing with applications for and hearings of family and domestic violence protection orders including applications for variation or cancellation of such orders;
 - (g) police powers of investigation and responsibilities in relation to family and domestic violence;
 - (h) police orders;
 - (i) provisions dealing with the making of family and domestic violence protection orders during other proceedings;
 - (j) provisions dealing with the provision of information to courts in relation to applications for and hearings of family and domestic violence protection orders; and
 - (k) that the legislation be reviewed after a period of five years has elapsed since its introduction.

2. That the provisions of the *Criminal Code* (WA), that refer to the definition of a family and domestic relationship for the purpose 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.
3. That, as part of the process of drafting the Family and Domestic Violence Protection Order Bill, consideration be given to all of the current provisions of the *Restraining Orders Act 1997* (WA) to ensure that the new legislation contains all necessary procedural and process provisions.
4. That consequential amendments be made to the *Restraining Orders Act 1997* (WA) to ensure that the current provisions under that legislation that exclusively concern family and domestic violence matters are repealed.

The Family and Domestic Violence Protection Order Act

As outlined in the preceding section, the Commission recommends that a new Family and Domestic Violence Protection Order Act be enacted in Western Australia. The main rationale for this recommendation is the goal of enhancing the understanding of family and domestic violence within the legal system, and the community generally, and to facilitate more consistent and appropriate decision-making. This section deals with the general features of the new legislation: objects, principles and key definitions. It is the Commission's view that these features (coupled with appropriate training across the board¹) will facilitate a more informed approach to dealing with family and domestic violence protection orders.

OBJECTS

Legislation may include an objects clause which is a provision at the beginning of the Act that 'outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity'.² Section 18 of the *Interpretation Act 1984* (WA) provides that 'in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written or not) shall be preferred to a construction that would not promote that purpose or object'. Therefore, the inclusion of an objects clause is likely to assist in the interpretation of legislation by the provision of an express statement of the purposes of the Act.

As noted in the Discussion Paper, the *Restraining Orders Act 1997* (WA) does not currently include an objects clause.³ After reviewing relevant provisions in other jurisdictions and the recommendations in the Australian Law Reform Commission and New South Wales Law Reform Commission ('ALRC/NSWLRC') report on family violence (as well as taking into

account the Commission's objectives for reform), the Commission proposed that the specified objects of any new legislation dealing with family and domestic violence should be:

- to maximise safety for children and adults who have experienced family and domestic violence;
- to prevent and reduce family and domestic violence to the greatest extent possible; and
- to promote the accountability of perpetrators of family and domestic violence for their actions.⁴

The Commission received a total of 16 submissions that responded directly to this proposal. Nine of these submissions expressed full support⁵ with the remaining seven submissions indicating support but suggesting alternative wording or additional objects.⁶ Legal Aid specifically highlighted that feedback from Victoria, where similar objects are included in the *Family Violence Protection Order Act 2008* (Vic), 'has assisted interpretation and facilitated educative and cultural changes in the judiciary and legal profession'.⁷

1. The Commission makes recommendations in relation to training for police, judicial officers, court staff and lawyers in later chapters of this Report: see Recommendations 11, 70, 71, 73.
2. Australian Law Reform Commission, *For Your Information: Australian privacy law and practice*, Report No. 108 (2008) [5.90].
3. LRCWA Discussion Paper, 57. The Preamble of the *Restraining Orders Act 1997* (WA) provides that it is an 'Act to provide for orders to restrain people from committing acts of family and domestic violence or personal violence by imposing restraints on their behaviour and activities, and for related purposes'.

4. LRCWA Discussion Paper, Proposal 6.
5. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).
6. Maggie Woodhead, Submission No. 4 (17 January 2014); Department of the Attorney General, Submission No. 21 (19 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). The Commission notes that the Geraldton Resource Centre expressed its preference for the wording of s 9 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW): Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 8. However, the Commission is of the view that the wording of this provision is not ideal because it confuses objects with statements of principle.
7. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 17.

One issue raised in a number of the submissions was the omission of a separate object of reducing or preventing exposure of children to family and domestic violence.⁸ For example, the Commissioner for Children and Young People argued that the inclusion of such an object would 'make a strong statement about the legislation's role in preventing and reducing children's exposure to family and domestic violence'.⁹ The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network submitted that including prevention and reduction of exposure of children to family and domestic violence in the objects clause would more 'closely align the proposed objects with the proposed principles' and with the agenda of the National Plan to Reduce Violence against Women and their Children.¹⁰

In principle, if exposure of children to family and domestic violence is to be included within the legislative definition of 'family and domestic violence' then a separate object in this regard is unnecessary.¹¹ Nevertheless, the Commission is of the view that, irrespective of the precise definition of family and domestic violence adopted in this Report (or in any subsequently enacted legislation), a distinct object in relation to the exposure of children to family and domestic violence is worthy of inclusion. It will serve as a clear indication of Parliament's intention that one purpose of the new legislation is to specifically reduce the exposure of children to family and domestic violence and it will increase awareness within the legal system of the importance of maximising children's safety when making decisions in relation to family and domestic violence protection orders.

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal

Workers Network also argued that the Commission's first proposed object of the legislation—to maximise safety for children and adults who have experienced family and domestic violence—should be reworded to also include the object of maximising the safety of children and adults who *fear* family and domestic violence. They stated:

We realise that anyone who is fearful of family violence has most likely already been subjected to some form of violence (ie, victim may be fearful of their physical safety because they have been threatened which already constitutes [family and domestic violence]), but we feel that by including fear in the objects, educative value is supported in legislation to both the public and professionals. We often find that many victims of [family and domestic violence] are unaware they are victims of [family and domestic violence] until there is a physical assault. Unfortunately, some professionals often share this view.¹²

It is critical that decision-makers and professionals who work in the legal system understand that victims of family and domestic violence may need a protection order before a physical assault has actually occurred. However, the Commission does not agree that the inclusion of 'fear' is the appropriate mechanism to achieve this aim. The concept of fear is inherently subjective – there may be people who unreasonably fear that they will be subject to family and domestic violence because of their own idiosyncratic traits (eg, mental illness) or, alternatively, there may be people who do not appreciate that they are at a high risk of future violence.¹³ The Commission is of the view that 'risk' is a more appropriate term in this context because it focuses attention on the likelihood of future family and domestic violence and the objective need for protection. Accordingly, the Commission recommends that the first object of the new legislation should be to 'maximise safety for children and adults who have experienced or who are at risk of family and domestic violence'.

The Department of the Attorney General submitted that the objects of new legislation could also include 'reducing re-victimisation to the greatest extent possible'.¹⁴ The Commission agrees that, as far as

8. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 9; Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 21. Also, one submission stated that an object of the legislation should be to 'maximise safety for dependent children and adults': Maggie Woodhead, Submission No. 4 (17 January 2014) 3. The Commission is of the view that including a separate object of reducing and preventing exposure of children to family and domestic violence adequately responds to this concern.

9. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 9.

10. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 21.

11. Because exposure of children to family and domestic violence would be included within the meaning of the term 'family and domestic violence'. This was acknowledged in the joint submission of the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 21.

12. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 21.

13. The Victims of Crime Representatives on the Victims of Crime Reference Group highlighted that 'some people currently living with covert forms of [family and domestic violence] may not identify themselves as victims of [family and domestic violence]' and that this 'lack of identification creates high levels of risk for victims, particularly during and after separation and divorce': Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 2.

14. Department of the Attorney General, Submission No. 21 (19 February 2014) 3. The Department also suggested that

is possible, the legal system should endeavour to reduce re-victimisation for victims of family and domestic violence. The Commission has reworded its recommendation to include that an object of the legislation is to prevent and reduce not only the incidence of family and domestic violence, but also the consequences of such behaviour. Re-victimisation and trauma experienced by victims when dealing with the legal system is one such consequence.

RECOMMENDATION 2

Objects clause for the new Family and Domestic Violence Protection Order Act

That the new Family and Domestic Violence Protection Order Act include an objects clause which provides that the objects of the legislation are:

- (a) to maximise safety for children and adults who have experienced or are at risk of family and domestic violence;
- (b) to prevent and reduce the incidence and consequences of family and domestic violence to the greatest extent possible;
- (c) to prevent and reduce the exposure of children to family and domestic violence to the greatest extent possible; and
- (d) to promote the accountability of perpetrators of family and domestic violence for their actions.

PRINCIPLES

Another way of improving decision-making and increasing understanding and awareness of the nature and dynamics of family and domestic violence within the legal system and the broader community is to include key principles in the legislation. In its Discussion Paper, the Commission made an extensive proposal for the inclusion of principles in any new legislation dealing with family and domestic violence protection orders and listed a total of 13

an objects clause could include statements such as 'family violence affects the entire community'; 'family violence occurs in all areas of society'; 'domestic violence is unacceptable in any circumstances, in any form, and in any culture'; 'domestic violence is predominantly perpetrated by men against women and children'; and 'the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being'. The Commission does not agree that these are suitable for inclusion in an objects clause because they are statements about the nature and dynamics of family and domestic violence and do not represent the purposes of specific family and domestic violence legislation.

different principles.¹⁵ Submissions were strongly in favour of this proposal;¹⁶ however, different views were received in relation to specific principles. The Commission discusses below the particular principles and/or statements it considers appropriate for inclusion in new legislation.

However, before considering the precise formulation of any guiding principles, it is necessary to determine how such a provision should appear in the legislation. Other jurisdictions have approached this issue differently. For example, the preamble of the *Family Violence Protection Act 2008 (Vic)*¹⁷ includes recognition of a number of principles and features of family violence. Likewise, the *Domestic and Family Violence Protection Act 2012 (Qld)* includes a preamble that recognises a number of features of family and domestic violence. However, this Act separately includes a provision that sets out the principles for administering the Act including that the 'safety, protection and wellbeing of people who fear or experience domestic violence, including children,

15. LRCWA Discussion Paper, Proposal 7.

16. Nine submissions were received by the Commission that supported the proposal in full: Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014) Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Anglicare, Submission No. 28 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014). A further 14 submissions expressed support for aspects of the proposal and/or made suggestions for additional or amended principles: Maggie Woodhead, Submission No. 4 (17 January 2014); Hayley Barbarich, Submission No. 8 (28 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of the Attorney General, Submission No. 21 (19 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014); Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014). The Commission did not receive any opposition to the proposal.

17. This was the model supported by the ALRC/NSWLRC when it recommended that state and territory legislation should contain guiding principles: ALRC/NSWLRC, *Family Violence – A National Response* (2010) Recommendation 7-1.

are paramount'.¹⁸ In contrast, the legislation in New South Wales contains one provision which includes both objects and statements of principle.

Section 31(1) of the *Interpretation Act 1984* (WA) provides that:

The preamble to a written law forms part of the written law and shall be construed as a part thereof intended to assist in explaining its purport and object.

Historically, legislation in Western Australia does not usually contain an extensive preamble. However, there are a number of Acts that include provisions setting out general principles. For example, s 7 of the *Children and Community Services Act 2004* (WA) provides that in performing a function or exercising a power under the Act in relation to a child, 'a person, the Court or the State Administrative Tribunal must regard the best interests of the child as the paramount consideration'. Section 8 sets out the matters that must be taken into account in determining what is in a child's best interests. Additionally, s 9 contains various principles that must be observed in the administration of the Act.¹⁹ Section 7 of the *Young Offenders Act 1994* (WA) provides for a number of general principles that must be observed in performing functions under the Act and s 46 of the Act stipulates that these principles are to be applied by a court when dealing with a young person who has been found guilty of committing an offence. Therefore, while provisions dealing with general principles can be expressed as relevant to the administration of an Act or the performance of functions under an Act, they can also be applicable to courts.

The Commission is of the view that the precise way in which the applicable principles are included in the new legislation is most appropriately left to Parliamentary Counsel when the new legislation is drafted. Having said that, it is the Commission's opinion that the recognition of key features of family and domestic violence and a statement of principles should be separately provided for under the new Act. Additionally, the factors that are to be taken into account by a court when determining whether to make a protection order and what conditions should

18. *Domestic and Family Violence Protection Act 2012* (Qld) s 4. Examples of other principles included are that 'people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives minimised'; that 'perpetrators of domestic violence should be held accountable'; and that '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'.

19. Section 4 of the *Commissioner for Children and Young People Act 2006* (WA) also contains principles that must be observed in the administration of that Act.

be attached to such an order should be independently specified. This is discussed further in Chapter Three of this Report.²⁰

Recognition of key features of and statements about family and domestic violence

A number of the principles included in the Commission's proposal are more appropriately described as statements about family and domestic violence. The Commission is of the view that their inclusion in legislation serves an important educative function and is likely to assist decision-makers in understanding the nature and dynamics of family and domestic violence. The Commission received submissions directly in response to some, but not all, of these statements. Only those statements that were the subject of comment in submissions are discussed below, as well as additional statements or areas for inclusion.

The nature of family and domestic violence

The Commission proposed that the new legislation should include the statement that 'family and domestic violence extends beyond physical and sexual violence and may involve other coercive behaviour including emotional, psychological and economic abuse'.²¹ Two submissions responded to this part of the proposal; one of these submissions argued that the proposal should read as follows:

That family and domestic violence extends beyond, and may not always include, physical and/or sexual violence and will involve a range of ongoing coercive behaviours including emotional, psychological and economic abuse, and directly or indirectly controlling the manner of parenting of any dependent children by the adult victim.²²

The Commission does not agree that a general statement should be so prescriptive. For example, on the basis of the above suggested alternative statement, family and domestic violence will always involve ongoing coercive behaviour and will always include the perpetrator controlling the adult victim's manner of parenting. The Commission prefers the following wording (which is based upon its recommended new definition of family and domestic violence²³): that family and domestic violence extends beyond physical and sexual abuse and may involve a range

20. See Chapter Three, Relevant factors.

21. See LRCWA Discussion Paper, Proposal 7(d).

22. Maggie Woodhead, Submission No. 4 (17 January 2014)
3. A similar submission was received from the Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014) 3.

23. See Recommendation 5 below.

of intimidating, coercive and controlling behaviours that adversely affect a person's safety or wellbeing or cause a person to reasonably apprehend that his or her safety or wellbeing (or the safety or wellbeing of another person) will be adversely affected.

It was also proposed that the new legislation include the statement that 'family and domestic violence typically involves power imbalances and may involve ongoing patterns of abuse'. Two submissions argued that this should be amended to provide that family and domestic violence *will* involve ongoing patterns of 'coercion, threat and control'.²⁴ However, family and domestic violence may consist of a one-off incident of physical or sexual violence and the suggested statement does not accommodate this reality. Two submissions recognised this and indicated that the word 'may' should be replaced by 'usually' in respect of the ongoing nature of abuse.²⁵ Further, one of these submissions (which was received from a magistrate) proposed that the statement should read that 'family and 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'.²⁶ The Commission agrees that the inclusion of 'overt or subtle' is useful.

The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also suggested the addition of the word 'exploitation' before the reference to power imbalances.²⁷ The Commission agrees with this suggestion because the mere existence of a power imbalance between two persons is not of itself an indicator of the presence of family and domestic violence. Taking these submissions into account the Commission recommends that the new Act should provide that 'family and domestic violence often involves an overt or subtle exploitation of a power imbalance and commonly involves an ongoing pattern of coercive or controlling behaviour'.

24. Maggie Woodhead, Submission No. 4 (17 January 2014) 3; Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014) 3.
25. Anglicare, Submission No. 28 (28 February 2014) 18; Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 5.
26. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 5. This suggestion is based upon the wording of the legislation in Queensland.
27. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 23.

Family and domestic violence during and after separation

One of the Commission's proposed statements recognises that victims of family and domestic violence may be at an increased risk following the breakdown of an intimate partner relationship. It was proposed that the new Act provide that 'family and domestic violence may escalate in frequency and severity after separation'.²⁸ This was specifically included in recognition of the reality that leaving a relationship often does not provide safety for the victim. The submission received from the Victims of Crime Representatives on the Victims of Crime Reference Group highlighted that family and domestic violence can 'occur during the course of separation [and] post-separation'.²⁹ The Commission agrees that this should be made clear in the legislation and accordingly recommends that the new Act include the statement that 'family and domestic violence may escalate in frequency and severity both during and after separation'.

Exposure of children to family and domestic violence

The Commission received two submissions directly in response to its proposed statement 'that the impact on children from being exposed to family and domestic violence is very detrimental'. Both the Commissioner for Children and Young People and the Department for Child Protection and Family Support³⁰ indicated their support for the comparable provision under the Victorian legislation, namely that:

[C]hildren 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.³¹

The Commissioner for Children and Young People supported this formulation because it recognises the 'capacity of children to develop resilience in

28. LRCWA Discussion Paper, Proposal 7(f).
29. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 1.
30. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 10; Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 2.
31. *Family Violence Protection Act 2008* (Vic) Preamble. It is also noted that the preamble to the *Domestic and Family Violence Protection Act 2012* (Qld) states that '[c]hildren who are exposed to domestic violence can experience serious physical, psychological and emotional harm'. Likewise, s 9(3)(f) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides that in enacting the legislation, the Parliament recognises the 'particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being'.

the face of adversity'.³² The Commissioner noted that research indicates that there are a range of negative impacts arising from children's exposure to family and domestic violence (eg, psychological and behavioural impacts such as depression, anxiety, antisocial behaviour and low self-esteem; health and socio-economic impacts such as substance abuse; and the potential for intergenerational transmission of violence). However, there is also research to demonstrate that 'many children from violent homes do not exhibit any signs of traumatisation' and that

[C]hildren's ability to cope with the adversity of living in a violent home is linked to their mothers' ability to maintain mothering functions, to model assertive and non-violent responses to abuse and to maintain positive mental health... High levels of extended familial and social support have also been demonstrated to positively impact on children's coping capacity.³³

The Commission agrees that the suggested formulation is preferable to its original statement because it explains the range of negative impacts that children *may* experience as a consequence of being exposed to family and domestic violence.

Vulnerable groups

The Commission also proposed that the principles include a statement acknowledging the different experiences and needs of particular vulnerable groups such as Aboriginal people; people from culturally and linguistically diverse backgrounds; gay, lesbian, bisexual, transgender and intersex people; elderly persons; and persons with disability.³⁴

The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network (which was endorsed by the Geraldton Resource Centre and the Women's Law Centre) contended that people from rural, remote and regional communities should also be recognised as a vulnerable group 'to recognise the unique barriers to safety and justice faced by victims from such communities (ie, access to support services and alternative accommodation, access to timely [violence restraining order] applications)'.³⁵ The Commission appreciates the

barriers and additional hardships faced by victims of family and domestic violence living in rural, remote and regional communities. For example, as was emphasised during the Commission's consultations in the Kimberley, many Aboriginal women are unable to relocate because there is simply no alternative accommodation available (either locally or elsewhere). Accordingly, the Commission has added this category to its recommendation below.

The Disability Services Commission strongly supported the legislative recognition of the 'particular needs, circumstances and vulnerabilities of people with disability' and highlighted that 'people with disability are at increased risk of being victims of crime and women in particular are at increased risk of being victims of family and domestic violence'.³⁶ The submission referred to the national *Stop the Violence Project*; at a national symposium in October 2013 the following introductory statement was made:

Compared to non-disabled women we experience violence at significantly higher rate, more frequently for longer, in more ways, and by more perpetrators yet policies, programs and services for us either do not exist, are extremely limited, or simply just exclude us. We experience alarmingly high rates of multiple forms of violence from a range of perpetrators including physical, psychological and sexual violence, financial abuse, neglect, social isolation, entrapment, degradation, trafficking, detention, forced sterilisation, psychiatric treatments, forced contraception and forced abortion, denial of healthcare including exclusion from sexual and reproductive healthcare services to name just a few. We are twice as likely to experience domestic and family violence as non-disabled women, are likely to experience this violence over a longer period of time, and suffer more serious injuries as a result. We are raped and sexually assaulted at a rate of at least two times greater than other women, more than 70 percent of us have been victims of violent sexual encounters at some time in our lives.³⁷

Other submissions indicated support for greater recognition of issues faced by Aboriginal people. Aboriginal Family Law Services stated that the 'specialised nature of family and domestic violence and working with Aboriginal people require everyone performing under the relevant acts to practice with sensitivity to these factors'.³⁸ The submission received

32. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 10.

33. Richards K, 'Children's Exposure to Domestic Violence in Australia' (2011) 419 *Australian Institute of Criminology Trends and Issues* 4.

34. LRCWA Discussion Paper, Proposal 7(j).

35. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 23; Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014). That submission was also endorsed by the submission received from the family of Andrea Pickett: Lorraine Bentley, Kelly

Bentley and Gary Bentley, Submission No. 40 (28 March 2014) 2.

36. Disability Services Commission, Submission No. 11 (31 January 2014) 1.

37. Stop the Violence Project, National Symposium, 'Plenary A – Key issues in Violence and Women and Girls with Disabilities', *Transcript* (25 October 2013) 1.

38. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 1.

from the family of Andrea Pickett also expressed the importance of acknowledging the 'issues and experiences of Aboriginal and Torres Strait Islander women and children'.³⁹

The Commission maintains its view that the new legislation should explicitly recognise that particular vulnerable groups may experience family and domestic violence differently from other groups, and may have specific and different needs. It is also important to acknowledge that some victims of family and domestic violence will fit within more than one of these categories and may, therefore, be even further marginalised and disadvantaged in comparison to other victims (eg, an Aboriginal disabled woman who lives in a remote community and who experiences family and domestic violence may face a multitude of barriers and needs).

The Commission has concluded that the following features of, and statements about, family and domestic violence should be included in its recommended Family and Domestic Violence Protection Order Act.

RECOMMENDATION 3

Legislative recognition of the key features of and statements about family and domestic violence

That the new Family and Domestic Violence Protection Order Act contain a provision that states that in enacting the Act, Parliament recognises that:

- (a) family and domestic violence is a violation of human rights and unacceptable in any community or culture;
- (b) 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;
- (c) family and domestic violence extends beyond physical and sexual abuse and may involve a range of intimidating, coercive and controlling behaviours that adversely affect a person's safety or wellbeing or cause a person to reasonably apprehend that his or her safety or wellbeing (or the safety or wellbeing of another person) will be adversely affected;

- (d) family and domestic violence often involves an overt or subtle exploitation of a power imbalance and commonly involves an ongoing pattern of coercive or controlling behaviour;
- (e) family and domestic violence may escalate in frequency and severity both during and after separation;
- (f) family and domestic violence is underreported and there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;
- (g) not all victims of family and domestic violence wish to end their relationships – some simply want the violence to stop;
- (h) children who are exposed to the effects of family and domestic violence are particularly vulnerable and exposure to family and domestic violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing; and
- (i) particular vulnerable groups may experience and understand family and domestic violence differently from other groups, may have different needs 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; people from rural, regional and remote locations; and people with disability.

Principles

As explained earlier, the Commission's original proposal for the inclusion of principles contained a combination of statements about family and domestic violence as well as principles. As noted above, the Commission has concluded that these statements and principles should be separated in the new legislation because this will enable a clear distinction to be made between the legislative recognition of the key features of family and domestic violence (which is primarily aimed at increasing awareness and understanding of the nature and dynamics of family and domestic violence) and the principles that should guide decision-makers.

39. Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014) 2.

Protection of victims and children

In its Discussion Paper, the Commission proposed that the legislation should provide 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'.⁴⁰ This principle is consistent with the Commission's first objective for reform⁴¹ and the first stated object of the recommended new Family and Domestic Violence Protection Order Act.⁴²

This principle is adopted in various forms in some other jurisdictions. Section 4(1) of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that:

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.

Section 7(1) of the *Domestic Violence and Protection Orders Act 2008* (ACT) provides that, in deciding an application for a domestic violence order, paramount consideration should be given to the 'need to ensure that the aggrieved person,⁴³ and any child at risk of exposure to domestic violence, is protected from domestic violence'. Section 80 of the *Family Violence Protection Order Act 2008* (Vic) provides that:

[In] deciding the conditions to be included in a family violence intervention order, the court must give paramount consideration to the safety of—

- (a) the affected family member for the application for the family violence intervention order; and
- (b) any children who have been subjected to the family violence to which the application relates.

Currently, s 12 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:

- (a) the need to ensure that the person seeking to be protected is protected from acts of abuse;⁴⁴
- (b) 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;
- (ba) the need to ensure that children are not exposed to acts of family and domestic violence;
- (c) the wellbeing of children who are likely to be affected by the respondent's behaviour or the operation of the proposed order.

Therefore, the current Western Australian legislation does not stipulate that the safety or protection of victims of family and domestic violence (including children who are exposed to family and domestic violence) is the paramount consideration. Instead, the need to ensure protection is expressed to be of primary importance.

The categorisation of a particular factor as the paramount consideration means that factor must outweigh other relevant factors. Upon reflection, the Commission has concluded that the need to ensure the protection of persons who are at risk of family and domestic violence (including children who are at risk of being exposed to family and domestic violence) should be expressed as a primary consideration. The Commission is concerned that expressing this principle as the paramount consideration may have unintended consequences. For example, if protection of the victim is the paramount consideration and a court is determining what restraints should be imposed on a respondent, the court will have to disregard the stated wishes of the applicant in relation to the proposed restraints if there is a possible risk that those restraints may not fully protect the applicant. By expressing the principle that safety is a primary consideration a court will be able to appropriately balance competing interests but at the same time have victim safety clearly at the forefront of decision-making.

Perpetrator accountability

The Commission's proposal included the principle that 'perpetrators should be held accountable and encouraged and assisted to change their behaviour'.⁴⁵ Again this is consistent with the Commission's

40. LRCWA Discussion Paper, Proposal 7(a). The Commission received three submissions directly responding to this aspect of the proposal. Two of these submissions argued that the wording of the principle should be that the 'ongoing safety of dependent children and adults victimised by family and domestic violence should be the paramount consideration': Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). The other submission emphasised that the family and domestic violence legislation must 'place victims above the perpetrator in dealing with [violence restraining orders]': Hayley Barbarich, Submission No. 8 (28 January 2104).

41. See Chapter One, Objectives for reform.

42. See Recommendation 2 above.

43. The 'aggrieved person' is defined in the dictionary to the Act as the person against whom domestic violence has been, or is likely to be, directed.

44. An 'act of abuse' includes an 'act of family and domestic violence'.

45. LRCWA Discussion Paper, Proposal 7(k).

objectives for reform and the recommended objects clause for the new legislation. Only two submissions specifically addressed this aspect of the proposal. One of these submissions stated that legislation needs to 'place a heavy amount of responsibility and accountability on the perpetrator'.⁴⁶ The other, received from a magistrate, submitted that this principle should be reworded to state that:

Perpetrators are solely responsible for their use of violence and its impact on others and they should be held accountable and encouraged and assisted to change their behaviour.

The Commission agrees with this suggested addition because it may assist in increasing understanding among those working in the legal system that victims should not be 'blamed' for family and domestic violence.

Children who are perpetrators

Three submissions received by the Commission in response to its Discussion Paper emphasised that any new legislation should acknowledge that special considerations apply to children who commit family and domestic violence. The Commissioner for Children and Young People referred to data provided by the Western Australia Police, which indicates that the number of children subject to police orders made under the *Restraining Orders Act* has increased over the last few years. However, the Commissioner also noted that reliable data in relation to the number of violence restraining orders made against children is not available. The submission contended that violence 'perpetrated by adolescents presents particular challenges for responding appropriately to the needs of both victims and perpetrators'.⁴⁷ In particular, it was noted that parents and guardians (who may be the victim of family and domestic violence committed by a child) retain responsibility for the care, welfare and development of the child; that children are legally required to attend school; and that the criminal justice system treats children who commit offences differently from adult offenders. It was further stated that the Commissioner understands that the Department for Child Protection and Family Support is planning to undertake research in relation to the nature and extent of adolescent family and domestic violence with a view to developing more effective solutions.

In its submission, Youth Legal Service advised that it has frequently represented children who have been charged with offences of assault against a parent and

children against whom an application for a violence restraining order has been made (but where no charges have been laid). It submitted that children who are 'perpetrators of family and domestic violence are more vulnerable than adult perpetrators, by virtue of their immaturity and also their protection needs'.⁴⁸ It noted a number of provisions under Part 6 of the *Restraining Orders Act* that presently concern cases where children are respondents to violence restraining order applications. For example, s 53G provides that a 'court is not to make a restraining order against a child that might affect the care and wellbeing of the child unless the court is satisfied that appropriate arrangements have been made for the care and wellbeing of the child'. Youth Legal Service submitted that these relevant provisions will need to be included in any new specific family and domestic violence protection order legislation. The Commission agrees. The Youth Legal Service also referred to a mediation service that it operated during 2008–2010 for restraining order matters in the Children's Court and noted that the mediation process was successful with no cases proceeding to a restraining order hearing.

Legal Aid submitted that:

[T]here are unique dynamics and complexities with respect to children which demand a separate and different approach. For example, a large number of restraining orders against children are taken out by parents and relate to drug or mental health issues. Many parents and families in these situations do not wish to sever the relationship with their children and would not support an overly punitive approach. Both because of the nature of the issues involved and consistent with accepted principles in relation to minors, a far greater focus on the use of a therapeutic approach is required.⁴⁹

The Commission agrees that the legislation should recognise the special needs of children who commit family and domestic violence and this is reflected in the Commission's recommendation below. The Commission has also included the principle that the best interests of children is a primary consideration. This will enable the best interests of all children (both victims and perpetrators) to be a key factor in decision-making. Of course, the best interests of child perpetrators will need to be balanced against the need to ensure the safety of victims.

46. Hayley Barbarich, Submission No. 8 (28 January 2104).

47. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 7.

48. Youth Legal Service, Submission No. 18 (12 February 2014) 6.

49. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 6.

Identification of person most in need of protection

The Commission also proposed that the principles should include 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'.⁵⁰ The Commission received two submissions in response to this principle. It was argued that this principle should read 'that where both persons in a relationship are committing acts of violence then it should be identified if this is a relationship of family and domestic violence or an equal relationship in which both parties are equally likely to be the perpetrators or victims of violence, and in which no one party is fearful of the other party on a regular basis'.⁵¹ As noted in Chapter One, Relationships Australia submitted that phrases such as 'violent relationship' or 'abusive relationship' should not be used because it implies mutual responsibility for the violence and reduces perpetrator responsibility.⁵² The Commission does not agree with the suggested amendment because it refers to identifying whether there is a relationship of family and domestic violence instead of focusing on the commission of family and domestic violence by persons who are in a relationship. Accordingly, the Commission considers that its original formulation of this principle is appropriate.

Treatment of victims by the justice system

The final principle included in the Commission's original proposal was 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'.⁵³ This principle recognises the importance of ensuring that the justice system does not itself discourage victims from seeking assistance. In its submission the Department of the Attorney General suggested that the aim of reducing re-victimisation to the greatest extent possible should be one object of any new family and domestic violence protection order legislation.⁵⁴ The Commission has accommodated this view by

50. LRCWA Discussion Paper, Proposal 7.1.
51. Maggie Woodhead, Submission No. 4 (17 January 2014). The second submission was expressed in very similar terms: Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014).
52. Relationships Australia, Submission No. 29 (28 February 2014) 2. See Chapter One, Terminology.
53. LRCWA Discussion Paper, Proposal 7(m).
54. Department of the Attorney General, Submission No. 21 (19 February 2014) 3.

reformulating its recommended legislative objects to include preventing and reducing the incidence and consequences of family and domestic violence.

Specific support for this principle was included in the joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network,⁵⁵ which submitted that the principles should include that 'victims and their children should not be subjected to secondary victimisation arising as a result of inappropriate/ineffective responses' to family and domestic violence. Similarly, it was argued that 'victims and their children should not be put at risk of further harm due to inappropriate/ineffective responses to family and domestic violence'. The Victims of Crime Representatives on the Victims of Crime Reference Group contended that 'not victimising victims [should be a] key priority in legislation and practice'.⁵⁶ The Peel Community Legal Service mentioned one example in its submission to illustrate how decisions may result in re-victimisation. It noted that there are variances in the willingness of magistrates to accept affidavit evidence in relation to applications for violence restraining orders.⁵⁷ Enabling applicants to provide their evidence by way of affidavit rather than oral evidence may reduce re-traumatisation for victims of family and domestic violence. In the Commission's recommendation below this principle has been reworded to include a stronger focus on reducing re-victimisation.

As a related issue, the Gosnells Community Legal Centre argued that in some communities the 'preservation of the primacy of the male as the family leader' and 'the preservation of the family unit' may take precedence over the need to protect a victim from family and domestic violence and as such community leaders may put pressure on victims not to report family and domestic violence.⁵⁸ It submitted that a further principle should be included that 'community leaders should be educated and encouraged to assist victims to report acts of family and domestic violence and seek help'. While the Commission agrees that there should be appropriate education campaigns to ensure that community members understand the seriousness of family and domestic violence and support victims to report incidents to police and seek

55. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 23.
56. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 1.
57. Peel Community Legal Service, Submission No. 30 (28 February 2014) 4.
58. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 5.

help, it does not consider that this is an appropriate inclusion in legislation.

The Commission has concluded that the following principles should be included in its recommended Family and Domestic Violence Protection Order Act. For the sake of clarification it is noted that specific factors that should be taken into account when deciding whether to make a protection order and the conditions that should be attached to any such order should be separately provided for in the legislation and these are discussed in Chapter Three.⁵⁹

RECOMMENDATION 4

Principles

That the new Family and Domestic Violence Protection Order Act include a provision stating that in performing a function under this Act, a person, court or body is to have regard to the following principles:

- (a) ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) that the best interests of children is a primary consideration;
- (d) that perpetrators are solely responsible for their use of violence and its impact on others and they should be held accountable and encouraged and assisted to change their behaviour;

59. One submission suggested that some of the principles contained in the Commission's proposal could be included in the current s 12 of the *Restraining Orders Act 1997* (WA): Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). The Commission agrees and notes that there are other relevant factors in s 12 (eg, criminal record of the respondent, and accommodation needs of the applicant and the respondent) that are not appropriately described as principles. Therefore, all relevant factors for decision-makers in regard to whether a protection order should be made and what conditions should be included in a protection order should be separately provided.

- (e) that the special and different needs of perpetrators who are children should be taken into account;
- (f) 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
- (g) that in order to encourage victims to report family and domestic violence and seek help, the justice system should treat victims with respect and endeavour to reduce the degree to which victims are subjected to re-victimisation or re-traumatisation.

KEY DEFINITIONS

Family and domestic violence

Section 6(1) of *Restraining Orders Act* currently 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:

- (a) assaulting⁶⁰ or causing personal injury to the person;
- (b) kidnapping or depriving the person of his or her liberty;⁶¹
- (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) pursuing⁶² the person or a third person, or causing the person or a third person to be pursued —

60. 'Assaulting' is defined in s 6(4) of the *Restraining Orders Act 1997* (WA) as including an assault within the meaning of the *Criminal Code* and behaving in a manner described in s 319(3) (a),(b) or (c). Sections 319(3)(a), (b) and (c) of the *Criminal Code* include procuring or permitting a child or incapable person to dealing indecently with the person; procuring a child or incapable person to deal indecently with another person; or committing an indecent act in the presence of a child or incapable person.

61. Section 6(4) of the *Restraining Orders Act 1997* (WA) provides that 'kidnapping or depriving the person of his or her liberty' includes behaving in a manner described in s 332 of the *Criminal Code*.

62. Section 6(4) of the *Restraining Orders Act 1997* (WA) provides that 'pursue' has the same meaning as in s 338D of the *Criminal Code*. Section 338D of the *Criminal Code* provides that 'pursue' includes '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

- (i) with intent to intimidate⁶³ 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.

The definition was introduced by the *Acts Amendment (Domestic Violence) Restraining Orders Act 2004 (WA)*,⁶⁴ which materially expanded the scope of the previous definition. The nature of the changes is conveniently outlined by Staude DCJ in *Walsh v Barron*.⁶⁵ In summary, he explained that:

- Prior to the amendments a violence restraining order could be made where a respondent had committed an offence of personal violence or 'behaved in a manner that could reasonably be expected to cause the applicant to fear that the respondent would commit such an offence'. The 2004 amendments introduced a broader concept of an 'act of abuse'.⁶⁶
- The amendments were intended (as outlined in the second reading speech) to 'modernise' the law and provide improved protection for victims of family and domestic violence. Specifically, the amendments differentiated between family and domestic violence and others forms of violence by recognising that family and domestic violence may be repeated and escalate in severity. The definition of an act of family and domestic violence included:

[B]ehaving in an ongoing manner that is intimidating, offensive or emotionally abusive

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'.

- 63. 'Intimidate' is defined in s 6(4) of the *Restraining Orders Act 1997 (WA)* as having the same meaning as in s 338D of the *Criminal Code*. Section 338D of the *Criminal Code* defines 'intimidate' as including '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'.
- 64. It was observed during Parliamentary debates that the 2004 amendments were introduced following wide ranging research and consultation, including a review of the *Restraining Orders Act 1997 (WA)* and detailed comparisons of restraining orders legislation in other Australian jurisdictions, Canada, Ireland, New Zealand, the United Kingdom and the United States; and the work undertaken to prepare the 1999 model domestic violence laws, the 2002 report of the Joondalup Family Violence Court, the 2002 report of the Auditor General on the management and effectiveness of restraining orders, the state Ombudsman's investigation into the police response to assault in the family home, and the Gordon inquiry: Western Australia, Parliamentary Debates, Legislative Assembly, 3304 (Hon JA McGinty, Attorney General).
- 65. [2012] WADC 165.
- 66. Ibid [33].

towards a person. The inclusion of emotional abuse is a new element, and acknowledges the insidious nature of this form of abuse and the effect it can have on the victim.⁶⁷

- The inclusion of 'behaving in an ongoing manner that is intimidating, offensive or emotionally abusive' in the definition of an act of family and domestic violence has 'the effect 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'.⁶⁸
- Following the amendments 'it is still the law, in my opinion, that a [violence restraining order] should not be granted lightly [because such an 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 person's personal freedom'.⁶⁹

The changes effected by the 2004 amendments represented a significant advance in this area. Therefore, the question arises whether any further changes to the definition are warranted, particularly in light of subsequent experience with the operation of the *Restraining Orders Act* and developments in understanding, practices and legislative responses in various jurisdictions.

In its Discussion Paper, the Commission expressed the view that the definition was arguably not sufficiently broad and did not refer to key features of family and domestic violence such as the existence of coercion or control. It also noted that during consultations a number of people had observed that the current definition does not expressly refer to economic abuse.⁷⁰ It further highlighted that the current definition does not refer to sexual abuse (although this type of behaviour may fit within the meaning of an assault). The Commission notes that it has included reference to sexual abuse in its recommended definition of family and domestic violence below.

The Commission proposed that the current reference to an act of family and domestic violence should be replaced with the term 'family and domestic violence' to change the focus from discrete incidents to the context of the behaviour, which commonly involves conduct occurring over a period of time. In doing so, the Commission was not seeking to narrow the

67. Western Australia, *Parliamentary Debates*, Legislative Assembly, 3304 (Hon JA McGinty, Attorney General) as cited in *Walsh v Barron* [2012] WADC 165, [34].

68. *Walsh v Barron*, ibid [35].

69. Ibid [36].

70. LRCWA Discussion Paper, 62.

scope of the operation of the *Restraining Orders Act*. Indeed, discrete acts or incidents may constitute family and domestic violence under most limbs of the existing and the new recommended definition. Whether certain types of behaviour should be required to be ongoing in order to fall within the definition is considered further below.

In proposing that the definition of family and domestic violence should be expanded, the Commission recognised the complexities in developing a balanced and appropriate modified definition. For that reason, it specifically sought submissions about what additional types of behaviour should be included or excluded in the definition and whether the legislation should include examples of relevant behaviour.⁷¹ A significant number of submissions supported the inclusion of an expanded definition of family and domestic violence in the applicable legislation, with a variety of views being expressed about what types of conduct should be included or excluded and the scope of any limitations to be placed on the definition.⁷² The Western Australia Police expressed opposition to this proposal on the basis that the inclusion of principles (as discussed above) should be sufficient.⁷³

In determining the scope of its new recommended definition, the Commission has carefully considered the need to balance a number of competing considerations. As explained in the Discussion Paper, if the definition of family and domestic violence is too narrow there may be gaps in protection for victims. On the other hand, care should be taken not to expand the definition too far given the significant intrusive and stigmatising effects such orders may have on respondents. Further, if the definition is too broad the protection order system may be open to

71. Ibid, Proposal 8.

72. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

73. Western Australia Police, Submission No. 26 (27 February 2014) 15.

abuse and inadvertently, by opening the floodgates, undermine the protection of those victims who are at the most serious risk of harm.⁷⁴

The specific question posed by the Commission in relation to the definition of family and domestic violence covered a number of different forms of behaviour as well as seeking submissions about whether the legislative definition should include specific examples of the relevant behaviour. The Commission discusses each of these areas in turn below.

Coercion, control and fear

In its Discussion Paper, the Commission highlighted that the current definition of an act of family and domestic violence does not refer to common features of family and domestic violence, such as the presence of coercion and control. It was noted that the definition of 'family violence' under family law legislation includes these elements in its definition. Section 9A of the *Family Court Act 1997 (WA)* 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'.⁷⁵ This definition was based upon the recommendation of the ALRC/NSWLRC in their comprehensive report on family violence in 2010. They recommended that the core definition of family violence should include behaviour that 'coerces or controls a family member or causes that family member to be fearful' in order to ensure that there is focus on the context of the behaviour. As the ALRC/NSWLC noted, to 'focus on discrete incidents of violence devoid of context' risks undermining the meaning of family violence and 'having the definition being co-opted and misused in contexts to which it was never intended to apply'.⁷⁶

The definition of family and domestic violence in Victoria and Queensland includes the elements of coercion, control or fear. Section 5(1) of the *Family Violence Protection Act 2008 (Vic)* separately includes behaviour that is 'coercive' in its definition as well as providing for an additional category of behaviour that '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'.⁷⁷ The *Domestic and Family Violence*

74. LRCWA Discussion Paper, 61.

75. Section 9A(2) also provides a non-exhaustive list of examples that may constitute family violence. Section 4AB of the *Family Law Act 1975 (Cth)* contains the same definition under federal law.

76. ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) [5.167]–[5.169].

77. *Family Violence Protection Act 2008 (Vic)* s 5(1).

Protection Act 2012 (Qld) is almost identical in this regard.

In its Discussion Paper, the Commission asked whether the definition of family and domestic violence should expressly include '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'.⁷⁸ The Commission received a significant number of submissions which supported the inclusion of this category of behaviour within the definition of family and domestic violence.⁷⁹ Only the Western Australia Police opposed this category on the basis that the current definition of family and domestic violence under the *Restraining Orders Act* is sufficient.⁸⁰

Legal Aid highlighted that the concepts of coercion and control 'as part of a pattern of behaviour are generally defining characteristics in most accepted definitions of [family and domestic violence]'.⁸¹ It also explained that a requirement for the presence of coercion or control may be an appropriate safeguard for other categories of behaviour, such as emotional or economic abuse. However, Legal Aid also argued that the presence of coercion or control is not necessary for categories of family and domestic violence such as physical violence, property damage and other forms of behaviour that amount to criminal behaviour. Similarly, the Commissioner for Children and Young People highlighted that it is important that 'an expanded definition is placed in the context of the sustained threat, coercion, control and fear created by a perpetrators' behaviour, which reflects the core dynamics involved in family and domestic violence',

thereby ensuring that categories of emotional and psychological abuse are not open to misuse.⁸²

The Commission's recommended definition of family and domestic violence appears later in this section. It notes that each aspect of the Commission's recommended definition of family and domestic violence should not be viewed in isolation (because one category under the definition cannot be fully understood without reference to the remaining categories). Nonetheless, at this stage of the Report, the Commission indicates that it favours the inclusion of a specific category of behaviour based primarily upon the elements of intimidation, coercion and control. However, the presence of coercive or controlling behaviour alone may capture conduct that should not be regarded as family and domestic violence, especially bearing in mind the broad range of relationships covered by the definition of a family and domestic relationship. For example, parents often quite appropriately compel their children to engage in or refrain from engaging in particular behaviour. Therefore, the Commission is of the opinion that there should be an additional requirement in order for conduct in this proposed category to be categorised as family and domestic violence. In determining the appropriate scope of the additional requirement, the Commission has considered whether the existence of fear or apprehension about a person's safety or wellbeing being adversely affected should be included.

The Commission acknowledges that the presence of fear is a key incident of family and domestic violence. The present definition of an act of family and domestic violence under the *Restraining Orders Act* does not explicitly use the term 'fear', although many of the behaviours falling within the definition may cause a victim to experience fear. However, reasonable fear of being subjected to an act of family and domestic violence is a ground on which a violence restraining order may be made. Section 11A of the Act (discussed below) empowers a court to make a violence restraining order if there has been a past 'act of abuse' (defined to include an 'act of family and domestic violence' or 'an act of personal violence') and the likelihood of recurrence or, alternatively, if there is a reasonable fear that a future 'act of abuse' will occur.⁸³

78. LRCWA Discussion Paper, Question 4.1(c).

79. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

80. Western Australia Police, Submission No. 26 (27 February 2014).

81. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 19.

82. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 10.

83. This dual approach was supported in a working group of federal, state and territory officials: Partnerships Against Domestic Violence, *Model Domestic Violence Laws*, Report (April 1999) 61–62.

To the extent that a test based on fear (or apprehension) is adopted, a difficult question arises as to whether the test should have an objective and/or subjective component. The Commission has concluded that an objective element should be included, consistent with the objective element in s 11A(b) of the *Restraining Orders Act*. In reaching that conclusion, the Commission acknowledges that there are inherent difficulties with any test based upon the presence of fear. The ALRC/NSWLRC observed that definitions which incorporate an objective element to the concept of fear⁸⁴ have been criticised because they fail to reflect the reality of family and domestic violence particularly where there has been a history of control. Specifically, it was mentioned that conduct 'that causes a victim to fear for his or her safety may seem benign to an outsider'.⁸⁵

In addition, the ALRC/NSWLRC noted that Women's Legal Services Australia had previously observed that:

Victims of family violence learn to 'read' the perpetrator of violence and know what is coming next. It may appear to an outsider that a specific incident should not 'reasonably' cause the victim to fear for their safety, but her experience tells her otherwise.⁸⁶

In his 2009 *Family Court Violence Review*, Professor Chisholm commented on the previous definition of family violence under family law legislation and noted that:

Some advocates for victims of violence have argued that the impact of the 'reasonable fear' requirement is unfair. It is often pointed out that behaviour may be frightening in ways that an outsider might not recognise. The example often given is where a violent partner uses a particular gesture which the victim knows from prior experience is a threat of a beating. An outsider not knowing the violent history or the significance of the gesture, might wrongly think that the other party could not reasonably be fearful.⁸⁷

84. The ALRC/NSWLRC referred to the previous definition of 'family violence' under family law legislation, which provided that family violence was particular conduct that causes a person 'reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety'. The 'note' to this provision stated that a 'person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety': ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) [6.61].

85. Ibid [6.63].

86. Ibid [6.64].

87. Professor Richard Chisholm, *Family Courts Violence Review* (2009) [146].

However, Professor Chisholm expressed the view that the condition of reasonableness would require the context to be taken into account, including consideration of whether 'a person in the victim's position, having experienced the history of violence and knowing the meaning of the gesture, would have a reasonable fear'.⁸⁸ He concluded that the inclusion of reasonableness was appropriate and, in the absence of evidence that its interpretation had been unfair to victims, he did not recommend its removal from the definition of family violence. In contrast, the ALRC/NSWLRC recommended the removal of the requirement for reasonableness primarily because in their view 'it is inappropriate to apply a test of reasonableness to the experience of fear in determining whether conduct is violent [and] to do so ignores the psychological impact of family violence, especially within the context of a controlling relationship'.⁸⁹

Nonetheless, a purely subjective test of fear is also problematic. In the context of discussing the appropriate formulation for the grounds for a protection order, the ALRC/NSWLRC explained some of the practical difficulties associated with a subjective test of fear. For example, some stakeholders argued that such a test may preclude police from applying for a protection order where the victim is not fearful even though there is clear evidence that future violence is likely to occur.⁹⁰ It was also submitted to the inquiry that a subjective test may be inappropriate where the person was genuinely fearful but the fear was misplaced. The example provided was where an applicant's fear is misplaced due to a psychiatric condition.⁹¹ It was further observed that a subjective test may work against men who may be less likely to admit that they are fearful and victims who 'do not express fear due to concerns about retaliation'.⁹²

In addition to recommending that an objective test should be adopted, the Commission considers that rather than the term 'fear' the term 'apprehension' is preferred. This is consistent with the approach that it has taken in relation to the recommended grounds for a family and domestic violence protection order.⁹³

The Commission has concluded that the legislative definition of family and domestic violence should include behaving in a manner that intimidates, coerces or controls a person or is likely to intimidate, coerce or control a person (in that person's circumstances) and

88. Ibid [147].

89. ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) [6.107].

90. Ibid [7.111].

91. Ibid [7.112].

92. Ibid [7.113], [7.129].

93. See Chapter Three, Recommendation 12.

that adversely affects the safety or wellbeing of that person or is likely to cause a person in that person's circumstances to reasonably apprehend that his or her safety or wellbeing, or the safety or wellbeing of another person, will be adversely affected. In the Commission's view this approach will focus on key recognised elements of family and domestic violence, without capturing too broad a range of conduct. The Commission also notes that this formulation means that a victim of family and domestic violence will not have to prove that he or she was actually coerced, intimidated or controlled; nor will proof of an adverse impact on safety or wellbeing be necessary. While proof of these matters (to the required standard) will be sufficient to establish that family and domestic violence has occurred, the definition will also capture conduct that is objectively likely to intimidate, coerce or control a person and cause that person to reasonably apprehend that safety or wellbeing will be adversely affected.

Emotional and psychological abuse

As noted earlier, since the 2004 amendments to the *Restraining Orders Act*, emotional abuse has been included in the definition of an act of family and domestic violence; however, it is qualified by a requirement that it must be ongoing.⁹⁴ The phrase 'emotional abuse' is not defined and the current definition does not include psychological abuse. In other jurisdictions, the concepts of emotional abuse and psychological abuse appear together in the applicable definition. In Victoria and Queensland the definition includes 'emotional or psychological abuse' as a distinct category.⁹⁵ The term 'emotional or psychological abuse' is separately defined to mean 'behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person'.⁹⁶

In South Australia, an act is included within the definition of an 'act of abuse' if it results in or is intended to result in emotional or psychological harm.⁹⁷ 'Emotional or psychological harm is defined to include mental illness, nervous shock and 'distress, anxiety, or fear, that is more than trivial'.⁹⁸ The definition of family violence in Tasmania includes 'emotional abuse and intimidation'. This phrase is

defined by reference to s 9(1) of the *Family Violence Act 2004* (Tas) which provides that:

A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.

Uniquely, 'emotional abuse' (as defined above) is a criminal offence in Tasmania.

In *Lydon v Lydon*,⁹⁹ the meaning of the term 'emotional abuse' in Western Australia was considered. In this case, the appellant appealed against the making of a violence restraining order that had been issued for the protection of his mother and sister. The magistrate found that the appellant's behaviour had been emotionally abusive. Examples of his conduct included using his body to stop his mother and sister from entering the house, poking them in the chest, demanding that they speak to him, standing in front of a car to stop them from leaving, and shouting and banging on doors. Le Miere AJA stated that:

Emotional abuse involves improper or inappropriate behaviour, verbal or non-verbal, that adversely impacts upon another person's emotional wellbeing. Emotional abuse improperly excites strong unwelcome feelings in another. Emotional abuse may involve coercion by intimidation, inducing fear, stalking, or harassment, that is words, conduct or action, usually repeated or persistent that, being directed at a specific person, annoys, alarms or causes substantial emotional distress.¹⁰⁰

It was further observed that persistent unwelcome approaches may be emotionally abusive where the 'frequency, nature and manner of the approaches is likely to demoralise, tire out or exhaust the person to whom it is directed' even if it is not intimidating and does not cause fear.¹⁰¹

In its Discussion Paper, the Commission asked whether the definition of family and domestic violence should expressly refer to 'psychological abuse' and whether this concept should, in turn, be defined.¹⁰² The Commission also asked whether (in recognition that emotional abuse is already included in the definition under the *Restraining Orders Act*) there should be a separate definition of 'emotional abuse'. The Commission received a total of 14 submissions in

94. *Restraining Orders Act 1997* (WA) s 6(1)(d).

95. *Family Violence Protection Act 2008* (Vic) s 5(1); *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1).

96. *Family Violence Protection Act 2008* (Vic) s 7; *Domestic and Family Violence Protection Act 2012* (Qld) s 11.

97. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(2).

98. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3).

99. [2008] WASCA 8.

100. *Ibid* [49].

101. *Ibid* [62].

102. LRCWA Discussion Paper, Question 4.

support of the inclusion of psychological abuse¹⁰³ and nine submissions in support of a separate definition for emotional abuse.¹⁰⁴ The Western Australia Police did not support the inclusion of psychological abuse nor did it support a separate definition for emotional abuse because it considers that the current legislative definition of an act of family and domestic violence is sufficient and there is a risk that 'certain behaviours will be excluded if the legislation is too prescriptive and inflexible'.¹⁰⁵

There were divergent views expressed in submissions about whether the concepts of psychological and emotional abuse should be defined in the legislation (either together or separately). For example, the joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network argued that the different categories of abuse should not be expressly defined because 'this could have the consequence of putting the onus on the applicant to prove effects that demonstrate the abuse' (eg, the requirement for a psychological report to prove psychological damage).¹⁰⁶ The Department for Child Protection and

103. Maggie Woodhead, Submission No. 4 (17 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

104. Patricia Giles Centre, Submission No. 5 (24 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

105. Western Australia Police, Submission No. 26 (27 February 2014) 3. It is noted that Aboriginal Family Law Services also did not support a separate definition of emotional abuse and instead supported the use of legislative examples: Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 4.

106. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission

Family Support contended that emotional abuse and psychological abuse should be subject to the same definition because, although there are differences between the two concepts, they are 'behaviours on a continuum'.¹⁰⁷

The Commissioner for Children and Young People noted the difficulty in distinguishing between emotional and psychological abuse and referred to relevant comments about this issue in the review of the *Children and Community Services Act*.¹⁰⁸ Currently, under s 28 of the Act, a child may be in need of protection if the child has suffered or is likely to suffer harm as a consequence of various forms of abuse including physical, sexual, emotional and psychological abuse. The terms 'emotional abuse' and 'psychological abuse' are not defined. The 2012 statutory review of the *Children and Community Services Act* observed that:

During development of the Act, debate occurred as to whether there should be separate grounds of emotional abuse and psychological abuse, or whether the single ground of emotional abuse would be sufficient to determine if a child was in need of protection. Contemporary opinion at that time was that the harms of abuse on children's emotional and psychological/cognitive development should both be recognised in the Act. As a result, Western Australia included both emotional abuse and psychological abuse as separate grounds for a child being in need of protection.¹⁰⁹

The report of the review observed that the distinction under the Act between psychological abuse and emotional abuse has caused difficulties in practice because both may occur, but 'it is difficult to distinguish what specific acts or omissions form emotional abuse as against acts which constitute psychological abuse'.¹¹⁰

In a submission from one magistrate it was suggested that, given the broad interpretation of emotional abuse in *Lydon v Lydon*,¹¹¹ it is unnecessary to separately include any reference to psychological abuse in the definition of family and domestic violence. It was also noted that the term 'psychological abuse does not appear to have been judicially interpreted' and the

No. 34 (28 February 2014) 26. This submission was endorsed by the Women's Law Centre and the Geraldton Resource Centre Inc: Women's Law Centre, Submission No. 31 (28 February 2014); and Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).

107. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 3.

108. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 10.

109. *Report of the Legislative Review of the Children and Community Services Act (2012)* [17].

110. *Ibid* [18].

111. [2008] WASCA 8.

magistrate suggested that it is likely to involve 'an adverse effect upon another person's psychological health and the behaviour that causes that negative effect'.¹¹² This submission further argues that evidence from a psychologist would most likely be required to establish psychological abuse and this would add to the cost of proceedings and potentially cause unnecessary delays. This view is supported by the observations in *Lydon v Lydon* that:

It is open to the court to be satisfied that a person has behaved in an ongoing manner that is emotionally abusive towards another person without the benefit of any psychiatric or psychological evidence. Behaviour that is emotionally abusive is behaviour that is reasonably capable of adversely impacting upon another person's emotional wellbeing. This does not require psychological or other expert evidence.¹¹³

The inclusion of emotional and psychological abuse within the definition of family and domestic violence is contentious. As the ALRC/NSWLRC observed, unless certain conduct is assessed within the context of coercive or controlling behaviour, the definition may be open to abuse. Two examples were referred to: verbal abuse committed by people in intimate relationships and 'acts of violent resistance by victims' where such conduct does not cause fear or form 'part of a pattern of controlling or coercive behaviour'.¹¹⁴ Similarly, Legal Aid suggested that coercion and control might usefully be included within the definition of emotional and psychological abuse (as well as economic abuse) to 'help differentiate those forms of conduct which by themselves warrant an order and those that do not'.¹¹⁵

Bearing in mind that the Victorian legislation includes 'emotional and psychological abuse' as a separate category within its definition of family violence (and there is no requirement for such abuse to be ongoing), the Commission sought the views of the Family Violence Program Manager of Victoria Legal Aid in relation to the operation of the Victorian definition in practice.¹¹⁶ She explained that there have been numerous applications for orders in Victoria on the basis of a one-off incident involving 'bad name calling' and, for the most part, these applications are unsuccessful. However, these applications have impacted upon court lists and, in some cases,

112. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 6.

113. [2008] WASCA 8 [57].

114. ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) [5.169].

115. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 19.

116. Leanne Sinclair, Family Violence Program Manager, Victoria Legal Aid, telephone consultation (4 April 2014).

respondents become subject to restraining orders because they do not lodge an objection. From her perspective, the problem rests with the provision of 'emotional and psychological abuse' as a discrete category of family violence. In her view, it would be more appropriate for emotional and psychological abuse (as well as economic abuse) to be included as a sub-category of the more general category of coercion and control.

Having considered all of the relevant submissions and other material, the Commission has formed the view that psychological abuse should not be expressly included within the definition of family and domestic violence because psychological abuse falls within the meaning of the broader term of 'emotional abuse'. Further, as explained above, the Commission favours inclusion of a new category within the definition of family and domestic violence that is based on intimidation, coercion and control. The Commission is of the view that this category will, in practice, appropriately capture a wide range of abusive conduct including, to an appropriate degree, conduct which falls within concepts of emotional (including psychological) abuse or economic abuse, as discussed in the literature and referred to in the definitions adopted in certain other jurisdictions. Rather than expressly referring to such concepts within the definition, the Commission considers it preferable that the proposed new definition focuses on the well-recognised features of intimidation, coercion and control. This achieves greater clarity in regard to the conduct which falls within the definition and avoids the risk that by referring to one type of abuse, such as emotional abuse, other forms of abuse which might also in appropriate circumstances be regarded as family and domestic violence may be excluded by implication.

In formulating the new proposed category, the Commission has carefully considered whether paragraph (d) of the existing definition, which applies to behaviour 'in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person', should be retained. While retention of paragraph (d) would avoid any possibility of inadvertent exclusion of forms of conduct that are currently covered by the existing definition, the Commission considers that, given the breadth and focus of the proposed new category, it is preferable that paragraph (d) is not retained. As discussed below, the new proposed category does not require that behaviour must be ongoing, unlike the existing category. Further, it explicitly covers behaviour that intimidates (or is likely to intimidate) a person subject to the additional criteria relating to the safety or wellbeing of the person being adversely

affected (or causing that person to reasonably apprehend that safety or wellbeing will be adversely affected). It is acknowledged that the category does not expressly refer to offensive behaviour; however, the Commission considers that offensive behaviour will be covered to an appropriate degree where there is associated intimidation, coercion or control (or behaviour that is likely to intimidate, coerce or control).

Economic abuse

Economic abuse is included in the applicable definitions in Queensland,¹¹⁷ Victoria,¹¹⁸ South Australia,¹¹⁹ Tasmania¹²⁰ and the Northern Territory.¹²¹ As noted earlier, the current Western Australian legislation does not refer to economic abuse. The Commission sought submissions about whether an expanded definition of family and domestic violence should expressly refer to economic abuse and, if so, what meaning should be attributed to the term. The Commission received 12 submissions in support of the inclusion of economic abuse in the definition of family and domestic violence.¹²²

A number of submissions expressed support for the definition of economic abuse in the Victorian and Queensland legislation. Section 12 of the *Domestic and Family Violence Protection Act 2012* (Qld) defines economic abuse as:

[B]ehaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent —

117. *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1).

118. *Family Violence Protection Act 2008* (Vic) s 5(1).

119. Section 8(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that 'abuse may take many forms including physical, sexual, emotional, psychological or economic abuse'. Section 8(2) provides that an act is an act of abuse if, among other things, it results in or is intended to result in 'an unreasonable and non-consensual denial of financial autonomy'.

120. *Family Violence Act 2004* (Tas) s 7.

121. *Domestic and Family Violence Act* (NT) s 5.

122. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Magistrate Liz Langdon, Submission No. 15 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). Again, the Western Australia Police did not support express reference to economic abuse on the basis that the current legislative definition of an act of family and domestic violence is appropriate.

(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.¹²³

In contrast, and as noted earlier, the joint submission of the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network (which was endorsed by the Women's Law Centre and the Geraldton Resource Centre) suggested that the different types of abuse should not be specifically defined. Further, as explained in relation to emotional and psychological abuse, Legal Aid suggested that economic abuse should arguably be qualified by reference to the presence of coercion and control.¹²⁴ In this regard, it is noted that the majority of the legislative examples of economic abuse under the Queensland and Victorian provisions explicitly refer to coercion (eg, coercing a person to claim social security benefits; coercing a person to sign a contract of guarantee; and coercing a person to relinquish control over assets and income).¹²⁵

The Family Violence Program Manager of Victoria Legal Aid explained, in relation to the Victorian definition, that when the *Family Violence Protection Act 2008* (Vic) was first enacted there were significant concerns among the legal profession that the inclusion of economic abuse might result in frivolous applications for protection orders (eg, applications lodged because the applicant was not allowed to buy a pair of shoes). However, she explained that in practice these types of applications did not eventuate. She suggested that the only problem encountered in the early days of the new legislation involved applications brought on the basis that a person was aggrieved about their proposed property settlement following separation but these types of applications were readily dismissed and the practice has since ceased.

Although the premise is that economic abuse is a form of family and domestic violence, as much as verbal and physical abuse, defining the concept is not straightforward. In his 2011 submission to

123. The definition of economic abuse is almost identical in Victoria: *Family Violence Protection Act 2008* (Vic) s 6.

124. Legal Aid Western Australia, Submission No. 35 (7 March 2014).

125. *Domestic and Family Violence Protection Act 2012* (Qld) s 12; *Family Violence Protection Order Act 2008* (Vic) s 6.

the Senate Committee on Legal and Constitutional Affairs, Professor Parkinson commented that adding economic abuse as a form of family and domestic violence 'has very little potential to be helpful and much potential for the opposite'.¹²⁶ He was concerned that because the idea 'raises all sorts of issues about control of finances in domestic relationships', this could 'open up endless arguments by self-represented litigants on such issues'.¹²⁷ Against this background, the Commission notes that the Family Violence Program Manager in Victoria suggested that the use of legislative examples of economic abuse had assisted in ensuring that this category of family violence was not misused.¹²⁸ She then suggested, as for emotional and psychological abuse, that economic abuse should be defined as a subcategory of the more general category of coercion or control under the Victorian legislation.

The Commission considers that the types of economic abuse that ought to fall within the legal definition of family and domestic violence should involve an element of intimidation, coercion or control that adversely affects a person's safety or wellbeing, or is likely to cause a person to reasonably apprehend that his or her safety or wellbeing or the safety or wellbeing of another person will be adversely affected. Further, given that the expanded definition applies to any behaviour that satisfies those criteria, as explained above, in the Commission's view it is preferable not to expressly refer to concepts such as economic (and emotional) abuse in this new proposed category of the definition.

A requirement for the behaviour to be ongoing

Currently, the definition of 'an act of family and domestic violence' specifies that intimidating, offensive or emotionally abusive behaviour must be ongoing.¹²⁹ Most of the other forms of behaviour included within the definition are not subject to any requirement for repetition (eg, assault, kidnapping and damage to property). In the case of pursuing a person with intent to intimidate (or in a manner that could reasonably be expected to intimidate and does in fact intimidate) the applicable definition of 'pursue' has the effect that most forms of behaviour under this category will need to have occurred on more than one occasion.¹³⁰ The only exception is if the

126. Parkinson P, 'Family Law Legislation Amendment (Family Violence) Bill, Submission to Senate Committee on Legal and Constitutional Affairs' (April 2011) 4.

127. *Ibid.*

128. Leanne Sinclair, Family Violence Program Manager, Victoria Legal Aid, telephone consultation (4 April 2014).

129. *Restraining Orders Act 1997* (WA) s 6(1)(d).

130. Section 6(4) of the *Restraining Orders Act 1997* (WA) provides that 'pursue' has the same meaning as in s 338D of the

specified behaviour has been committed in breach of a restraining order or a condition of bail.

In regard to the meaning of 'ongoing' under s 6(1)(d) of the *Restraining Orders Act*, it has been observed that:

I have not been taken to any authority on the meaning of 'ongoing manner', but I take 'ongoing' to bear its ordinary and natural adjectival meaning of 'progressive, continuous, current', as opposed to occasional or past. Having regard to the purpose of the legislation, I am of the view that it does not purport to make *any* behaviour that is offensive, intimidating or emotionally abusive an act of abuse. Clearly, such behaviour may occur occasionally in relation to an intimate relationship without giving rise to a need for a protective court order. Such a construction is consistent with the principle that a [violence restraining order] is not a punishment for past behaviour.¹³¹

In its Discussion Paper, the Commission sought submissions about whether the definition of family and domestic violence should stipulate that certain behaviours (eg, psychological abuse, economic abuse, coercive and controlling behaviour) must be ongoing. The Commission received a mixed response to this question. A number of submissions were in favour of a requirement for particular forms of behaviour to be ongoing.¹³² One submission contended that the behaviour should not be required to be ongoing but suggested that there should be a requirement for the behaviour to have occurred on 'more than one occasion'.¹³³ Other submissions maintained that there should not be a requirement for relevant behaviour to be ongoing.¹³⁴ One magistrate contended that, although behaviour that would constitute emotional abuse would usually be

Criminal Code. Section 338D of the *Criminal Code* provides that 'pursue' includes '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'.

131. *Walsh v Baron* [2012] WADC 165, [19].

132. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Anglicare, Submission No. 28 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014).

133. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014);

134. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014).

ongoing, 'in rare cases there may be behaviour that occurred over a short period of time or on a one-off occasion that was so emotionally damaging to the applicant that inclusion of the word "ongoing" may be a barrier to his/her success in obtaining an order'.¹³⁵ Two submissions noted that if the definition of family and domestic violence requires behaviour such as emotional abuse to have occurred within a context of coercion and control, there is no need to require that the behaviour be ongoing.¹³⁶ Bearing in mind that the Commission's recommended new definition includes a requirement that the victim's safety or wellbeing be adversely affected, or that a person in the position of the victim is likely to reasonably apprehend that his or her safety or wellbeing or that of another person will be adversely affected, the Commission does not consider that it is necessary to include a requirement that the behaviour must be ongoing.

Exposure of children to family and domestic violence

The Commission explained in its Discussion Paper that the approach to exposure of children to family and domestic violence varies between jurisdictions.¹³⁷ In Victoria, the definition of 'family violence' expressly includes 'behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of family violence'.¹³⁸ In contrast, Queensland legislation provides that a child may be separately named in a domestic violence order if the court is 'satisfied that naming the child in the order is necessary or desirable to protect the child from associated domestic violence [or from] being exposed to domestic violence committed by the respondent'.¹³⁹ Likewise, in Western Australia a violence restraining order may be made for the benefit of a child if the court is satisfied that 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 to again be exposed to such an act (or where there is a reasonable fear that the child will be exposed to an act of family and domestic violence).¹⁴⁰ The term 'exposed' in relation to an act of abuse is defined in Western Australian legislation to include seeing or hearing the act or witnessing physical injuries resulting from the act.¹⁴¹ This is more limited

135. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 7.

136. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

137. LRCWA Discussion Paper, 64.

138. *Family Violence Protection Act 2008* (Vic) s 5.

139. *Domestic and Family Violence Protection Act 2012* (Qld) s 53.

140. *Restraining Orders Act 1997* (WA) s 11A.

141. *Restraining Orders Act 1997* (WA) s 3.

than in some other jurisdictions where exposure is defined more broadly to encompass being exposed 'to the effects' of family and domestic violence.¹⁴² In the Commission's view, this broader approach is preferable to give recognition that damaging exposure of a child to domestic violence can take a wide range of forms beyond the child seeing or hearing an act of domestic violence. For example, a child might be exposed to its effects by being present in the aftermath of an incident of family and domestic violence; observing injuries or distress of a person who has been subject to family and domestic violence; observing police attend in response to such conduct; or assisting with cleaning up a site after family and domestic violence has occurred.

Submissions were sought about whether the definition of family and domestic violence should explicitly include exposure of children to family and domestic violence. This approach would recognise that children who are exposed to family and domestic violence are direct victims. However, it was also noted that this approach runs the risk of causing adult victims to be held accountable for not protecting their children. For this reason 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.¹⁴³

The Commission received a total of 17 submissions in response to its question with 15 of these submissions¹⁴⁴ in full support of including exposure of children to family and domestic violence within the definition of family and domestic violence. As noted

142. *Family Violence Protection Act 2008* (Vic) s 5; *Domestic and Family Violence Protection Act 2012* (Qld) s 10.

143. ALRC/NSWLRC, *Family Violence – A National Response* (2010) [5.205].

144. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

earlier in this section, the Western Australia Police do not support amending the current definition of family and domestic violence; however, their submission stated that if the definition is amended then exposure of children should be included within the new definition.¹⁴⁵ The Commissioner for Children and Young People emphasised that including exposure of children to family and domestic violence within the definition may result in women being reluctant to report family and domestic violence due to fear that they will be held responsible for failure to protect their children from the damaging effects of exposure to family and domestic violence.¹⁴⁶ Consistent with the recommendations of the ALRC/NSWLRC it was submitted that, if exposure of children to family and domestic violence is to be included within the definition of family and domestic violence, it must be clear that it is only the behaviour of the person using the violence that can be held to have caused the exposure. The Commission agrees and recommends that the new legislation should provide that family and domestic violence against a child extends to a person committing family and domestic violence against another person which the child hears or witnesses or is otherwise exposed to the effects of.

Legislative examples

The use of examples or notes in legislation is uncommon in Western Australia.¹⁴⁷ However, as a number of jurisdictions include legislative examples of specific types of behaviour that are included within the definition of family and domestic violence, the Commission invited submissions as to whether the Western Australian Act should also include examples. By way of illustration, s 5(1)(b) of the *Family Violence Protection Act 2008* (Vic) lists examples of behaviour that 'causes a child to hear or witness, or otherwise be exposed to the effects' of family violence:

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a) —

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;

- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.¹⁴⁸

Many submissions received by the Commission supported the inclusion of legislative examples.¹⁴⁹ Legal Aid stated that it 'strongly supports providing non-exhaustive examples in the legislation' to provide guidance to judicial officers, lawyers and parties to proceedings. It mentioned that feedback from Victoria Legal Aid suggests that legislative examples have assisted in increasing understanding in practice and that courts have 'not limited themselves to matters listed in the examples, treating them as non-exhaustive as intended'.¹⁵⁰ The Family Violence Program Manager from Victoria Legal Aid told the Commission that, in her view, the most effective examples are those included in the Victorian legislation in relation to exposure of children to family violence and these examples have resulted in much improved understanding of the impact of exposure of children to family violence. The Family Violence Program Manager also stated that, prior to the commencement of the *Family Violence Protection Act 2008* (Vic), arguments in relation to a child tended to focus on whether a child was in the same room as the victim when an assault occurred or whether the TV was so loud that the child was unable to hear an assault taking place. Nonetheless, she also suggested that all of the current examples of economic, emotional and psychological abuse under that Act are arguably unnecessary and it

145. Western Australia Police, Submission No. 26 (27 February 2014) 3.

146. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 11.

147. Although examples do appear in some legislation; eg, *Road Traffic Code 2000* (WA).

148. Pursuant to s 36(3A) of the *Interpretation of Legislation Act 1984* (Vic) an example or a note at the foot of a provision in an Act forms part of the Act if the Act was passed on or after 1 January 2001.

149. Martin Chape JP, Submission No. 10 (29 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014).

150. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 21.

may be preferable to have a shorter more carefully selected list.

It has been observed that legislative examples are a 'tool that the drafter can use to facilitate comprehension of legislation [and] gives the legislation real life effect and makes it seem more tangible'.¹⁵¹ On the other hand, if the examples are not carefully chosen they may be misleading and result in 'sloppy drafting'. For this reason, it is argued that the substantive legislative provision 'should be able to stand alone'.¹⁵² While the use of examples can potentially assist in the understanding of the operation of a statute, they may also create misunderstanding, particularly among persons who are not legally trained.

For example, in *Carra v Schultz*¹⁵³ the applicant father claimed that the mother had engaged in family violence (as defined under family law legislation) on the basis that she was refusing to allow him to spend time or communicate with their child. The applicant's argument was based on the list of examples of behaviour that may constitute family violence under s 4AB of the *Family Law Act 1975* (Cth). This list includes 'preventing the family member from making or keeping connections with his or her family, friends or culture'. The court observed that this example 'appears to be directed at a situation where one party coerces or controls another by keeping them in a state of social and/or emotional isolation by cutting them off from family and friends'.¹⁵⁴ It was held that the applicant's argument was 'misconceived' and that 'withholding of time or communication with a child, without more, does not constitute family violence'. The court emphasised that at the core of the family law definition of family violence is behaviour that coerces or controls or causes fear and there was no evidence of such behaviour in this case.¹⁵⁵

It is also to be noted that examples are sometimes included in relevant commentary such as a law reform report that recommended the legislative provision; or the second reading speech or explanatory memorandum that accompanies the draft legislation.¹⁵⁶ Examples provided in these contexts can also be relied upon to assist in understanding the meaning of a legislative provision.

151. McKechnie H, 'Examples in Legislation' (2000) *New Zealand Law Journal* 465, 465, 467.

152. *Ibid* 468.

153. [2012] FMCAfam 930.

154. *Ibid* [7].

155. *Ibid* [7].

156. This was mentioned in a submission along with the fact that Western Australia does not usually include examples in legislation in the way that other jurisdictions do: Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 11.

The Commission has ultimately decided not to recommend that the legislation include examples. In its view it is preferable for attention to be focussed on the adoption of a clear, precise and appropriate definition, appropriate training and making information available to persons concerned with the operation of the proposed new Act, to further their understanding of the nature of family and domestic violence and the operation of the Act. It is also highlighted that the legislative recognition that family and domestic violence extends beyond physical and sexual abuse will make it clear that the definition of family and domestic violence covers a wide range of behaviour.¹⁵⁷

The recommended definition

RECOMMENDATION 5

Definition of family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide:

1. That **family and domestic violence** means any of the following conduct committed by a person (the first person) towards another person (the second person) with whom he or she is in a family and domestic relationship:
 - (a) physical or sexual abuse;
 - (b) damaging the second person's property, including injuring or causing the death of an animal;
 - (c) pursuing the second person or another person, or causing the second person or another person to be pursued —
 - (i) with intent to intimidate the second person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the second person;
 - (d) behaving in a manner that:
 - (i) intimidates, coerces or controls the second person or is likely to intimidate, coerce or control a person in the second person's circumstances; and

157. Recommendation 3 above.

- (ii) adversely affects the safety or wellbeing of the second person or is likely to cause a person in the second person's circumstances to reasonably apprehend that his or her safety or wellbeing, or the safety or wellbeing of another person, will be adversely affected;
 - (e) if the second person is a child, committing family and domestic violence against another person to which the child is exposed; or
 - (f) threatening to engage in any behaviour that is included in (a) to (e) above, or causing a third person to engage in behaviour that is included in (a) to (e) above.
2. That for the purposes of 1(a) above:
 - (a) **physical abuse** means assaulting a person; causing any bodily harm or injury to a person; depriving a person of his or her liberty; and kidnapping a person; and
 - (b) **sexual abuse** means sexually penetrating a person without his or her consent; indecently assaulting a person; indecently dealing with a person; committing a sexual offence against a child; and sexual coercion.
 3. That for the purposes of 1(b) above, **damaging** means conduct that constitutes an offence under ss 444 or 445 of the *Criminal Code* (WA).
 4. That for the purposes of 1(b) above, **property of the second person** includes the property of the second person, the property of another person that is situated in premises in which the second person lives or works, and property of another person that is being used by the second person.
 5. That for the purpose of 1(c) and (d) above, **intimidate** and **pursue** have the same meaning as in s 338D of the *Criminal Code* (WA)
 6. That for the purpose of 1(e) above, a child is **exposed** to domestic and family violence if the child sees or hears or is otherwise exposed to any of the effects of that behaviour.

A family and domestic relationship

Section 4(1) of the *Restraining Orders Act* defines a 'family and domestic relationship' as 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, related¹⁵⁸ 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,¹⁵⁹ or other personal relationship,¹⁶⁰ with each other.

In its Discussion Paper, the Commission observed that there did not appear to be any significant issues in relation to the definition of a family and domestic relationship.¹⁶¹ It was also acknowledged that the definition needs to be relatively broad in order to accommodate the reality that, while family and domestic violence is often committed towards or by intimate partners, it is also committed against elderly relatives, towards or by carers of disabled persons and by adolescents towards their parents.¹⁶²

However, there was some concern expressed during consultations that the above definition does not apply to an ex partner of someone's current partner. For example, in *Seah v MacIntyre*¹⁶³ the applicant for a violence restraining order was a woman's current de

158. 'Related' in relation to a person is defined in s 4(2) of the *Restraining Orders Act 1997* (WA) to mean a person who 'is related to that person taking into consideration the cultural, social or religious backgrounds of the [two] persons' or is related to the person's 'spouse or former spouse' or 'de facto partner or former de facto partner'.

159. An 'intimate personal relationship' is not defined under the *Restraining Orders Act 1997* (WA).

160. 'Other personal relationship' is defined under s 4(2) of the *Restraining Orders Act 1997* (WA) as a 'personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person'.

161. It was noted, however, that the Western Australia Police were in the process of amending their internal definition of a family and domestic relationship. Since the publication of its Discussion Paper, the Commission has been advised that a new, narrower, definition now applies on a statewide basis for the purpose of recording an incident on the DVIR1-9. A DVIR1-9 is required for incidents involving intimate partners or immediate family members (ie, parents; grandparents; or a child who ordinarily resides, resided or regularly stays with the other person or a guardian of a child): for further discussion, see Chapter Three, Recording of family and domestic violence incidents.

162. LRCWA Discussion Paper, 66.

163. [2010] WADC 186.

facto partner and the respondent was her former de facto partner. It was held that although 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.¹⁶⁴ As a consequence, the Commission proposed that the definition of a family and domestic relationship should be expanded to include the former spouse or former de facto partner of a person's current spouse or current de facto partner.¹⁶⁵ The Commission received a total of 10 submissions in response to this proposal with unanimous support.¹⁶⁶

Two other submissions raised issues in regard to the definitions of specific relationships under the *Restraining Orders Act*. In a submission from a justice of the peace, it was suggested that there is a degree of confusion over the effect of the term 'imagined personal relationship' under the *Restraining Orders Act*.¹⁶⁷ This term has relevance for 'acts of personal violence' that occur outside a family and domestic relationship. The current definition of 'an act of personal violence' does not include conduct that is included in the definition of 'an act of family and domestic violence', namely, damaging property (including the injury or death of an animal); behaving in an ongoing manner that is intimidating, offensive or emotionally abusive; or threatening to commit damage. Section 6(2)(e) of the *Restraining Orders Act* provides that if the person who commits the act has an imagined personal relationship with the person against whom the act is committed, an act that would constitute an act of family and domestic violence is included within the definition of an act of personal violence. This means that the commission of what would constitute an act of family and domestic violence by a person in an imagined person relationship is treated as if the parties were in a family and domestic relationship because it provides the grounds for a violence restraining order.

Under the Commission's recommendations in this Report, the definition of family and domestic violence will be contained in the new Family and Domestic

Violence Protection Order Act. Without commenting on the appropriateness of the current provisions in relation to the extension of the meaning of an act of personal violence where the parties are in an imagined personal relationship, the Commission notes that consequential amendments to the *Restraining Orders Act* may be necessary to maintain the status quo. This could be achieved by referring explicitly to damaging property (including the injury or death of an animal); behaving in an ongoing manner that is intimidating, offensive or emotionally abusive; or threatening to commit damage as falling within the definition of an act of personal violence where the parties are in an imagined personal relationship.

In a submission from a magistrate it was contended that the definition of 'other personal relationship' should be expanded to include a person's carer similar to what is provided in the example listed under s 8(3)(i) of the *Family Violence Protection Act 2008* (Vic).¹⁶⁸ This section provides that a 'family member' includes any other person whom the relevant person regards, or regarded, as being like a family member if it is, or was, reasonable to regard the other person as being like a family member taking into account the circumstances of the relationship including, among other things, 'the provision of sustenance or support between the relevant person and the other person'. An example is provided: 'A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members'.

Currently, the *Restraining Orders Act* defines 'other personal relationship' as 'a personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person'. The Commission is of the view that this definition is broad enough to include a carer in relevant circumstances. In view of the support received for the Commission's proposal in relation to the expanded definition of a family and domestic relationship, the Commission makes a recommendation in terms of its original proposal.

164. Ibid [7].

165. LRCWA Discussion Paper, Proposal 9.

166. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

167. Martin Chape JP, Submission No. 10 (29 January 2014) 14.

168. Magistrate Liz Langdon, Submission No. 15 (31 January 2014) 1.

RECOMMENDATION 6

Definition of a family and domestic relationship

That the new Family and Domestic Violence Protection Order Act define a family and domestic relationship as 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, related¹⁶⁹ to each other;
- (d) one of whom is a child —
 - (i) who ordinarily resides, or resided, with the other person; or
 - (ii) who 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,¹⁷⁰ with each other; or
- (g) where one of those persons is the former spouse or former de facto partner of the other person's current spouse or current de facto partner.

169. The term 'related' should have the same definition as is currently provided for in s 4(2) of the *Restraining Orders Act 1997* (WA).

170. The term 'other personal relationship' should have the same definition as is currently provided for in s 4(2) of the *Restraining Orders Act 1997* (WA).

Chapter Three

Family and Domestic Violence Protection Orders

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Introduction

As discussed in Chapter Two of this Report, the Commission recommends the introduction of new legislation dealing with family and domestic violence protection orders and related matters (such as the making of police orders and the investigation of family and domestic violence).¹ This Chapter examines the crucial areas that the Commission considers should be included in the new legislation. The Commission does not intend to refer to every potential legislative provision under the current *Restraining Orders Act 1997* (WA) that may need to be reproduced or redrafted under the new Act.²

A number of the key recommended provisions of the new legislation have already been examined in Chapter Two of this Report; namely, the objects of the new legislation, legislative recognition of the features of family and domestic violence, principles and the definitions of 'family and domestic violence' and 'a family and domestic relationship'.³ Among other things, these provisions represent reforms that the Commission believes will enhance awareness and understanding of the nature and dynamics of family and domestic violence as well as facilitating more informed decision-making.

1. See Chapter Two, Recommendation 1.
2. Recommendation 1.3 states that 'as part of the process of drafting the Family and Domestic Violence Protection Order Bill, consideration be given to all of the current provisions of the *Restraining Orders Act 1997* (WA) to ensure that the new legislation contains all necessary procedural and process provisions'.
3. See Chapter Two, Recommendations 2–6.

Police response to family and domestic violence

While victims of family and domestic violence may access the civil protection order system independently of police, police will frequently be the first point of contact with the justice system for victims and perpetrators of family and domestic violence. This contact usually occurs at the time police respond to a family and domestic violence incident (either following a report directly from a victim or a report from another person).

Currently, the *Restraining Orders Act 1997* (WA) includes provisions that deal exclusively with the investigation of family and domestic violence by police and associated police powers.¹ In this section, the Commission examines these provisions along with related matters (such as the decision by police to arrest and charge alleged perpetrators with family and domestic violence related offences and police training).

INVESTIGATION OF FAMILY AND DOMESTIC VIOLENCE

Obligation to investigate

Section 62A of the *Restraining Orders Act* creates a legislative obligation to investigate family and domestic violence in specified circumstances. The obligation to investigate arises if a police officer reasonably suspects 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'. If so, the police officer is to investigate whether family and domestic violence is being or has been committed or whether family and domestic violence is likely to be committed. The current definition of 'an act of family and domestic violence' (and the Commission's recommended new definition of 'family and domestic violence') includes conduct that may not constitute a criminal offence and conduct that may not put a person's safety at risk.² Thus the obligation to investigate family and domestic violence is not absolute. The Commission's consultations revealed concerns about the approach of police to the investigation of family and domestic

violence and related matters. These are discussed below.

Recording of family and domestic violence incidents

Police policy

In its Discussion Paper, the Commission noted that the number of recorded family and domestic violence incidents, classified as Domestic Violence Incidents (DVIs), has risen significantly over the past eight years.³ In 2004 there were 16,607 DVIs and this increased to 44,947 incidents in 2012. Until recently, every reported incident of family and domestic violence (as defined by reference to the provisions under *Restraining Orders Act*) was subject to the requirement to complete a Domestic Violence Incident Report (DVIR) 1–9.⁴ This documentation would be completed by the attending officer and then reviewed by the Family and Domestic Violence Response Teams (comprised of representatives from the Western Australia Police, the Department for Child Protection and Family Support and non-government agencies). These teams undertake a triage process to assess risk and, where appropriate, referrals are made to other agencies.⁵

1. *Restraining Orders Act 1997* (WA) ss 62A–2D.

2. For example, behaviour that intimidates, coerces or controls a person and adversely affects that person's wellbeing.

3. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Project No 104 (December 2013) ('LRCWA Discussion Paper') 46.

4. The DVIR1–9 involves nine separate questions, and 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 or red file 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; and information about patterns of behaviour (eg, jealousy, possessiveness, stalking or harassment).

5. The Commission also notes that a pilot program has commenced in the south east metropolitan area as part of Frontline 2020 where the Family Violence Protection Unit has been replaced with a Victim Support Management Unit. According to information provided by the Western Australia Police, this unit maintains the previous role of the Family Violence Protection Unit as well as undertaking other functions. The Commission was advised that the interagency response to family and domestic violence (ie, triage and assessment undertaken jointly by a representative from the Western Australia Police, the Department for Child Protection and Family Support and a non-government agency) is still operational in this district. The Western Australia Police representative on this team is a member of the local police team established as part of the pilot

Since the publication of the Commission's Discussion Paper, the Western Australia Police have implemented policy changes on a statewide basis in regard to the recording of DVIs. The Western Australia Police State Family Violence Coordination Unit explained to the Commission that the definition of a family and domestic relationship has been amended and restricted for internal purposes.⁶ As a consequence, the recording process for incidents of family and domestic violence has changed (although the Western Australia Police remain subject to the legislative provisions in relation to the investigation of family and domestic violence as it is more broadly defined under the *Restraining Orders Act*). The stated purpose of the change is to ensure that the Western Australia Police policy reflects national and state policies that focus on preventing violence against women and children (regarded as highest risk category for family and domestic violence).

The updated policy states that:

[The] police definition is utilised to differentiate between a family related incident and an incident of domestic related abuse or violence, for the purposes of recording incidents and enabling [family and domestic violence] protocols to be implemented. This does not override the legal definition contained within the *Restraining Orders Act* but guides members as to the required methods of reporting family related incidents.⁷

The new Western Australia Police definition of a 'family and domestic relationship' in this policy is stated as follows:

Intimate partner means 2 persons who:

Are or have been in a relationship with each other which has some degree of stability and continuity. It must reasonably be supposed to have, or have had a sexual aspect to the relationship.

program. Depending on the results of this pilot, the changes may be rolled out across the state or in certain districts: Consultations: Detective Inspector Valdo Sorgiovanni (State Coordinator, Family Violence Coordination Unit); Detective Sergeant Tony Rosenberg (OIC, Family Violence Coordination Unit); Senior Constable Carol Davenport (20 March 2014). On 5 May 2014 the *West Australian* reported that this pilot appeared to be achieving success with a 47% reduction in callouts to the 20 most frequently attended addresses in this area and a greater decline in verified offences in comparison to what has occurred in other metropolitan districts: Knowles G, 'Police Trial Helps to Slash Crime Call-outs', *West Australian* (Perth), 5 May 2014, 9; see also O'Callaghan K, 'Police Reform will Help Create a Better Future', *West Australian*, Opinion (Perth), 5 May 2014, 18.

6. Consultations: Detective Inspector Valdo Sorgiovanni (State Coordinator, Family Violence Coordination Unit); Detective Sergeant Tony Rosenberg (OIC, Family Violence Coordination Unit); Senior Constable Carol Davenport (20 March 2014).
7. *COPS Manual*, DV 1.1.1 – Definitions.

The partners **do not** have to be living together on a full time continuing basis and need not ever have done so.

Immediate family member means 2 persons who are related whether directly, in-laws or step family:

- i. Parent
- ii. Grandparent
- iii. One of the persons involved is a child who ordinarily resides, resided or regularly stays with the other person
- iv. Guardian of an involved child.

The amended policy stipulates where the persons involved in a family and domestic violence incident are intimate partners or immediate family members a DVIR1–9 must be completed.⁸ In contrast, if the parties are not intimate partners or immediate family members a DVIR1–9 is not required and the incident will be recorded as either a 'Crime Related Incident' or a 'General Incident'. However, the policy also encourages police to consider the context of the relationship and it states that:

For family related incidents where members become aware that there appears to be patterns of behaviour facilitating coercion or control from one person to another, it is advisable to submit an incident report inclusive of the DVIR1–9 to initiate [Family Protection Unit] assessment and consideration of support and intervention.⁹

Nevertheless, as noted above, police are required to comply with their legislative obligations in relation to the investigation of family and domestic violence even where the relationship between the parties extends beyond the Western Australia Police internal definition of a family and domestic relationship.

In summary, the Western Australia Police policy indicates that any incident of family and domestic violence will be recorded although the actual manner of recording will vary depending on whether the parties involved fit within the police definition of a family and domestic relationship or the legislative definition of a family and domestic relationship. For the former, a DVIR1–9 will be completed. Where the parties are not intimate partners or immediate family members, the incident will be recorded as either a 'crime related incident' via an Incident Report or a 'general incident' via a computer aided dispatch (CAD) system. The Commission notes that as a consequence of this policy change it is likely

8. The policy also requires the completion of a DVIR1-9 if the parties are subject to recidivist/red file case management or a police order has been issued (ie, irrespective of whether an act of family and domestic violence has taken place): *COPS Manual*, DV 1.1.2 – Recording Family and Domestic Violence Incidents.
9. *Ibid*.

that the total number of DVIs recorded each year will fall because some incidents previously labelled as domestic violence will be categorised as general incidents.

The provision of a record of a reported incident of family and domestic violence

In its Discussion Paper the Commission referred to concerns raised during consultations that incidents of family and domestic violence reported by victims are not always recorded by police. This may cause difficulties for victims in subsequent legal proceedings where there is no record to verify that a complaint to police was made. It appears that this problem arises most commonly when a victim attends a police station and makes a complaint of family and domestic violence. In these situations it was asserted by many stakeholders that victims are often told (either by a police officer or the staff member on the front desk) that there is nothing that can be done in the absence of corroborating evidence and that they should obtain a violence restraining order.¹⁰ In order to address this issue the Commission proposed that legislation stipulate that if a person reports 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 incident with a report number.¹¹ This proposal was designed to ensure that there is a record of the report irrespective of whether or not the police undertake an investigation into the incident.

The Commission received overwhelming support in submissions for this proposal.¹² The only submission

in opposition to this proposal was from the Western Australia Police. It stated that:

[T]he concept already exists in WA Police procedures and policy. An 'Incident/Offence Report Complainant Advice Slip' is in use across the agency plus any victim that has reported any incident or crime can ask for and receive an incident report number at any time.¹³

In its submission, the Gosnells Community Legal Centre confirmed that many of its clients who have reported family and domestic violence have not been provided with any formal record of the complaint and are often told that 'the person cannot be charged because there are no witnesses' and advised to apply for a violence restraining order.¹⁴ The Peel Community Legal Service observed that the police in the Peel Region appear to formally record reports in most cases; however,

it is of great concern that we continue to hear some examples where clients claim that they have reported an act of family and domestic violence but find that there is no police report when the matter is followed up.¹⁵

This submission emphasised that the failure to record a complaint of family and domestic violence has two consequences. First, there is no evidence to corroborate a victim's account that he or she reported the matter to police. Second, the approach taken by police may cause the victim to believe that the complaint has not been taken seriously and, therefore, discourage future reporting.¹⁶ Similarly, Legal Aid acknowledged that the response of many police to family and domestic violence is 'excellent; however, inconsistent or inadequate response to [family and domestic violence] by some police still remains a major issue'.¹⁷

The Commission appreciates that the Western Australia Police internal policy may require police to formally record all reports of family and domestic violence; however, there appears to be sufficient anecdotal evidence to suggest that this is not occurring in all cases. The Commission agrees with the observation of Legal Aid that the 'extent of this

10. LRCWA Discussion Paper, 47–8. This issue was also mentioned by magistrates during the 2008 review of the *Restraining Orders Act 1997* (WA): Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 21.

11. *Ibid*, Proposal 1.

12. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7

March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014); Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014).

13. Western Australia Police, Submission No. 26 (27 February 2014) 12.

14. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 1–2.

15. Peel Community Legal Service, Submission No. 30 (28 February 2014) 2.

16. *Ibid*.

17. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 7.

problem is sufficient to warrant legislative reform. It is noted that if all complaints are meant to be recorded now, the inclusion of a legislative requirement should not cause any significant additional workload in practice. The Commission is of the view that a legislative requirement will send a strong message of the importance of this obligation and encourage greater compliance.

In addition, the Commission is concerned that the new Western Australia Police policy in regard to the manner in which incidents of family and domestic violence are now to be recorded (discussed above) may cause challenges with any subsequent evaluation or monitoring of reforms arising out of this Report. Some incidents will be recorded by way of a DVIR1-9 and others will be recorded as criminal incidents or general incidents. The Commission recommends that the Western Australia Police keep data, in a manner that will enable subsequent retrieval, of all reports of family and domestic violence by any person who alleges that he or she has been subject to family and domestic violence (as recommended above). This data could then be compared to the number of matters that are recorded by way of a DVIR1-9 or a general/criminal incidents report and a comparison made between the number of reports that result in some form of action or investigation by the police and the number of reports that are simply recorded but no action taken.

RECOMMENDATION 7

Recording of reported family and domestic violence

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) The Western Australia Police must formally record every incident of family and domestic violence that is reported to the Western Australia Police by any person who alleges that he or she has been subject to family and domestic violence.
 - (b) That the person who reports the incident of family and domestic violence must be provided with a report number for subsequent verification at the time of making the report.
2. That the Western Australia Police collect and maintain accessible data in relation to the number of recorded reports of an incident of family and domestic violence as per 1 above.

Collection of evidence

It is well known that prosecuting family and domestic violence related offences can be difficult because some victims may be reluctant witnesses, fail to attend court or recant their statements. As the Commission observed in its Discussion Paper, the chance of successful prosecution is enhanced if police are able to collect alternative forms of evidence.¹⁸ The current Western Australia Police policy provides that when attending family and domestic violence incidents the 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.¹⁹

Except for the recognition of the inherent difficulties in relation to prosecuting family and domestic violence offences, consultations did not reveal any specific issues in relation to the collection of evidence by police. However, the Commission noted in its Discussion Paper that the coronial inquiry into the death of Andrea Pickett found inadequacies in the police investigation of complaints of family and domestic violence made by Andrea Pickett (eg, failure to interview witnesses).²⁰ The Commission sought submissions about whether there are 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.²¹

The Commission received 16 submissions in response to this question.²² The responses can be grouped into six main themes:

18. LRCWA Discussion Paper, 49.
19. *COPS Manual*, DV 1.1.4.1.
20. LRCWA Discussion Paper, 49.
21. *Ibid*, Question 1.
22. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Magistrate Liz Langdon, Submission No. 15 (31 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February

- **Recognition of the difficulty in obtaining corroborating evidence:** The Western Australia Police stated that common problems include the difficulty in engaging with victims who do not wish for the perpetrator to be charged with an offence and the lack of other witnesses if the alleged offence occurred in the family home.²³ Aboriginal Family Law Services noted that in some cases the need to provide for the immediate safety of the victim may override the need to obtain corroborating evidence and that victim safety should be the priority.²⁴
- **Failure or reluctance by police to investigate:** A submission from one justice of the peace noted that there have been cases in court where the evidence is clearly sufficient to justify making an interim violence restraining order but the police had not issued a police order. It was suggested that this may indicate a failure to investigate properly.²⁵ The Aboriginal Social Workers Association of Western Australia referred to a case where an Aboriginal woman was assaulted by her non-Aboriginal partner in front of her two children. The police attended and the woman was removed from the property (possibly by the issuing of a police order). The police did not record evidence of her injuries (bruises and broken skin) and no charges were laid.²⁶ One magistrate commented that:

Too frequently, in my experience as a presiding Magistrate hearing ex-parte applications for Violence Restraining Orders on a daily basis, the Applicant gives evidence that she attended the police station to make a complaint against the perpetrator of (sometimes) very serious violence and, rather than her Statement being taken by the police officer who received the report, the victim is told to go to the courthouse and 'get a Violence Restraining Order'.²⁷

She also emphasised that failure to promptly investigate may prejudice the collection of evidence at a later time. Other submissions referred to an apparent reluctance to prosecute breaches of violence restraining orders where the police regard the breach as 'technical'.²⁸

The joint submission of the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network also highlighted that police sometimes refuse to investigate a complaint and make comments such as 'it's your word against his', 'there's nothing we can do', or 'go and get a restraining order'.²⁹ This submission referred to a case where a woman called '000' in the early hours of the morning when the father of her children was 'threatening to slit her throat with a knife, and in a highly agitated, drug altered state'. Police attended; however, the perpetrator had just left. According to this submission the police refused to search for him and stated that there was nothing that they could do until the woman attended the police station and made a statement. When further queried by the victim they responded that too many women refuse to provide a statement. The submission observes that had the police searched for and found the perpetrator they may have obtained useful evidence such as locating him in the vicinity, observations of his drug-affected state, locating the knife, and possible admissions in response to questioning.³⁰

- **Failure to obtain corroborating evidence:** The Gosnells Community Legal Centre submitted that 'one of the main failings in relation to the investigation of family and domestic violence is the failure of police to collect evidence from other witnesses and evidence of early complaint'.³¹ The submission referred to a case where a woman was assaulted by her husband and she fled to a friend's house. The following day she moved in with another friend who took her to the police station so she could make a complaint. Police obtained a statement from the victim but did not seek statements from either of her friends. For the purpose of the violence restraining order proceedings, the Gosnells Community Legal Centre obtained witness statements from both

2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014); Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014).

23. Western Australia Police, Submission No. 26 (27 February 2014) 1. See also Patricia Giles Centre, Submission No. 5 (24 January 2014) 2.

24. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 2.

25. Martin Chape JP, Submission No. 10 (29 January 2014) 12.

26. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014) 4.

27. Magistrate Liz Langdon, Submission No. 15 (31 January 2014) 1.

28. Relationships Australia, Submission No. 29 (28 February 2014) 8.

29. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 7.

30. Ibid 9.

31. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 2.

friends. At the trial for the charge of assault the victim told the prosecutor about the existence of the other witnesses (for which the prosecutor had no prior knowledge) and the trial was adjourned so that these witnesses could be called. The husband later pleaded guilty to the assault charge and did not attend the final order hearing for the violence restraining order.

Anglicare commented that many victims have stated that police do not take photographs of (or fingerprints at) the scene (nor do they interview neighbours).³² The Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network specifically referred to the failure to interview neighbours when attending family and domestic violence incidents that have allegedly occurred in the family home.³³

- **Particular issues for persons with disability:** The Disability Services Commission emphasised that persons with disability may have difficulty 'remembering information, focusing attention and regulating behaviour' and other challenges include 'talking to the police, understanding the process and subsequent consequences'.³⁴ It suggested that Western Australia Police should endeavour to seek support from the Disability Services Commission, family and other relevant stakeholders when conducting investigations involving persons with disability. Path of Hope mentioned that it is difficult to obtain corroborating evidence in cases involving persons with disability especially if the perpetrator is the main carer because he or she is likely to control the victim's interactions with other people who may be able to act as a witness.³⁵
- **Difficulty in investigating technology based offences:** The Western Australia Police advised that proving 'technology based' breaches of violence restraining orders can be difficult if the administration offices for the applicable social networking site (eg, Facebook, Twitter, Instagram) are based overseas.³⁶ Aboriginal Family Law Services mentioned that contact in breach of a violence restraining order by way of social media or text messages should be treated seriously and it should be recognised that often

these forms of communication are used with the same intent as 'in person' intimidating behaviours.³⁷

- **Insufficient training for police prosecutors in leading other forms of evidence:** One magistrate contended that many prosecutors are 'insufficiently trained to lead corroborative material' such as photographs of injuries and '000' recordings. In this regard, the Commission notes that it has included police prosecutors in its recommendation in relation to training for police.³⁸

The joint submission from the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network stated:

Unfortunately, it is our experience that there is no standard response in relation to how Police initially respond and investigate incidents of [family and domestic violence]. Whilst the WA Police have policies and procedures about responding to [family and domestic violence] incidents and collecting evidence, it is our experience that the Police are not implementing them consistently.³⁹

This submission emphasised that the failure to investigate a complaint of family and domestic violence and to treat it seriously is a form of secondary victimisation and may cause reluctance to report any future violence.

Some submissions suggested solutions such as a legislative duty to investigate all allegations of family and domestic violence⁴⁰ and the inclusion in the legislation of minimum standards of investigation for all family and domestic violence.⁴¹ Additionally, it was submitted that there should be sanctions for non-compliance with legislation in this regard and a legislated complaints mechanism.⁴² It was also suggested, as an alternative, that Western Australia Police policies in regard to the investigation of family and domestic violence should be publicly accessible on the Western Australia Police website to 'improve transparency'. Legal Aid highlighted that existing police policies are not always adhered to in a number

32. Anglicare, Submission No. 28 (28 February 2014) 20–1.

33. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 10.

34. Disability Services Commission, Submission No. 11 (31 January 2014) 2.

35. Path of Hope, Submission No. 14 (31 January 2014) 4.

36. Western Australia Police, Submission No. 26 (27 February 2014) 1.

37. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 2.

38. See Recommendation 11.

39. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 7.

40. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 3.

41. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 11; Legal Aid Western Australia, Submission No. 35 (7 March 2014) 10.

42. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 12.

of different areas and, therefore, argued for the inclusion of minimum standards of investigation in legislation.⁴³

As noted earlier, s 62A of the *Restraining Orders Act* already imposes a positive obligation on the police to investigate certain incidents of family and domestic violence. Section 100(1) of the *Domestic and Family Violence Protection Act 2012* (Qld) provides a broader obligation than exists in Western Australia:

If a police officer reasonably suspects that domestic violence has been committed, the police officer must investigate or cause to be investigated the complaint, report or circumstance on which the officer's reasonable suspicion is based.

Arguably, the current legislative requirement to investigate family and domestic violence in Western Australia could be strengthened by removing the proviso that the relevant incident involves a criminal offence or has put the safety of a person at risk. However, the Commission is concerned that broadening this requirement may impact significantly on police resources and potentially shift those resources away from cases involving the highest risk to safety.

The Commission has concluded that improvements in respect to the investigation of family and domestic violence can be made by updating and expanding the Western Australia Police policy and, as suggested in submissions, by ensuring that the policy is publicly accessible on the police website. Victims of family and domestic violence and advocates, lawyers and others working in the system should be able to easily locate the relevant policies. It would be difficult to lodge a complaint about the failure to investigate or investigate properly without recourse to such policies.⁴⁴

In regard to its recommendation below, the Commission suggests that a useful model for consideration by the Western Australia Police is the *Victorian Code of Practice for the Investigation of Family Violence* (2014). This policy includes far greater detail than the Western Australia policy and usefully provides a variety of relevant information for police in relation to children and other vulnerable groups. For example, in relation to culturally and linguistically diverse communities, the policy states (among other things) that interpreters should be considered at the 'earliest opportunity and at every stage while providing assistance' and assistance should be given to women to gather important documents such as

43. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 10–11.

44. It is noted that a complaint in regard to the administrative actions of police can be made to the Ombudsman.

residential status papers, temporary protection visa and/or passports.⁴⁵ In relation to persons with disability the policy states that police should 'engage the services of a support person or independent third person as soon as possible'; that it is 'important for police to be cautious of undue influence, power imbalances and/or possible manipulation by the alleged perpetrator'; and that the alleged perpetrator 'may restrict movement, access to support and information, and try to create a perception of a lack of credibility or capacity'.⁴⁶ The policy also refers to some of the factors that contribute to family violence in Aboriginal communities.⁴⁷ There are also specific sections dealing with older people; adolescents as perpetrators; women in rural communities; and gay, lesbian, bisexual, transgender and intersex people. The Commission notes that the Western Australia Police policy in relation to family and domestic violence has specific sections dealing with children who have been exposed to family and domestic violence, abuse against older persons and family and domestic violence involving police officers; however, there are no specific sections for other vulnerable groups.

RECOMMENDATION 8

Improved Western Australia Police policy in relation to the investigation of and response to family and domestic violence

That the Western Australia Police update and expand their policy on family and domestic violence (including the addition of relevant information concerning vulnerable groups) and ensure that this policy is publicly available on the police website.

In its Discussion Paper, the Commission also specifically referred to concerns expressed during consultations about the collection of evidence in regard to allegations of breaching a violence restraining order by contact through social media or other electronic means. In particular, it was observed that it is important for the court to have sufficient material before it to show the content of the communication in order to enable a proper assessment of the seriousness of an alleged breach.⁴⁸ The Commission proposed that, where an accused is charged with breaching a violence restraining order by making contact with the person protected

45. *Victorian Code of Practice for the Investigation of Family Violence* (2014) 12.

46. *Ibid.*

47. *Ibid.* 11.

48. LRCWA Discussion Paper, 49–50.

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.⁴⁹

The Commission received unanimous support for this proposal.⁵⁰ The Western Australia Police expressed its support but also noted that this information should already be included within the prosecution brief at the first appearance in court as well as contained in the 'evidence matrix'.⁵¹ However, the Commission notes that it was informed by one prosecutor during consultations that evidence demonstrating the content of text messages in these types of cases is included in the prosecution brief in about 50 per cent of cases.

Submissions also stressed that breaching a violence restraining order by contacting the person protected via text messaging or other electronic means is a growing problem and the seriousness of such behaviour may be underestimated. The Geraldton Resource Centre stated that where a violence restraining order permits contact for the purpose of arranging time to spend with children, it has often seen 'perpetrators use the permitted communication either excessively and/or as an opportunity to communicate, often abusively, about other matters'.⁵² It was further stated that the police are reluctant to charge the person bound in these circumstances because the communication involved issues concerning children.

The Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network strongly supported the Commission's proposal and highlighted that breaching violence restraining orders by way of text messaging is often

not treated as seriously by police as it should be. It suggested that the provision of more information for the court about the content of the communication will enable the court, rather than the individual officer, to make an assessment about the seriousness of the breach.⁵³

Legal Aid agreed that information about the content of electronic communication should be provided to the court but also noted that it is equally important for other forms of communication.⁵⁴ It submitted that information from the victim should be sought by police about the context of the communication, the meaning to the victim (noting that seemingly innocuous matters can have very serious and sinister connotations), the impact of the communication on the victim, and the number of contacts made in breach of the order. Legal Aid highlighted that the provision of information in regard to the circumstances and context of communication that is allegedly in breach of an order may also assist in identifying those cases that are 'less serious' and hence provide fairness to the accused.

In its submission, Anglicare contended that any assessment of text messaging (and similar communications) needs to be undertaken from a 'trauma informed perspective'. It was noted that electronic messages can be interpreted in a manner that 'minimises' the seriousness:

For example, 'I love you babe' may be interpreted as a minor, non-threatening message, however a trauma informed perspective takes account of the broader context of psychological and emotional abuse that includes the history of violence and abuse that includes manipulation and reality distortion. The same message can be experienced by the victim as terrifying.⁵⁵

The *Victoria Police Code of Practice* provides that family violence intervention orders and family violence safety notices 'must be strictly interpreted and enforced'.⁵⁶ It is also provided that:

When preparing witness statements police will ask protected persons about the impact of the contravention on them. This information should be included in the statement that forms part of the brief of evidence and in the police summary, and will assist Magistrates in assessing the seriousness of the offence by placing the contravention in context.⁵⁷

49. Ibid, Proposal 2.

50. Patricia Giles Centre, Submission No. 5 (24 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

51. Western Australia Police, Submission No. 26 (27 February 2014) 12.

52. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 4. See also Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 14.

53. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 13–14.

54. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 11.

55. Anglicare, Submission No. 28 (28 February 2014) 16.

56. *Victorian Code of Practice for the Investigation of Family Violence* (2014) 28.

57. Ibid 29.

The Commission agrees that its proposal should extend beyond electronic communication and, accordingly, recommends that the Western Australia Police should ensure that the full context and circumstances of any form of communication that breaches a protection order is included in the prosecution brief. This means that, in practice, the police should seek input from victims about their interpretation of the communication and its impact upon them.

RECOMMENDATION 9

Enhancing understanding about the content and context of breaches of protection orders

That where an accused is charged with breaching a family and domestic violence protection order or police order by communicating with the person protected by the order (including by electronic communication, by telephone, in writing or in person), the Western Australia Police ensure that sufficient information to demonstrate the content and context of that communication is included in the police brief for prosecution as early as possible.

Pro-arrest policy

The Western Australia Police have a pro-arrest policy for family and domestic violence: arrest is expressed to be the 'preferred option'.⁵⁸ However, the Western Australia Police informed the Commission that although accused are usually arrested for breaching a violence restraining order or a police order there are instances where summonses are issued for these offences. In fact, data obtained from the Department of the Attorney General demonstrated that a significant proportion of breach of violence restraining order charges are brought by summons (28% in 2012). In contrast, for breaches of police orders the proportion of charges brought by summons was much smaller (10%).⁵⁹ The Commission suggested that this difference may be attributable to s 16A of the *Bail Act 1982* (WA) which prevents police from releasing an arrested person on bail for a charge of breaching a violence restraining order in an urban area. The Commission proposed that this provision be repealed (and this proposal is discussed further in Chapter Four).⁶⁰ It concluded in its Discussion Paper that this proposal, coupled with the existing Western Australia Policy of pro-arrest, should be sufficient to

58. *COPS Manual*, DV 1.1.4.1.

59. See LRCWA Discussion Paper, 51.

60. See Chapter Four, Recommendation 48.

discourage inappropriate summoning of persons who have been charged with breaching family and domestic violence protection orders and other family and domestic violence related offences. Nonetheless, the Commission sought submissions about whether any further reform is required (eg, a legislative presumption of arrest) to encourage more frequent arrest for family and domestic violence offences.⁶¹

The Commission received a mixed response from submissions. A number supported a legislative presumption of arrest so that accused are arrested unless there are exceptional circumstances.⁶² One submission advocated for mandatory arrest in family and domestic violence matters.⁶³ In its submission, Anglicare contended that the practice of summoning persons charged with family and domestic violence offences does not support perpetrator accountability because it sends a message that the offending is not viewed seriously.⁶⁴ Others argued that no reform is required⁶⁵ and emphasised that discretion should be retained because of the wide range of circumstances in which family and domestic violence offences may occur. The Chief Justice of Western Australia stated that a presumption of arrest 'will almost inevitably produce injustice and hardship in some cases'.⁶⁶ The Geraldton Resource Centre also cautioned that any presumption of arrest may discourage police from charging perpetrators where the police consider that the breach is 'technical' or 'minor'.⁶⁷

61. See LRCWA Discussion Paper, Question 2.

62. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014). The Disability Services Commission noted that if there was a legislative presumption of arrest unless there are exceptional circumstances then 'exceptional circumstances' should include disability or cognitive impairment: Disability Services Commission, Submission No. 11 (31 January 2014). Youth Legal Service similarly didn't specifically respond to whether or not there should be a legislative presumption but stated that if there is such a presumption, exceptional circumstances should include that the accused is a child: Youth Legal Service, Submission No. 18 (12 February 2014).

63. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014).

64. Anglicare, Submission No. 28 (28 February 2014) 22.

65. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). The Commissioner for Children and Young People submitted that there should not be a legislative presumption of arrest for children: Commissioner for Children and Young People, Submission No. 22 (21 February 2014).

66. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 2.

67. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 5.

The joint submission from the Women’s Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network suggested that a greater use of arrest in family and domestic violence matters could be achieved by amending s 142 of the *Criminal Investigation Act 2006* (WA) to provide that a ‘serious offence’ for the purpose of that provision includes breaches of violence restraining orders and police orders and other family and domestic violence related offences.⁶⁸ Currently a serious offence is defined in s 142(1) as an indictable offence which has a statutory penalty of five years’ imprisonment or more (or life). This would include a number of family and domestic violence related offences but not all (eg, breach of violence restraining order, breach of a police order and common assault are simple offences and carry a lesser maximum penalty than five years’ imprisonment).

The Commission has examined the relevant provisions of the *Criminal Investigation Act* and formed the view that the provisions are appropriate in relation to how an arrested suspect who is to be charged with a simple offence should be dealt with. Section 142(4) when read with s142(2) provides, in effect, that such a person must be released unconditionally unless the person’s presence is likely to be required in court or the police officer reasonably suspects that if released unconditionally the person would commit another offence, continue or repeat the offence for which he or she is under arrest, endanger another person’s safety or property, interfere with witnesses or otherwise obstruct the course of justice or the person’s safety would be endangered. These are all relevant considerations in relation to family and domestic violence related offences. If the arrested suspect is not released unconditionally the police officer must, amongst other things, ensure in accordance with s 142(7) that the suspect is charged as soon as practicable and dealt with under the relevant provisions of the *Bail Act 1982* (WA) or *Mental Health Act 1996* (WA).

Having reviewed the submissions, the Commission has concluded that its recommendation to repeal s 16A of the *Bail Act* is sufficient to encourage the appropriate use of arrest for family and domestic violence offences. If this recommendation is implemented, police in the metropolitan area will no longer be constrained by a rule that prohibits them from granting bail following arrest to persons charged with breaching a violence restraining order.

68. Women’s Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 15. This submission was also endorsed by Women’s Law Centre, Submission No. 31 (28 February 2014); Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014).

Therefore, issuing a summons rather than arrest in order to circumvent this rule will no longer be necessary.

POLICE POWERS

The *Restraining Orders Act* currently sets out the powers of police to search and enter premises in certain circumstances involving family and domestic violence. Section 62B(1) of the *Restraining Orders Act* provides that:

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, in general, a police officer is not entitled to exercise the powers under s 62B(1) unless approval from a senior officer under s 62D has been obtained. A senior officer is defined under s 62D(8) as an officer who is senior to the officer making the application and is of or above the rank of Inspector. The attending officer can exercise the power to enter and remain in 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.⁶⁹

In its Discussion Paper, the Commission explained that the Western Australia Police consider that the specification of the rank of Inspector for the definition of a senior officer is unwarranted. Having reviewed the definition of ‘senior officer’ under a number of provisions under the *Criminal Investigation Act 2006* (WA),⁷⁰ the Commission expressed the view that the

69. *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).

70. For example, pursuant to 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. Other provisions that stipulate that a senior

rank of Inspector is unnecessarily high for the purpose of obtaining approval under s 62D to enter and remain in premises for the purpose of investigating a family and domestic violence incident. It proposed that the definition of a senior officer under s 62D(8) of the *Restraining Orders Act* 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.⁷¹

However, at the same time the Commission was concerned about the broad nature of the power to enter and remain in premises under s 62B. It was highlighted that in exercising the power to enter premises, the attending officer is authorised to remain in the premises for as long as the attending 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. Accordingly, the Commission sought submissions about whether additional authorisation from a police officer of or above the rank of Inspector should be required in the event that it becomes necessary to remain in the premises for an extended period (and, if so, what period should be specified for this purpose).⁷²

A range of views were received by the Commission in response to its proposal and the associated question. Nine submissions supported an amendment to the definition of senior officer under s 62D of the *Restraining Orders Act* in line with the Commission's proposal.⁷³ The Geraldton Resource Centre queried

officer is an officer of or above the rank of Sergeant include approval to exercise powers that could be exercised under a search warrant (if one had been made) in relation to a Protected Forensic Area (s 47); approval for non-intimate forensic procedures for adults (s 97); or approval to extend period of detention of an arrested suspect after six hours (s 140). The rank of Inspector is specified for provisions dealing with roadblocks (s 18) and declarations about public places where persons are not permitted to enter or remain unless they consent to being searched (s 69). It is also noted that under the *Criminal Investigation (Identifying People) Act 2002* (WA) a senior officer is an officer of or above the rank of Sergeant for the purposes of approval to undertake non-intimate identifying procedures without the person's consent. For intimate procedures a warrant from a justice of the peace is required. Under s 94C of the *Community Protection (Offender Reporting) Act 2004* (WA) the rank of Sergeant is specified for the purpose of the power to enter premises without warrant to inspect computers of persons subject to protection orders. Legislative provisions which define senior officer as an officer of or above the rank of Inspector include provisions dealing with affidavits to support an application that an organisation is a criminal organisation under the *Criminal Organisations Control Act 2012* (WA) and provisions in relation to the notification of impounding and confiscation of vehicles under the *Road Traffic Act 1974* (WA).

71. LRCWA Discussion Paper, Proposal 3.

72. Ibid, Question 3.

73. Trevor Higgs, Submission No. 1 (6 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal

why approval from a senior officer is required at all and suggested that the attending officer should be permitted to enter and remain in the premises if he or she has a reasonable suspicion that family and domestic violence has been or is being committed in the premises.⁷⁴ In contrast, Legal Aid opposed the proposal and suggested that further investigation about the use of s 62B is required to properly assess the need for a reduction in the rank applicable to the definition of a senior officer. It stated that:

A review of this provision first requires a review and analysis of Police statistics and feedback from Police as to whether there are still issues in practice in entering houses after [family and domestic violence] complaints to investigate and ensure the safety of residents. If the statistics demonstrate that the provision has not been utilised in practice, this may either be because the power is not needed as Police are able to use existing powers of entry and arrest for [family and domestic violence] situations or else the provision is too time-consuming and impractical, in which case consideration should be given to amendment or repeal of the legislative provision.⁷⁵

The Commission notes that police officers have at their disposal other legislative powers of entry that may apply in certain circumstances involving family and domestic violence. Section 35(1) of the *Criminal Investigation Act* provides that a police officer may enter a place if he or she has a reasonable suspicion that certain behaviour (ie, violence, a breach of peace, an act that is likely to kill or seriously injure a person or an act that is likely to seriously damage property) is occurring or is just about to occur for the purpose of preventing that behaviour. Section 36 of that Act empowers a police officer to enter a place to ascertain facts (and, if necessary attend to a person) where there is a reasonable suspicion that there is a person in the place who has died or is so ill or injured as to be likely to die or suffer permanent injury. Pursuant to s 40 a police officer may enter private premises and establish a 'protected forensic area' if he or she has a reasonable suspicion that a serious offence⁷⁶ has been or is being committed in

Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

74. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 5.

75. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 14.

76. An offence with a penalty of five years' imprisonment or more.

the place (or there is a thing relevant to a serious offence in the place) as long as the officer also reasonably suspects that in the time it would take to obtain a search warrant either the thing relevant to the offence is likely to be concealed or disturbed or 'the safety of a person who is in or may enter the place is likely to be endangered'. In the absence of a warrant or the informed consent of the occupier of the premises a protected forensic area will be disestablished after six hours.

In response to the Commission's question about whether a higher rank should be specified if it becomes necessary to remain in the premises for a prolonged period of time, submissions again were mixed. Four submissions stated that the applicable rank should be Inspector or above⁷⁷ and a suggested period for when this requirement should take effect was two hours⁷⁸ and another was 'two to three hours'.⁷⁹ Other submissions commented that a rank higher than Sergeant is unnecessary in order to enable police to remain in the premises for an extended period of time. One of these submissions stated that if a protracted enquiry is required it is likely that the provisions under the *Criminal Investigation Act* will be utilised.⁸⁰ The Western Australia Police submitted that the decision about how long to remain in the premises should rest with the attending/investigating officer and also stated that no time limit should be prescribed.⁸¹

77. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).
78. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). This submission was endorsed by Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).
79. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 3.
80. Trevor Higgs, Submission No. 1 (6 January 2014) 3.
81. Western Australia Police, Submission No. 26 (27 February 2014) 2. During consultations with representatives of the State Family Violence Coordination Unit the Commission was told that when entering premises under s 62B of the *Restraining Orders Act*, police do not wish to remain in the premises for any longer than is necessary. It was reiterated that requiring authorisation from an Inspector (or above) can be difficult in practice because Inspectors are not always readily available. It was conceded that given that other legislation includes a time limit (eg, six hours for a protected forensic area) arguably for the sake of consistency s 62B should also include a time limit for remaining in the premises without additional approval: Consultations: Detective Inspector Valdo Sorgiovanni (State Coordinator, Family Violence Coordination Unit); Detective Sergeant Tony Rosenberg (OIC, Family Violence Coordination Unit); Senior Constable Carol Davenport (20 March 2014).

The Commission notes that during its original consultations in 2013 it was informed by the State Family Violence Coordination Unit that any data in relation to the number of senior officer approvals sought and the number of times police entered premises without senior officer approval would be unreliable and as a consequence no formal request for such data was made.⁸² After considering all submissions received in response to its proposal and question, the Commission is not convinced of the need for reform in the absence of detailed information in regard to current use of s 62B of the *Restraining Orders Act*. In this regard, it is noted that as soon as practicable after giving approval a senior officer must record the date and time when it was given and the reasons for giving the approval.⁸³ Similarly, a police officer who enters premises without a senior officer's approval must report to a senior officer as soon as practicable after the entry why entry was made and what occurred at the premises.⁸⁴ The Commission appreciates that this information may not be easily accessible; however, it suggests that a selection of family and domestic violence investigations could be examined to determine if, and on what basis, entry to premises was undertaken. Consideration needs to be given to the proportion of cases where entry to premises is made with senior officer approval, and those where it is not, as well as any practical difficulties experienced in seeking approval from an Inspector.

Accordingly, the Commission recommends that the Western Australia Police review its use of s 62B of the *Restraining Orders Act* including instances where entry to premises is not achieved because approval from an Inspector cannot be obtained or is considered too difficult to obtain. If this review finds that the current definition of a senior officer is restrictive and detrimental to the investigation of family and domestic violence and the safety of victims, the Commission strongly suggests that the definition of a senior officer be amended to an officer who is senior in rank to the officer making the application and is of or above the rank of Sergeant. The Commission notes that it also supports the current provision that requires the application for a senior officer's approval to be made to a senior officer 'who is not involved in the proposed entry'.⁸⁵

In its Discussion Paper, the Commission also referred to an issue raised by Western Australia Police in relation to the power to enter premises. It was

82. Western Australia Police Family Violence State Coordination Unit, consultation (29 August 2013).
83. *Restraining Orders Act 1997* (WA) s 62D(6).
84. *Restraining Orders Act 1997* (WA) s 62B(1b).
85. *Restraining Orders Act 1997* (WA) s 62D.

contended that the current wording of s 62D(3) of the *Restraining Orders Act* means, in practice, that police are not able to seek and obtain the necessary approval to enter premises if the 'person of interest' is no longer on the premises and that this may impact upon the safety of victims and children who remain in the premises. Section 62D(3) currently 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

It was argued that this provision requires the police officer making the application to have a reasonable suspicion that a person is on the premises and that this same person is the person who is suspected of committing family and domestic violence. In order to rectify this problem, the Commission proposed that s 62D(3) be amended to replace the word 'the' in paragraph (b)(ii) with the word 'a'.⁸⁶

The Commission received a number of submissions fully supporting this proposal.⁸⁷ However, the joint submission from the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network cautioned that the proposed amendment of s 62D(3) may result in unnecessary infringements upon the rights of victims. It was stated that if a police officer enters the premises and the alleged perpetrator is not present, but subsequently finds out that police attended the house, this may cause difficulties for the victim at a later time. It was also noted that if a false report is made by neighbours

86. LRCWA Discussion Paper, Proposal 4.

87. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014). Youth Legal Service, Submission No. 18 (12 February 2014) submitted that s 62D(3) of the *Restraining Orders Act 1997* (WA) should be amended to read: '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; **or** (ii) a person has committed, or is committing, an act of family and domestic violence against another person.' The Commission does not agree with this suggestion because it would enable police to enter premises even if there is no suspicion that any person is on the premises.

and police attend and enter the premises this 'may breach the privacy of the residents of the home'.⁸⁸

The Commission notes that under the current provision police may enter a person's premises following a false report of family and domestic violence (assuming that the nature and circumstances of the report were sufficient at the time to cause a reasonable suspicion that family and domestic violence was being committed or had been committed on the premises). The Commission's proposal addresses the situation where police have a reasonable suspicion that family and domestic violence is being or has been committed on the premises and wish to enter to investigate or to ensure the safety of a person or persons who may be inside the premises but are unable to do so if the alleged perpetrator has fled. The Western Australia Police informed the Commission that situations arise where the alleged perpetrator is driving away from the premises at the time of their arrival. The Commission maintains its view that its original proposal is appropriate.

The Commission emphasises the provisions discussed above (as well as ss 62A and 62C) are specific to family and domestic violence and, therefore, as part of the Commission's recommendation for a new Family and Domestic Violence Protection Order Act these provisions (as amended) will need to be transferred from the *Restraining Orders Act* into the new Act.

RECOMMENDATION 10

Police powers of entry in relation to family and domestic violence

1. That s 62D(3) of the *Restraining Orders Act 1997* (WA) be amended to provide that a police officer making an 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 –

88. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). This submission was endorsed by the Geraldton Resource Centre and the Women's Law Centre: Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014). Legal Aid reiterated its comments made in relation to Proposal 3 and Question 3: Legal Aid Western Australia, Submission No. 35 (7 March 2014).

- (i) a person is on in the premises; and
 - (ii) a person has committed, or is committing, an act of family and domestic violence against another person.
2. That the Western Australia Police review its use of s 62B of the *Restraining Orders Act 1997* (WA) including consideration of the proportion of entries that are made with a senior officer's approval, the proportion of entries that are made without a senior officer's approval (and the reasons for proceeding without such approval), and the extent to which s 63B of the *Restraining Orders Act 1997* (WA) is utilised for the purpose of investigating family and domestic violence.
 3. That sections 62A–62D (as amended or reformed) be removed from the *Restraining Orders Act 1997* (WA) and be included in the new Family and Domestic Violence Protection Order Act.

TRAINING

The Commission highlighted in its Discussion Paper that there were significant concerns expressed during consultations about the consistency and appropriateness of the response by police to family and domestic violence.⁸⁹ Some examples have been referred to above. One example that was repeatedly mentioned to the Commission is where police officers issue a police order against the victim of family and domestic violence (possibly because it is easier for the victim to find alternative accommodation or because of misconceptions about what has occurred due to cultural and language barriers). As a consequence of these concerns, the Commission proposed that the Western Australia Police provide regular training to all police officers in relation to family and domestic violence and that this training should 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.⁹⁰

The Commission received extensive support for this proposal and no submissions were received in opposition.⁹¹ A number of submissions also included

89. LRCWA Discussion Paper, 54.
 90. Ibid, Proposal 5.
 91. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January

suggestions in relation to the appropriate content of police training, which officers should be required to undertake the training, and about how such training should be delivered. The Patricia Giles Centre emphasised that training needs to be undertaken on an ongoing basis by all police including high-level officers responsible for policy decisions.⁹² One submission stated that the requirement in the proposal for ongoing training should extend to police recruits.⁹³ As noted earlier, one magistrate mentioned that prosecutors lack sufficient training in relation to how to lead corroborating evidence for family and domestic violence cases.⁹⁴

Youth Legal Service submitted that the training should include training delivered by agencies with 'expert knowledge of children as perpetrators' of family and domestic violence.⁹⁵ Similarly, the Commissioner for Children and Young People stated that police training should include the impact of exposure of children to family and domestic violence and particular issues for children who are perpetrators.⁹⁶ Aboriginal Family Law Services also emphasised the importance of police understanding the impact of family and domestic violence on children in order to encourage 'more in depth risk assessment and safety plans' for children.⁹⁷

2014); Hayley Barbarich, Submission No. 8 (28 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Anglicare, Submission No. 28 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014); Lorraine Bentley, Kelly Bentley and Gary Bentley, Submission No. 40 (28 March 2014).

92. Patricia Giles Centre, Submission No. 5 (24 January 2014) 2.
 93. Maggie Woodhead, Submission No. 4 (17 January 2014) 3.
 94. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).
 95. Youth Legal Service, Submission No. 18 (12 February 2014) 10.
 96. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 8.
 97. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 3.

In its submission, Anglicare acknowledged the 'exemplary examples of outstanding responses to victims and perpetrators of [family and domestic violence], particularly the specialist police officers in the Family Protection Units'. However, it argued that examples of inappropriate responses indicate that the current training provided at the Academy (and as part of ongoing professional development) is inadequate. Anglicare recommended that training for police must be comprehensive and include contemporary understandings of behaviours associated with family and domestic violence and include a 'trauma informed perspective'.⁹⁸ It was further suggested that the training should be subject to ongoing evaluation.

In their submission, the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network stressed that adequate police training is a 'core concern'. It was submitted that many of the problems encountered by their clients could be remedied (or at least minimised) by adequate training, including failure to investigate family and domestic violence, failure to lay charges, failure to identify the primary aggressor, failure to understand the dynamics of family and domestic violence and failure to understand why a victim does not wish to make a statement. Further, the submission advocated for the inclusion of a requirement for adequate training to be in legislation and the establishment of a stakeholder committee comprised of government and non-government agencies to oversee the training content and its outcomes.⁹⁹

Legal Aid acknowledged that the current police training program is already augmented by the use of external experts such as staff from women's refuges and the Family Violence Service, but suggested that the current program could be enhanced by the 'creation of a multi-agency Advisory/Reference Committee to identify current issues and professional development gaps for Police and provide a pool of appropriately qualified/experienced trainers to address identified training needs'.¹⁰⁰ The submission made reference to specific areas that currently require more substantial and appropriate training such as the failure to identify the primary aggressor and the grounds for making

98. Anglicare, Submission No. 28 (28 February 2014) 17.

99. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 19.

100. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 15. Examples of agencies suggested for inclusion in such a committee were representatives from the Women's Council for Domestic and Family Violence Services, the Domestic Violence Legal Workers Network, Men's Programs and academics with expertise in family and domestic violence.

a police order. It was argued that deficiencies in these areas have led to victims being inappropriately subject to police orders and criminal charges. Two case examples are reproduced below:

Case example 1

Police are called out to a [family and domestic violence] incident where they separately speak to the man and woman. The man is calm and tells the Police that the woman 'went crazy' and assaulted him by throwing a plate at his head. The woman who is an immigrant from the Philippines cannot speak English well. An interpreter was not organised by the Police. The woman is charged with assault. The woman threw the plate at the man's head in order to try to escape after the man had physically grabbed her, dragged her inside the house and stopped her from leaving after they had argued. The man had a history of some prior [family and domestic violence] incident reports. The woman had no such history. However, it seems the Police did not check Police records before laying charges.

Case example 2

Police attend a [family and domestic violence] incident. The woman appears distressed and tells Police she has been assaulted by her partner. Her partner is angry and aggressive. The Police ask who is prepared to leave the home. The woman says that she will stay with the children at her mother's house. The Police then issue a 24 hour police order against her. The following day, the man applies for and obtains an interim [violence restraining order] against the woman relying heavily on his evidence that the Police 'evicted' his partner with a police order.¹⁰¹

The Western Australia Police neither supported nor opposed the Commission's proposal but confirmed the details of its current training conducted in regard to family and domestic violence. The submission states that police recruits are provided with four and a half days of family and domestic violence training consisting of training in relation to police procedures and policy; presentations from the Pat Giles Centre (victim perspective), Breathing Space (perpetrator perspective), a CALD victim of family and domestic violence, and Family Violence Services; presentations from internal speakers including officers from the Family Protection Units; and scenario training.¹⁰² It is further stated that the content of this training is regularly reviewed by the Family Violence State Coordination Unit. In addition, online and 'classroom based' diversity training is available for two days. In order to achieve promotion to the rank of first

101. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 16.

102. Western Australia Police, Submission No. 26 (27 February 2014) 13.

class constable and senior constable, police are also required to undertake a training module in family and domestic violence.

The Commission maintains its view that more comprehensive and regular training should be undertaken by police. The importance of ensuring that all police officers (including those who may potentially respond to family and domestic violence incidents, deal with victims and perpetrators and establish internal policies in regard to family and domestic violence) are appropriately trained in relation to the contemporary nature and dynamics of family and domestic violence, as well as specific issues facing vulnerable groups in the community, cannot be underestimated. The Commission also agrees with submissions suggesting that police training programs should be reviewed by appropriate experts and recommends the establishment of a multi-agency stakeholder committee for that purpose.

RECOMMENDATION 11

Police training

1. That the Western Australia Police ensure that it provides comprehensive and ongoing family and domestic violence training to all police officers (including police recruits, frontline police officers, police officers working in management and administrative roles, and police prosecutors).
2. That the training include contemporary understandings of the nature and dynamics of family and domestic violence; and specific issues in relation to family and domestic violence for Aboriginal communities, multicultural communities, persons with disability, children who are exposed to family and domestic violence and children who are perpetrators of family and domestic violence.
3. That the training be delivered by members of the Western Australia Police with expertise in family and domestic violence as well as experts from government and non-government agencies.
4. That the Western Australia Police establish a multi-agency stakeholder committee (comprised of relevant experts from government and non-government agencies) to regularly review the content of the training and to monitor its effectiveness.

Family and domestic violence protection orders

Violence restraining orders are designed to protect victims of family and domestic violence by imposing restraints on the behaviour of the person bound by the order. Such orders are an important mechanism for providing safety for victims; however, they are not foolproof and should not be viewed as a panacea for family and domestic violence. As the Commission has highlighted in the Introduction to this Report, agencies that work with victims and perpetrators must be resourced to ensure the provision of appropriate services that aim to prevent family and domestic violence. Sufficient resources are also required to protect and support victims in other practical ways (eg, the adequate provision of alternative accommodation for victims and perpetrators, safety planning, the provision of duress alarms and other security measures, and adequate counselling services).

It is also important to emphasise that, for persons who are bound by violence restraining orders, their lawful activities are curtailed and the order may have serious consequences (such as removal from the family home, loss of employment and restrictions on contact with children). Furthermore, any breach of the order constitutes a criminal offence and may lead to significant punishment including imprisonment. These potential consequences explain why courts have highlighted that restraining orders should not be made lightly,¹ and why the Commission believes that the process for seeking and obtaining orders must be fair to all parties.

As explained earlier in this Report, the Commission has recommended that violence restraining orders for family and domestic violence matters be termed 'family and domestic violence protection orders'. In the remainder of this Chapter, the Commission makes a number of recommendations that are intended to ensure that family and domestic violence protection orders are made in appropriate circumstances and the associated processes are fair and effective.

GROUNDS FOR A PROTECTION ORDER

In this section, the Commission discusses the grounds for making a protection order and the factors that must be considered by the decision-maker when determining whether to make a protection order. The grounds for a violence restraining order (which apply irrespective of whether the parties are in a family and domestic relationship) are currently set out in s 11A of the *Restraining Orders Act 1997* (WA). This section 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.

Therefore, for family and domestic violence matters the grounds are either 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; or that the applicant reasonably fears that the respondent will commit an 'act of family and domestic violence' in the future. While the second limb does not require proof of a past act of family and domestic violence, in practice—in order to establish 'reasonable fear'—evidence of past family and domestic violence will often be necessary. Even if one of the grounds is established the court may, nevertheless, determine that a violence restraining order is not appropriate in the circumstances.²

In its Discussion Paper, the Commission examined the grounds for comparable orders in other Australian jurisdictions, as well as the recommendations of the ALRC/NSWLRC, and proposed reformulated grounds largely based upon the existing grounds under the

1. See *McKenzie v Picken* [2002] WASCA 113, [34]; *Walsh v Baron* [2012] WADC 165, [36].

2. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 67.

Restraining Orders Act.³ It proposed that the grounds for making a protection order should be:

- (1) 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
- (2) 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.⁴

The Commission also sought submissions about whether the residual discretion under s 11A of the *Restraining Orders Act*—that the court must be satisfied that the making of an order is appropriate in the circumstances—should remain.⁵ The main basis for this question was the concern expressed during consultations that this residual discretion allows the personal views of some judicial officers about violence restraining orders and family and domestic violence to negatively impact the decision-making process.

Very strong support for the Commission's proposed two grounds (as set out above) was expressed in submissions.⁶ The Western Australia Police supported

3. The Commission proposed that the phrase 'reasonably fears' in s 11A(b) of the *Restraining Orders Act 1997* (WA) be changed to 'has reasonable grounds to apprehend' so that it is unnecessary to prove subjective fear: *ibid* 68. This was expressly supported in a submission from one magistrate: Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). Also, as discussed in Chapter Two above, the Commission changed the terminology from an 'act of family and domestic violence' to 'family and domestic violence' in order to shift the focus from discrete incidents to the context of the behaviour.
4. LRCWA Discussion Paper, Proposal 10.
5. *Ibid*, Question 5. It is noted that s 37 of the *Domestic and Family Violence Protection Act 2012* (Qld) provides that the grounds for a protection order are that the court is satisfied that the respondent has committed domestic violence and the order is 'necessary or desirable to protect' the applicant from domestic violence. Therefore, once it is established that domestic violence has occurred, it is assumed that the court would consider whether the applicant is likely to be subject to future domestic violence or fears the commission of future domestic violence in order to properly assess the necessity or desirability of an order. These considerations are already included within the two grounds under the current Western Australian law; however, the criteria in Queensland would also enable the court to take into account other considerations in assessing whether the order is necessary or desirable to protect the applicant from domestic violence. In Victoria, pursuant to s 74(1) of the *Family Violence Protection Act 2008* (Vic) a court may make an order if satisfied that the 'respondent has committed family violence against the affected family member and is likely to continue to do so or do so again'. There is no residual discretion that the court must be satisfied that the order is appropriate.
6. Martin Chape JP, Submission No. 10 (29 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and

the proposal, other than the omission of the phrase 'an act of family and domestic violence' because the terminology under the legislation should be consistent. However, the Commission has adopted the phrase 'family and domestic violence' instead of 'an act of family and domestic violence' throughout this Report and in all of its recommendations.

The only submission expressing any disagreement with the proposed grounds was from Relationships Australia, which argued that a single act of family and domestic violence should be sufficient to justify the making of a protection order because of the difficulties faced by many victims in obtaining sufficient evidence of past repeated behaviour.⁷ In this regard, a case example was referred to where a woman had been subjected to ongoing stalking by her ex-partner (sometimes on a daily basis) but only the most recent incident had been subject to a charge by police. The submission reports that this woman was told by police in relation to past stalking behaviour that there was 'insufficient evidence', 'she couldn't prove it was him' and that police need to be able to 'catch him in the act'. While the Commission appreciates the difficulties experienced by victims in providing evidence of past family and domestic violence, it does not consider that it is appropriate to make a family and domestic violence protection order on the basis of a single past act of family and domestic violence. Considering that the underlying purpose of such orders is protection, it is not appropriate to make an order where there is no risk or apprehension of future family and domestic violence.

Newborn Health Service, Submission No. 17(a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). An additional submission indicated support for the proposal but also suggested that the grounds should expressly refer to dependent children who may be subjected to and require protection from family and domestic violence: Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). The Commission discusses below the applicable grounds in relation to children who are exposed to family and domestic violence.

7. Relationships Australia, Submission No. 29 (28 February 2014) 10.

The responses received to the Commission's question concerning the appropriateness of the residual discretion under s 11A of the *Restraining Orders Act* were varied. Eight submissions supported the removal of the requirement to consider that the making of an order is appropriate in the circumstances.⁸ The Geraldton Resource Centre noted that decisions in relation to the making of interim orders are usually made without giving reasons, so there is 'little transparency and accountability in relation to how this part of s 11A is being used'.⁹ The Aboriginal Family Law Services suggested that, if either of the two grounds for making a protection order is made out, a requirement to be satisfied that the making of the order is appropriate is unnecessary.¹⁰

On the other hand, five submissions opposed removing the residual discretion under s 11A.¹¹ One magistrate submitted that the requirement for the order to be appropriate in the circumstances should remain because there may be cases where family and domestic violence is of a 'less serious' nature and, as a consequence of existing Family Court orders or proceedings, the making of a protection order may be unnecessary.¹² Youth Legal Service emphasised the potential consequences of a protection order for the respondent and noted that there are cases where the seeking of an order is not motivated by safety concerns.¹³ The Commissioner for Children and Young People submitted that judicial discretion should be retained. The Commissioner suggested that other recommendations in regard to judicial training and the inclusion of appropriate legislative objects and principles should assist in improving the manner in which the discretion is exercised.¹⁴

8. Patricia Giles Centre, Submission No. 5 (24 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).
9. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 14.
10. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 4.
11. Martin Chape JP, Submission No. 10 (29 January 2014); Magistrate Liz Langdon, Submission No. 15 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014).
12. Magistrate Liz Langdon, Submission No. 15 (31 January 2014) 1.
13. Youth Legal Service, Submission No. 18 (12 February 2014) 15.
14. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 11.

The Gosnells Community Legal Centre stated that 'judicial admonitions that violence restraining orders should not be made lightly are valid and the requirement in s 11A that the court should be satisfied that a violence restraining order is appropriate will ensure that this principle is adhered to'.¹⁵ However, it also submitted the current wording is too broad and suggested that, if the court is satisfied of either of the two grounds, the onus should shift to the respondent to demonstrate that there are exceptional circumstances which make it inappropriate for an order to be made. For example, the respondent would have to demonstrate that, although the court is satisfied that family and domestic violence has occurred and is likely to occur in the future, the nature of the future family and domestic violence is so minor as to not warrant the making of an order.

Legal Aid also stressed the importance of retaining judicial discretion because it ensures 'that each decision is appropriate in the circumstances and prevents unfairness'.¹⁶ However, it also observed that:

[J]udicial discretion can be problematic in relation to [violence restraining orders] if judicial understandings of [family and domestic violence] are erroneous or inadequate.... In practice the general discretion in section 11A has been frequently used by judicial officers as a basis to deny a [violence restraining order] despite the grounds for a [violence restraining order] being clearly made out.¹⁷

Legal Aid contended that a 'more qualified discretion' (coupled with improved judicial education and the provision of more reliable and probative information to courts) would result in a 'better informed and more appropriate exercise of judicial discretion' in this context. Although supporting the removal of the residual discretion, the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also indicated that they might support a change that shifts the onus to the respondent to demonstrate that there are exceptional circumstances why the making of a family and domestic violence protection order is inappropriate.¹⁸

One magistrate argued that any problems, in regard to how the discretion is being exercised in practice, could be rectified by amending s 11A to provide

15. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 7–8.
16. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 25.
17. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 25.
18. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 30.

that the court must be satisfied (in addition to being satisfied that one of the grounds has been made out) that the making of an order is appropriate in the circumstances 'having regard to the provisions of s 12'.¹⁹ The Commission considers that this suggestion confirms the existing law because the provisions of s 12 stipulate that the court is required to have regard to matters listed in that section when considering whether to make a violence restraining order.

After considering all of the submissions on this issue, the Commission has formed the view that, if either of the two grounds for a protection order has been satisfied to the required standard, it is reasonable for a person seeking protection to expect that an order will usually be made in that person's favour. For example, if a court is satisfied that the respondent has committed family and domestic violence and is likely to do so again, the scope for determining that a family and domestic violence protection order is inappropriate should be limited. In recognition that there may be situations where an order is not appropriate, even though the grounds are established, the Commission recommends that the residual discretion be reformulated and tightened (requiring that the court be satisfied that there are special circumstances which make it inappropriate to make an order).

RECOMMENDATION 12

Grounds for making a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that a court may make a family and domestic violence protection order if it is satisfied that –

- (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

unless the court is satisfied that there are special circumstances which make it inappropriate for a family and domestic violence protection order to be made.

19. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 8.

Relevant factors

Legislative guidance about what factors are to be considered in determining whether to make an order is set out in s 12 of the *Restraining Orders Act*. The listed factors have a dual purpose: they are required to be considered by the court when determining whether to make an order as well as when determining the terms of the order. Section 12(1) currently provides:

When considering whether to make a violence restraining order and the terms of the order a court is to have regard to –

- (a) the need to ensure that the person seeking to be protected is protected from acts of abuse;
- (b) 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;
- (ba) the need to ensure that children are not exposed to acts of family and domestic violence;
- (c) the wellbeing of children who are likely to be affected by the respondent's behaviour or the operation of the proposed order;
- (d) the accommodation needs of the respondent and the person seeking to be protected;
- (da) 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;²⁰
- (e) hardship that may be caused to the respondent if the order is made;
- (f) any family orders;
- (g) other current legal proceedings involving the respondent or the person seeking to be protected;
- (h) any criminal record of the respondent;
- (i) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and
- (j) other matters the court considers relevant.

Section 12(2) stipulates that the first four matters listed above are 'of primary importance'.

In Chapter Two of this Report, the Commission recommended a number of principles that are required to be considered by a person, court or body in performing a function under its recommended

20. Section 12(3) states that in 'having regard to the matters set out in subsection (1)(da), a 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'.

new Family and Domestic Violence Protection Act. These principles are also relevant for a court when determining whether to make a family and domestic violence protection order and when determining the terms of a family and domestic violence protection order.

The first three recommended principles are:

- ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration; and
- the best interests of children is a primary consideration.²¹

The Commission is of the view that these three principles adequately encompass the first four factors that are currently listed in s 12 of the *Restraining Orders Act*.

Before setting out its recommendation in regard to the relevant factors for consideration when determining whether to make a family and domestic violence order and the terms of any order, it is necessary to discuss one new factor that the Commission proposed in its Discussion Paper. The Commission found that, in reality, a number of victims and perpetrators of family and domestic violence continue to live together or maintain contact. This was especially evident during consultations in Geraldton and the Kimberley and in relation to Aboriginal people. The Commission observed that not all victims of family and domestic violence can, or want to, end the relationship for a variety of reasons.²² Moreover, for many Aboriginal people, socio-economic constraints (eg, lack of alternative accommodation), cultural constraints (eg, connection to family and community) and geographical remoteness will mean that protection orders are simply not sought or, if they are obtained, the parties will continue to reside together or stay in contact.

It appears that the standard approach to violence restraining orders in the past has been to prohibit or significantly restrict contact between the parties. From the perspective of minimising the risk of future family and domestic violence, this is an

21. Chapter Two, Recommendation 4.

22. LRCWA Discussion Paper, 86–7.

understandable approach. However, the unintended consequences of this approach are significant. Some victims of family and domestic violence are likely to be discouraged from seeking a protection order in the belief that it will prevent them from continuing some form of contact with the perpetrator. Further, if a non-contact order is made and the parties intend to maintain contact, it is inevitable that breaches will occur and the person bound will be liable to criminal prosecution and punishment.

The Commission decided that in determining the terms of a family and domestic violence protection order a more flexible approach should be encouraged. Many people consulted expressed support for protection orders that enabled contact between the parties but prohibited certain behaviour (eg, the commission of family and domestic violence, consumption of alcohol or attending specified premises while under the influence of alcohol). The Commission proposed that, when considering the terms of a family and domestic violence protection order, the court is to have regard to the circumstances of the relationship between the parties (including whether the parties intend to remain living together or remain in contact). It was also proposed that every family and domestic violence protection order should contain, as a standard condition, that the person bound is not to commit family and domestic violence against the person protected and is not to expose a child to family and domestic violence.²³ These types of conditions are often referred to as 'non-molestation' orders. One clear benefit of this standard condition is that it provides a clear basis for a person protected by the order to seek police assistance in the event that the person bound commits family and domestic violence (irrespective of whether that conduct constitutes a criminal offence).

The Commission received extensive support for this proposal²⁴ and no submissions were received that

23. Ibid Proposal 22.

24. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic

indicated any opposition. The Department for Child Protection and Family Support stated that:

Increasing flexibility of [violence restraining orders] to allow for conditions that support safe co-habitation or safe contact will increase their use and relevance for a range of women that may not currently see these orders as a suitable option. For example, victims living in remote areas; victims employed by the same company as the respondent; victims who wish to remain in a relationship with their partner but have the violence stop; victims who are cared for by the respondent; and/or victims with parenting orders or other child contact arrangements.²⁵

Anglicare explained that feedback from Aboriginal staff indicated that 'non-molestation orders' have particular relevance for Aboriginal people and should be considered along with specific additional conditions, such as conditions not to consume alcohol; not to attend specific premises if under the influence of alcohol; and not to use drugs, amphetamines or cannabis.²⁶

Gosnells Community Legal Centre noted that conditions such as prohibiting the commission of family and domestic violence or the consumption of alcohol are difficult to enforce but worthy of consideration so long as police are educated about their potential value and the need to treat allegations of breaching such conditions seriously.²⁷ The Geraldton Resource Centre observed that some victims are discouraged from seeking orders 'because of the all or nothing approach of the courts'.²⁸ It was also noted that people in the community still view family and domestic violence as referring to actual physical violence, so it will be important that the meaning of a condition 'not to commit family and domestic violence' is clearly understood by the person bound by the order.²⁹

Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). Two submissions suggested that the standard condition should include that the person bound is not to engage in a process of threat and intimidation: Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). However, the Commission is of the view that the broad condition that the person bound is not to commit family and domestic violence covers this type of behaviour.

25. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 4.
26. Anglicare, Submission No. 28 (28 February 2014) 19.
27. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 11.
28. A justice of the peace advised in his submission that some justices of the peace 'tick all the boxes rather than tailor conditions to the specific circumstances of the case': Martin Chape JP, Submission No. 10 (29 January 2014).
29. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 27.

Youth Legal Service agreed with the Commission's proposals but expressed concern about the potential for the person protected by the order to commit 'acts of abuse' against the person bound, causing the person bound to breach the order. It suggested that where both parties are living together the court should be able to make 'mutual non-molestation orders'.³⁰ The Commission does not agree that mutual protection orders should be considered as the norm. The Commission's recommended legislative principles require that, where both parties are committing family and domestic violence, the person who is most in need of protection should (where possible) be identified. Where there are two parties who are on an equal footing in regard to reciprocal family and domestic violence, mutual protection orders may be appropriate. However, the Commission does not consider that victims of family and domestic violence who have engaged in conduct for the purpose of self-protection should generally be subject to a protection order.

The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network was supportive of the proposal but cautioned against the standard condition not to commit family and domestic violence being seen as the 'default position'.³¹ A similar sentiment was expressed by Legal Aid; however, it also stated that it is aware of cases where a victim has indicated a wish to live with or communicate with the person bound but the court has refused to make an order enabling this to occur.³² Bearing in mind other recommendations made in this Report (eg, legislative principles that posit victim safety and the best interests of children as primary considerations and improved training for judicial officers), the Commission does not consider that the requirement to take into account the circumstances of the relationship between the parties (including whether the parties intend to remain living together or remain in contact) and the standard inclusion of a condition not to commit family and domestic violence will be viewed as the default position. Having said that, the Commission believes that the legislation should expressly require the court to consider the views of the person seeking to be protected in relation to whether he or she wishes to maintain contact with the respondent. The Commission includes these two additional factors in its recommendation below. The recommendation

30. Youth Legal Service, Submission No. 18 (12 February 2014) 20.
31. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 42.
32. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 41.

in relation to the inclusion of a standard condition not to commit family and domestic violence appears later in this Chapter.³³

RECOMMENDATION 13

Relevant factors for consideration when determining whether to make a family and domestic violence protection order and the terms of a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a family and domestic violence protection order and when considering the terms of a family and domestic violence protection order, the court is to have regard to:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) the past history of the respondent and the person seeking to be protected with respect to applications under this Act,³⁴ whether in relation to the same act or persons as are before the court or not;

33. See Recommendation 32.

34. Or under the *Restraining Orders Act 1997* (WA).

- (h) hardship that may be caused to the respondent if the order is made;
- (i) the accommodation needs of the person seeking to be protected and the respondent;
- (j) the circumstances of the relationship between the parties, including whether the parties intend to remain living together or remain in contact and the wishes of the person seeking to be protected in this regard;
- (k) any family orders;
- (l) other current legal proceedings involving the respondent or the person seeking to be protected;
- (m) any criminal record of the respondent and the person seeking to be protected;
- (n) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and
- (o) any other matter the court considers relevant.

Grounds where children are exposed to family and domestic violence

Section 11B of the *Restraining Orders Act* provides for the grounds for making a violence restraining order for the benefit of a child. It states that a violence restraining order may be made for the benefit of a child if the court is satisfied that:

- (a) The child has been exposed³⁵ 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;
- (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.

In Chapter Two of this Report, the Commission has recommended that the definition of family and domestic violence includes exposure of children to

35. 'Exposed' in relation to an act of abuse includes 'to see or hear the act of abuse' or 'to witness physical injuries resulting from the act of abuse': *Restraining Orders Act 1997* (WA) s 3.

family and domestic violence.³⁶ Therefore, under the Commission's recommendations, a child will be able to directly seek a family and domestic violence protection order on the basis of exposure to family and domestic violence. Equally, under the Commission's recommendations, a family and domestic violence protection order will be able to be made to protect a child from exposure to family and domestic violence where a person who has applied for an order on behalf of a child has reasonable grounds to apprehend that the respondent will expose the child to family and domestic violence in the future.³⁷ However, under the current s 11B, a violence restraining order may also be made to protect a child from exposure to family and domestic violence where 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. This is broader than what is contemplated under the Commission's recommendations because the categories of persons who can apply for an order on behalf of a child cover a parent or guardian, a police officer, or a child welfare officer. In order to address this gap, the Commission recommends that the new legislation provide that a protection order can be made for the benefit of a child on the basis that a person with whom the child is in a family and domestic relationship has reasonable grounds to apprehend that the respondent will expose the child to family and domestic violence.

RECOMMENDATION 14

Grounds for making a family and domestic violence protection order for the benefit of a child who has been exposed to family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide that, in addition to the grounds for making a family and domestic violence protection order (as set out in Recommendation 12 above), a family and domestic violence protection order may also be made for the benefit of a child if the court is satisfied that a person with whom the child is in a family and domestic relationship has reasonable grounds for apprehending that the child will be exposed to family and domestic violence committed by the respondent, unless the court is satisfied that there are special circumstances which make it inappropriate for the family and domestic violence protection order to be made for the benefit of the child.

36. Chapter Two, Recommendation 5.

37. See Recommendation 12.

Interim violence restraining orders

In its Discussion Paper, the Commission observed that the grounds for making an interim violence restraining order are the same as the grounds for making a final violence restraining order. Clearly, the evidence and information before the court may differ at each hearing (eg, the respondent will not be present for an ex-parte interim hearing) but the matters about which the court must be satisfied are the same. It was noted that the position varies in other jurisdictions.³⁸ For example, 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.³⁹

The Commission referred to data which demonstrates that in Western Australia there are significantly fewer final violence restraining orders made in comparison to interim violence restraining orders. For example, in 2012 interim orders were made in 61% of applications for violence restraining orders, whereas final orders were made in only 10% of cases. It was noted that there are various reasons to explain this discrepancy: 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 an order after considering all of the evidence from both parties. Nonetheless, bearing in mind the significant potential consequences for respondents subject to interim orders and the fact that they are invariably made on an ex parte basis, the Commission expressed a degree of concern about whether interim orders are being made too frequently. On the other hand, the Commission observed that the ability to apply for and obtain an interim order on an ex parte basis is vital for victims of family and domestic violence because prior notice of the application may put the victim's safety in jeopardy. As a result of these competing tensions,

38. LRCWA Discussion Paper, 70.

39. *Family Violence Protection Act 2008* (Vic) s 53. 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: *Domestic Violence and Protection Orders Act 2008* (ACT) s 29.

submissions were sought about whether the grounds for making an interim family and domestic violence protection order should be different to the grounds for making of a final order.⁴⁰

Submissions were strongly opposed to any reform that provided for different grounds for making an interim order.⁴¹ One basis for opposition was that the provision of different grounds may create confusion. It was also noted that, if there were different grounds for a final order, the criteria would have to be reconsidered at the final order hearing stage even if the respondent did not object to the making of a final order or did not attend the hearing. Other submissions expressed concern that having different grounds may impact upon victim safety and that, in the absence of evidence to demonstrate that the alternative approach in other jurisdictions is more effective, it is preferable to maintain the status quo.

The Commission received one submission (from a magistrate) supporting different grounds for interim and final orders. While the Commission queried in its Discussion Paper whether interim orders may be granted too frequently, this submission suggested that the current grounds 'may well be responsible for the reluctance of some courts to grant an interim order'. The submission also contended that, while the *ex parte* process may be open to abuse, 'there is little evidence to suggest that the system is in fact abused to any meaningful degree'.⁴² This submission supported the approach in Victoria.

Since the publication of its Discussion Paper, the Commission has conferred with the Family Violence Program Manager from Victoria Legal Aid in relation to the provisions in that jurisdiction.⁴³ It was suggested that the basis for the different grounds for interim and final orders in Victoria is that interim orders are intended for victims who require *immediate* protection

40. LRCWA Discussion Paper, Question 6.

41. Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

42. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 8.

43. Leanne Sinclair, Family Violence Program Manager, Victoria Legal Aid, telephone consultation (17 March 2014).

(eg, there is likely to be the commission of family and domestic violence in the short term). Situations where an interim order is not required include where the respondent is due for release from custody on a date in the future; where the respondent is returning to Victoria from a different jurisdiction on a date in the future; or where there is an upcoming significant event where both parties will be in close proximity.

Having regard to the considerable opposition to the provision of different grounds for interim and final protection orders, and taking into account the absence of evidence to demonstrate why the proportion of interim orders made is significantly less than final orders made, the Commission does not intend to recommend legislative reform in this area. However, it is the Commission's view that a study should be undertaken to examine the number of interim orders granted in comparison to final orders and, in particular, to consider the reasons why the interim orders did not eventuate into a final order. This study should also look at the number and circumstances of applications for family and domestic violence protection orders that are made without first seeking an interim order, as well as considering whether this option is used effectively and in appropriate cases. Following this review and depending on its findings, consideration should be given to whether any reform is justified.

RECOMMENDATION 15

Review of the circumstances of making interim and final family and domestic violence protection orders

That the Department of the Attorney General conduct a review of the circumstances of making interim and final family and domestic violence protection orders including consideration of:

- (a) the number of interim family and domestic violence protection orders made in comparison to the number of final family and domestic violence protection orders made in a 12-month period;
- (b) the reasons why a final family and domestic violence protection order was not made after an interim family and domestic violence protection order had already been made; and
- (c) the circumstances of and reasons for applications for final orders being made without an application for an interim order first being made.

POLICE ORDERS

The *Restraining Orders Act* makes provision for police-issued orders in certain circumstances and these orders are only available where the parties are in a family and domestic relationship. Therefore, all of the current provisions under the *Restraining Orders Act* that deal with police orders will need to be removed from that Act and transferred to the recommended new Family and Domestic Violence Protection Order Act. In its Discussion Paper, the Commission explained the background to the introduction of police orders and subsequent reforms to the applicable provisions.⁴⁴ Presently, police orders may be issued for up to 72 hours and they do not require the consent of the person protected by the order. The primary purpose of a police order is to provide the person protected with sufficient time and support to apply for an order in court. In some instances, they are used to provide temporary respite to a victim of family and domestic violence.

Criteria for making a police order

As already mentioned earlier in this Chapter, the Commission was repeatedly told during consultations that police orders have been made against the victim of family and domestic violence (an observation which has been reiterated in submissions). It was also suggested during consultations that police orders are sometimes issued too readily as a means of quelling a verbal dispute between family members where no risk to safety is evident. As a result, the Commission considered whether the criteria for granting a police order are appropriate.

Currently, under s 30A of the *Restraining Orders Act* 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'.

Section 30B of the *Restraining Orders Act* sets out the factors to be taken into account by a police officer in considering whether to make a police order and when determining 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 12.⁴⁵ 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 Commission formed the view that the problem of police orders being made against a victim can be rectified by more appropriate and ongoing training for police. The Commission was undecided about whether the criteria for police orders should be strengthened and, therefore, sought submissions on this issue.⁴⁶ All submissions received directly in response to this question did not support amending the grounds for making a police order.⁴⁷ A number of submissions agreed that the problems identified by the Commission could be addressed through improved training and by police ensuring that they check police records for both parties when they attend an incident.

One magistrate suggested that the purposes of a police order should appear upfront and before the provision which sets out the grounds for making a police order. It was argued that this would make it clear that a police order should not be made against the victim.⁴⁸ The Commission has made a recommendation earlier in this Chapter in relation to the factors to be considered by a court when making a family and domestic violence protection or determining the terms of such an order. The Commission is of the view that a similar recommendation in relation to police orders (ie, based upon the current factors in the

44. LRCWA Discussion Paper, 71.

45. Factors that are included under s 12 but are not included under s 30B are 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.

46. LRCWA Discussion Paper, Question 7.1.

47. Trevor Higgs, Submission No. 1 (6 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

48. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 9.

Restraining Orders Act as well as the Commission's recommended new principles) is sufficient to address the concerns raised in relation to police orders.

RECOMMENDATION 16

Relevant factors for consideration when determining whether to make a police order and the terms of a police order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a police order and when considering the terms of a police order, a police officer is to have regard to the following:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring that the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) hardship that may be caused if the order is made;
- (h) the accommodation needs of the persons involved;
- (i) any similar behaviour by any person involved, whether in relation to the same person or otherwise; and
- (j) any other matter the police officer considers relevant.

It was also noted in the Discussion Paper that the ALRC/NSWLRC 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'.⁴⁹ This occurs in some jurisdictions. For example, in Victoria, 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 the safety of the victim, preserve any property of the victim or protect a child. 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.⁵⁰ Generally, the first mention date must be within 120 hours after the notice is issued.

The Commission sought submissions about whether police orders could usefully serve as an application for family and domestic violence protection orders and, if so, should the order only serve as an application if the person consents?⁵¹ Two submissions opposed this option.⁵² One emphasised that if a police order automatically operates as an application for a family and domestic violence protection, victims who do not wish for such an order may be discouraged from seeking assistance from police in response to an incident of family and domestic violence.⁵³ Similarly, the Western Australia Police stated that police orders provide immediate and temporary protection and not all victims want a longer protection order.⁵⁴

Seven submissions supported police orders serving as an application for a family and domestic violence protection order⁵⁵ with a number of these submissions indicating that this should only occur

49. ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) Recommendation 9-1.

50. *Family Violence Protection Act 2008* (Vic) s 31.

51. LRCWA Discussion Paper, Question 7.2.

52. Trevor Higgs, Submission No. 1 (6 January 2014); Western Australia Police, Submission No. 26 (27 February 2014).

53. Trevor Higgs, Submission No. 1 (6 January 2014) 2.

54. Western Australia Police, Submission No. 26 (27 February 2014) 4.

55. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

with the consent of the victim.⁵⁶ The Geraldton Resource Centre argued that a police order should serve as an application for a family and domestic violence protection order irrespective of the consent of the victim.⁵⁷ However, this was qualified by the condition that, as soon as the matter is first heard in court, the victim should have the option of indicating that he or she objects to the making of a court-issued protection order.

Legal Aid highlighted that some victims do not wish for a protection order and favour the temporary nature of police orders (in particular, Aboriginal women). However, it also contended that having a police order automatically initiate an application for a family and domestic violence protection order is beneficial in terms of 'victim support and efficiency'.⁵⁸ Legal Aid submitted that a police order should serve as an application for a family and domestic violence protection order with the proviso that the victim can 'opt out' and that police should conduct the application on behalf of the victim. This was also the position advanced by the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network.⁵⁹

In a detailed submission from a police sergeant from regional Western Australia, it was suggested that police orders should be imposed for a longer duration and reference was made to 'long police orders' made for up to 14 days in other jurisdictions such as Austria and Germany.⁶⁰ It was argued that a long police order would provide victims with time to obtain adequate respite and to make a clear decision about their options. Further, this submission proposed criteria for the making of long police orders (eg, the victim indicates that he or she does not wish to separate from the perpetrator; the victim previously revoked a violence restraining order; there has been an escalation in frequency or intensity of family and domestic violence; and three standard police orders have been issued in the previous 12 months). It was also contended that the parties to a long police order should be required to make contact with relevant support agencies. Some of the benefits espoused of long police orders included a reduction in the number of protection orders that are revoked by the person protected soon after it was made; a reduction in the

number of applications for court-issued protection orders; and a reduction in the pressure on victims to make decisions quickly in relation to applications for protection orders.⁶¹

The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also put forward an alternative option that police orders could be extended in their duration (eg, three to four weeks) to enable sufficient time for victims to consider their options and make the application.⁶²

The Commission notes that in the United Kingdom, a system of long police orders was recently piloted.⁶³ An initial temporary notice ('domestic violence protection notice') is issued by police to the perpetrator and following this notice an application for domestic violence protection order (14 to 28 days) is heard in court (usually within 48 hours and in the absence of the victim). One of the main objectives of this scheme was to 'enable victim-survivors of domestic violence to have the time and support needed to consider their future options, including longer term civil injunctions'.⁶⁴

The potential benefits of enabling a police order to serve as an application for a family and domestic violence protection order include the reduction of trauma and stress for victims, and the more active involvement of police in assisting victims in their applications. However, potential disadvantages include that some victims may be discouraged from seeking police assistance, and police may be discouraged from making police orders because of the associated workload involved in lodging the order as an application. Clearly, in the absence of additional resources, police will not be in a position to progress an application for a family and domestic violence protection order on behalf of the victim. The Commission recommends below that the Western Australia Police be resourced to enable police officers to make applications for family and domestic violence protection orders on behalf of victims.⁶⁵ In the absence of sufficient resources to enable police to conduct the application on behalf of the victim, the Commission sees little merit in providing that a police order is to serve as an application for a court-issued order because the victim would still be required to attend court, provide evidence to justify the making

56. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Relationships Australia, Submission No. 29 (28 February 2014).

57. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 16.

58. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 30.

59. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 31.

60. Trevor Higgs, Submission No. 1 (6 January 2014) 1–2.

61. Ibid.

62. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 31.

63. Kelly L et al, *Evaluation of the Pilot of Domestic Violence Protection Orders* (United Kingdom Home Office, Research Report 76, November 2013) 4.

64. Ibid 9.

65. See Recommendation 20.

of an order and complete necessary paperwork. If such resources are provided, the Commission strongly suggests that consideration be given to providing in legislation that, with the consent of the victim, a police order can be filed at court as an initiating application by police for an interim family and domestic violence protection order.

Explanation of police orders

Police are required by legislation to explain (to the person bound by a police order and to the person for whose benefit the police order is made) the nature of the order, the consequences for non-compliance, and that counselling and support may be of assistance (and, where possible, police are to make referrals to appropriate services).⁶⁶ The *Restraining Orders Act* also provides that, if a person 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'.⁶⁷ Some lawyers and advocates consulted by the Commission mentioned that interpreters are not routinely used by police when providing this explanation. Other problems were said to occur when police orders are issued to persons who are intoxicated. The Commission proposed that s 30E(4) of the *Restraining Orders Act* be amended to require the provision of a trained interpreter as far as is practicable.⁶⁸

All but one submission received in response to this proposal supported the Commission's proposal.⁶⁹ The Western Australia Police opposed the proposal and stated that:

There will be impacts on time and cost involved in arranging an interpreter in the first instance to explain a Police Order when, provided it is suitable to do so, an English speaking member can help explain the order and defuse the situation.⁷⁰

66. *Restraining Orders Act 1997* (WA) s 30E(3).

67. *Restraining Orders Act 1997* (WA) s 30E(4).

68. LRCWA Discussion Paper, Proposal 12.

69. Patricia Giles Centre, Submission No. 5 (24 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

70. Western Australia Police, Submission No. 26 (27 February 2014) 17.

It was also highlighted that incidents of family and domestic violence often occur outside business hours and there are difficulties in locating interpreters. Further, the Western Australia Police were concerned that delays caused by trying to locate an interpreter may potentially increase tensions and 'create the potential for violence to escalate'.⁷¹ Although generally in support of the proposal, Legal Aid also mentioned that it needs to be 'workable' given the times at which police orders may be issued and the availability of interpreters during those times.⁷²

Two submissions stressed that persons under the age of 18 years should not be used to interpret for family members.⁷³ The Commissioner for Children and Young People argued that children 'are not appropriate interpreters in any context but particularly in relation to family and domestic violence situations. The use of children and young people as interpreters inappropriately places them in positions of responsibility, can undermine relationships and may expose them to the risk of negative consequences'.⁷⁴ In addition, the Commissioner emphasised that, where police orders are issued against children, it is vital that the explanation of the effect and consequences of the order is explained 'in a manner appropriate to the maturity and understanding of the young person'.⁷⁵

The Disability Services Commission expressed as its 'overarching position' that 'information given to a person with disability must be explained to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand'.⁷⁶ In response to the specific proposal it suggested that it may be preferable to refer to a 'trained interpreter or support worker' to adequately accommodate the experiences of persons with disability.

The Commission appreciates that the availability of interpreters is beyond the control of the Western Australia Police and that in some situations it may be very difficult to obtain the services of a trained interpreter. Nonetheless, the Commission's proposal did not impose a mandatory requirement and it considers that the phrase 'as far as is practicable' accommodates this concern. It also agrees that

71. Ibid.

72. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 31.

73. Patricia Giles Centre, Submission No. 5 (24 January 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014).

74. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 14.

75. Ibid.

76. Disability Services Commission, Submission No. 11 (31 January 2014) 1.

children under the age of 18 years should not be used to interpret and, even if a child is the only other person present when police attend a family and domestic violence incident, the potential risks to children outweigh any inconvenience or delay caused in locating an alternative person to provide the explanation. The Commission also refers expressly to children and persons with disability in its recommendation below to make it clear that it is not solely directed to persons who may not understand the explanation because of language barriers.

RECOMMENDATION 17

Explanation of police orders

1. That the new Family and Domestic Violence Protection Order Act provide that, if a person to whom an explanation is to be given by a police officer in relation to a police order does not readily understand English, the officer should, as far as practicable, arrange for a trained interpreter to provide the explanation. If it is not practicable for the officer to arrange for a trained interpreter to provide the explanation the officer should, as far as practicable, cause a person above the age of 18 years to give the explanation to the person in a way that the person is likely to understand.
2. That the new Family and Domestic Violence Protection Order Act provide that if a police officer is required to give a person an explanation in relation to a police order and the police officer is not satisfied that the person understood the explanation because of age, disability or other factors, the officer is, as far as practicable, to arrange for an appropriate support person who is over the age of 18 years to provide the explanation.
3. That the Western Australia Police liaise with the Disability Services Commission and other relevant agencies with a view to establishing a panel of support persons who may be able to assist in providing explanations of police orders.

Duration of order

Police orders remain in force for up to 72 hours after they have been served. 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. 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). The concern expressed by some victim advocates is that a period of 24 hours or less is not sufficient to enable a victim to access support services and lodge an application for a violence restraining order.

The Commission noted in its Discussion Paper that the data received from the Western Australia Police indicates that the frequency at which 24-hour police orders are made has declined substantially since 2012 and for 2013 the number of 24-hour orders is insignificant. In the absence of further evidence that there continues to be a problem in relation to the duration of police orders, the Commission did not make any proposals in this regard.⁷⁷ During consultations with a police officer (who provided a submission), it was suggested that Western Australia Police data may not be reliable in regard to the duration of police orders.⁷⁸ While this officer agreed that 72-hour orders are by far the most common, he estimated from his experience that 24-hour police orders are issued in about 10% of cases. This does not accord with the data provided by the Western Australia Police which indicates that from January to the end of October 2013 only four 24-hour police orders had been issued out of a total of 15,000 police orders issued during that period.

However, the Commission did not receive any other submissions in relation to the duration of police orders. In the absence of evidence of continuing problems concerning inappropriately short police orders, the Commission does not consider that any reform is required at this stage. Nevertheless, the Commission suggests that the Western Australia Police review its data recording practices in relation to the duration of police orders to ensure that accurate data are recorded and can be accessed for future monitoring purposes.

Service of police orders

The Western Australia Police informed the Commission that the current legislative provision in relation to the service of police orders is problematic. The *Restraining Orders Act* provides that the police officer who makes the police order is to 'prepare and serve the order'.⁷⁹ This has been interpreted by police to mean that the same officer who makes the order must serve the order. A police order lapses

77. LRCWA Discussion Paper, 74.

78. Sergeant Trevor Higgs, telephone consultation (30 January 2014).

79. *Restraining Orders Act 1997* (WA) s 30E(1).

after 24 hours and, if it is not served, this causes problems if the person bound is not present at the time the order is made and the officer who made the order is no longer on duty at the time the person bound is located. The Commission made a proposal to rectify this⁸⁰ and all submissions received were in full support.⁸¹ Accordingly, the Commission makes a recommendation in terms of its original proposal.

RECOMMENDATION 18

Service of police orders

That the new Family and Domestic Violence Protection Order Act 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 telephone applications for violence restraining orders in urgent cases where access to a court is not possible.⁸² However, police orders were introduced in 2004 as an alternative process in order to respond to practical problems that were encountered in relation to telephone applications. Telephone applications are rare – since 2008 only about two applications are made each year. Although the Commission acknowledges that the police order regime has effectively replaced the use of telephone applications, they are still made on occasions and may have some relevance to persons in remote communities where access to a court is difficult and where police are not always present. For this reason, the Commission did not recommend the repeal of Division 2 of the *Restraining Orders Act*.

The Commission noted, however, that the current precondition for the making of a telephone

application—that a police officer must first introduce the applicant to an authorised magistrate—may be an unnecessary prerequisite to the use of the power. Section 18 of the Act provides that a telephone application can be made by an authorised person on behalf of the person seeking to be protected or by the person seeking to be protected if that person is first introduced to the magistrate by an authorised person. Only police have been authorised for this purpose. The Commission sought submissions about whether additional persons (eg, victim support workers) should be prescribed as authorised persons for the purpose of telephone applications.⁸³

A number of submissions supported an expansion of the range of persons authorised to make or facilitate telephone applications⁸⁴ and suggested persons to be authorised include refuge workers, victim support workers, child protection workers, corrective services officers,⁸⁵ and employees of the Family Violence Service and Victim Support Service. The Geraldton Resource Centre commented that the ability of alternative authorised persons to make or assist with telephone applications would be particularly useful in remote areas where there is limited availability of police and suggested that if this option is adopted it should only apply in such areas.⁸⁶

The Western Australia Police agreed that prescribing additional persons would provide another option but queried whether legislative amendment was justified given the small number of telephone applications made each year.⁸⁷ Other submissions received did not support the proposal. Legal Aid suggested that further analysis of the current use of telephone applications should be undertaken before any reform is considered.⁸⁸

80. LRCWA Discussion Paper, Proposal 13.

81. Trevor Higgs, Submission No. 1 (6 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

82. *Restraining Orders Act 1997* (WA) Division 2.

83. LRCWA Discussion Paper, Question 8.

84. Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Anglicare, Submission No. 28 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

85. The Department of Corrective Services submitted that authorised persons should not include its staff because of the potential for a conflict of interest if the staff member has dealt with the respondent.

86. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 18.

87. Western Australia Police, Submission No. 26 (27 February 2014) 4.

88. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 31.

Other submissions emphasised that the types of persons contemplated for inclusion as authorised persons do not presently have sufficient legal training to undertake this role and the relevant agencies do not have sufficient resources to accommodate this extra function.⁸⁹ Most of the stakeholders who agreed with the authorisation of additional persons for the purpose of making or assisting with telephone applications also stated that such persons will need specific training to undertake the function. The Department of the Attorney General did not respond to this question in its formal written submission; however, it advised the Commission that it would need to 'explore the feasibility, resourcing and training requirements, and the real potential for conflict of interest' associated with any provision to allow additional persons (such as victim support workers) to become authorised persons for the purpose of making telephone applications.⁹⁰ The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network opposed the concept on the basis that it would 'place undue pressure and reliance on community services to undertake actions that should be demonstrated by police'.⁹¹

Having considered the different views expressed in submissions and taking into account the frequency in which telephone applications are currently made and the resource implications for necessary training, the Commission does not consider that it is appropriate to make a recommendation in this regard.

Who may apply for a family and domestic violence protection 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. In addition, 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.

89. Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

90. Department of the Attorney General, consultation (18 March 2014).

91. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 33.

Children

In its Discussion Paper, the Commission noted that there appears to be some confusion among stakeholders about whether children are permitted to apply for a violence restraining order in their own right.⁹² The Commission expressed the view that the legislation is clear – a person seeking to be protected may apply for a violence restraining order irrespective of whether that person is an adult or a child 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.

In its submission, Legal Aid stated that it agreed with the Commission's interpretation but that 'this is not the interpretation of most general magistrates in practice'.⁹³ It submitted that s 25 should be amended to make it clear that children can apply in their own right. The Commission agrees that legislative clarification would be useful.

RECOMMENDATION 19

Applications for family and domestic violence protection orders by children

That the new Family and Domestic Violence Protection Order Act expressly provide that a child is permitted to apply for a family and domestic violence protection order in his or her own right.

Applications made by persons other than the person seeking to be protected

Data received by the Commission from the Department of the Attorney General indicates that the vast majority of applications for violence restraining orders are made by the person seeking to be protected (86% in 2012). Almost 12% of applications were made by a parent or guardian on behalf of a child and less than 1% of applications were lodged by a legal guardian. The number of applications made by a child welfare officer was negligible.⁹⁴

In view of the current police policy (which provides that if a 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 a person at risk, 'it will be incumbent on

92. LRCWA Discussion Paper, 77.

93. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 71.

94. LRCWA Discussion Paper, 77.

the member to make the violence restraining order application'),⁹⁵ it is somewhat surprising that in 2012 there were only 75 applications made by a police officer (representing approximately 0.5% of the total applications made). During consultations the State Family Violence Protection Coordination Unit explained that applications for violence restraining orders by police are infrequent due to resourcing constraints.

Victims of family and domestic violence may face a number of barriers to initiating an application for a violence restraining order such as fear of the process, fear of repercussions from the perpetrator, and a lack of understanding of the process and requirements (especially for victims with additional vulnerabilities such as disability or language and cultural barriers). In its Discussion Paper the Commission expressed the view that ideally police officers should take a far more active role in initiating applications on behalf of victims; however, in recognition of the reality that this is not occurring due to a lack of resources, it made a proposal designed to enable other appropriate persons to lodge applications on behalf of a victim. It was proposed that the legislation 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. Additionally, the Commission sought submissions about the appropriate range of persons who should be authorised for this purpose and whether an authorised person should be required to have the written consent of the person seeking to be protected.⁹⁶

The majority of submissions received in response to the proposal were in favour of providing for authorised persons to make applications on behalf of persons seeking to be protected.⁹⁷ A range of views were expressed about who should be permitted to act as authorised persons.⁹⁸ A number

95. *COPS Manual*, RO-1.5. Section 62C of the *Restraining Orders Act 1997* (WA) also provides that after an investigation has been conducted pursuant to s 62A or after entering premises pursuant to s 62B, a police officer is to make an application for a restraining order, a police order or a written record of the reasons why he or she did not take either of these actions.

96. LRCWA Discussion Paper, Proposal 15, Question 9.

97. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

98. It is noted that not all of these submissions supported the proposal for other persons to be authorised to make applications on behalf of the person seeking to be protected,

of submissions supported the use of prescribed persons from particular agencies;⁹⁹ some considered that written consent from the person seeking to be protected is sufficient;¹⁰⁰ while others expressed the view that the legislation should enable prescribed persons as well as persons acting with the written consent of the person seeking to be protected to lodge an application.¹⁰¹ Two submissions stated that prescribed persons should only be able to act with the written consent of the person seeking to be protected.¹⁰² Again, the necessity for authorised persons to be properly trained was emphasised.

However, the Commission received opposition to this proposal from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network (and this submission was endorsed by others).¹⁰³ In their submission it was stated that 'ideally police officers should be actively and directly involved in the application process to assist victims of [family and domestic violence]' and it was queried 'why current police policy would be so disconnected and inconsistent with police resources'.¹⁰⁴ It was further stated that the proposal is not supported in principle because 'police should actively assist with obtaining restraining orders in accordance with the legislation and their policies' and that the Western Australian government should

but expressed their view in relation to who should be authorised if the proposal was implemented. The Department of the Attorney General repeated its response to Question 8 for Proposal 15 and Question 9: Department of the Attorney General, consultation (18 March 2013).

99. Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

100. Maggie Woodhead, Submission No. 4 (17 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014).

101. Western Australia Police, Submission No. 26 (27 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014).

102. Relationships Australia, Submission No. 29 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

103. Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).

104. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 34.

ensure that there is adequate funding to police to enable them to do so.

In its Discussion Paper the Commission noted that the frequency in which police make applications for violence restraining orders in other jurisdictions is much greater.¹⁰⁵ Recent consultations with representatives of Legal Aid in Victoria and New South Wales confirm that police are far more proactive in applying for orders in these jurisdictions than is presently the case in Western Australia (it was estimated that police apply for orders in about 65-75% of cases in Victoria and in about 60-70% of cases in New South Wales).¹⁰⁶

Having considered the views expressed in submissions, the Commission agrees that police should make applications on behalf of victims of family and domestic violence in far greater numbers. Its proposal was intended to provide an alternative option given that police are not undertaking this role. However, if government agencies (such as the Family Violence Service and the Victim Support Service) and non-government service providers are to be prescribed for the purpose of making applications for family and domestic violence protection orders, these agencies will also require additional funding and training to undertake the role. In other words, whichever option is taken, additional resources are required.

Accordingly, the Commission recommends that the Western Australian government provide sufficient resources to the Western Australia Police to enable police officers to take a consistent and active role in applying for family and domestic violence protection orders in Western Australia. In the event that this recommendation is not supported by government or the Western Australia Police, the Commission's view is that relevant agencies should be prescribed as 'authorised persons' with the power to make an application for a family and domestic violence protection order on behalf of a person seeking to be protected so long as those agencies have undergone sufficient training, are provided with adequate resources to enable this function to be fulfilled, and on condition that such authorised persons only undertake this role with the written consent of the person seeking to be protected.

105. LRCWA Discussion Paper, 78.

106. Angela Jones, Senior Solicitor, Family and Domestic Violence, Legal Aid NSW), telephone consultation (26 March 2014); Leanne Sinclair, Family Violence Program Manager, Victoria Legal Aid, telephone consultation (17 March 2014).

RECOMMENDATION 20

Sufficient funding to the Western Australia Police to enable police officers to make applications for family and domestic violence protection orders

That the Western Australian government provide sufficient resources to the Western Australia Police to ensure that police officers are able to actively and regularly make applications for family and domestic violence protection orders on behalf of a person seeking to be protected.

Extension of orders for the benefit of other persons

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.

Therefore, if an adult applies for a family and domestic violence protection order and also wishes to apply for an order to protect a child, both applications can be lodged and heard in the Magistrates Court. This is generally preferable to having two separate hearings (one in the Magistrates Court and one in the Children's Court).

Section 68 of the *Restraining Orders Act* also enables a court to extend an order to operate for the benefit of the second person in addition to the person protected by the order. The Commission was told that, despite this provision ostensibly enabling the second person to be named in the order without that person having lodged an application, courts sometimes require a separate application to be filed in respect of each person. The completion of separate applications for each child (especially in a large family) can be onerous and time consuming. While acknowledging that separate applications may be useful for data recording purposes, the Commission proposed that s 68 should be amended to provide that the power to extend a violence restraining order to operate for the benefit of a person named in the order in addition to the person protected by the order can be exercised without the named person having first lodged an application to court in the prescribed form.¹⁰⁷ It is

107. LRCWA Discussion Paper, Proposal 14.

noted that, although adding children to an order is the most likely circumstance where s 68 might be used, it is not limited to children and could be used to extend an order for other family members.

The Commission received overwhelming support for this proposal.¹⁰⁸ Legal Aid agreed with the proposal and noted simplifying processes 'is in line with good [family and domestic violence] practice'.¹⁰⁹ One magistrate reiterated that it is time consuming and onerous to require a victim to complete separate applications for 'herself and her child'; however, it was also submitted that the legislation needs to make it clear that the court must be satisfied of the relevant criteria for granting an order in respect to each person who is proposed to be added to the order.¹¹⁰ The Commission agrees with this suggestion and has included this in its recommendation below.

Youth Legal Service commented that, if different conditions apply to each person, the order must be clearly worded in order to avoid confusion on the part of the person bound and for police who may be required to enforce the conditions of the order.¹¹¹

108. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). Two of these submissions advocated that if a violence restraining order is made to protect an adult parent then all dependent children should be automatically covered by the order irrespective of 'their stated wishes and/or any concerns for their individual safety': Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). The Commission does not agree with this suggestion; it is inappropriate to prevent a parent from having contact with their children where there is no risk that those children will experience family and domestic violence (including from being exposed to family and domestic violence). The Department of the Attorney General indicated its support for this proposal during consultations: Department of the Attorney General, consultation (18 March 2014).

109. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 32.

110. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 9.

111. Youth Legal Service, Submission No. 18 (12 February 2014) 17.

The Western Australia Police agreed with the proposal but noted that it may lead to 'an increase in reported breaches and subsequent investigations which will impact on resources'.¹¹² The Commission is unable to comment on whether its proposal will lead to more persons being protected by an order than is presently the case or will simply enable a proportion of persons who would otherwise have been protected by an order to be protected without the need to complete a formal application. The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network strongly supported the proposal and also suggested that accurate data will need to be maintained in relation to persons who are protected by a family and domestic violence protection order by use of this provision.¹¹³

RECOMMENDATION 21

Extending orders for the benefit of other persons

1. That the new Family and Domestic Violence Protection Order Act provide that:

- (a) When making a family and domestic violence protection 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 prescribe form.
- (b) The court may only extend a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order if it is satisfied of the applicable grounds for making a family and domestic violence in relation to that named person.

112. Western Australia Police, Submission No. 26 (27 February 2014) 17.

113. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 34. The Commission had sought data in relation to the number of violence restraining orders extended to other persons under s 68 of the *Restraining Orders Act 1997* (WA) (as well as a breakdown of the categories of those persons); however, this data was unavailable because it is not recorded electronically: LRCWA Discussion Paper, 69.

(c) If a court extends a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order, the court is to ensure that the order clearly stipulates which conditions are applicable to the person protected and which conditions are applicable to the named person.

2. That the Department of the Attorney General ensure that accurate data is collected and maintained in relation to the number and categories of people who are protected by a family and domestic violence protection order by virtue of being a named person under 1 above.

Service of violence restraining orders

In terms of maximising the effectiveness of family and domestic violence protection orders, it is vital that the orders are served on the person bound by the order as promptly as possible; the person bound is not required to comply with the order until he or she has notice of the existence of the order and its terms.¹¹⁴ The *Restraining Orders Act* currently does not include any requirement for a violence restraining order to be served as soon as possible or within any set period of time.

The existing legislative provisions require a restraining order to be served personally unless the registrar authorises oral service.¹¹⁵ The general requirement for an order to be served personally may cause delays in effecting service if the person bound by the order cannot be located. The registrar is permitted to authorise oral service if satisfied that 'reasonable efforts' have been made to serve the order personally. This process requires the police to seek authorisation from the registrar for oral service. The Western Australia Police policy states that the service of restraining orders is to be given the 'highest priority' and that if service is not achieved within five days the court is to be contacted.¹¹⁶

During consultations it was suggested that it may be preferable if oral service is authorised at the time

114. A restraining order is taken to have been served if the person who is bound by the order was present in court when the order was made: *Restraining Orders Act 1997 (WA)* s 55(3a). Section 55(3) also authorises service by post in particular circumstances (eg, for an order made by consent and a final order that is made after an interim order had already been made and is still in force).

115. *Restraining Orders Act 1997 (WA)* s 55(1).

116. *COPS Manual*, RO-1.8.

the order is made rather than requiring police to apply for oral service at a later time. For example, the order could provide that if the person bound has not been served with a copy of the order personally within 24 hours or 48 hours, the order may be served orally by phone. In its Discussion Paper, the Commission expressed the view that personal service should remain the preferred method of service because it is important that the person bound properly understands the content of the order and the consequences of non-compliance.¹¹⁷ There is also a risk that, if oral service is specified as an alternative option at the time the order is made, the police may be discouraged from making adequate efforts to locate the person bound. Nonetheless, the Commission sought submissions about whether a family and domestic violence protection order should specify (at the time it is made) that oral service is authorised after a particular period of time and whether the legislation should also provide that oral service is only permitted if the police have made reasonable efforts to locate the person bound within that period.¹¹⁸

Virtually all of the submissions received in response to this question supported the greater use of oral service.¹¹⁹ The Western Australia Police were strongly in favour of oral service being authorised at the time an order is made. It stated that this would enable service to be undertaken at any time including, for example, at a routine traffic stop. It also contended that police officers should not be responsible in the first instance for the service of violence restraining orders. It suggested that, as soon as an order is made, court staff should immediately contact the person bound by an order to effect oral service and the order could then be posted or emailed to the person bound.¹²⁰

However, a number of submissions expressed concern about how the provision for oral service would operate in practice. For example, in one submission it was stated that clarification is needed as to exactly what will constitute oral service because the person bound may hang up on police when

117. LRCWA Discussion Paper, 79.

118. *Ibid*, Question 10.

119. Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

120. Western Australia Police, Submission No. 26 (27 February 2014) 5.

telephoned.¹²¹ The Disability Services Commission expressed support for the proposal but submitted that where the respondent is a person with disability the court should indicate that 'in person' service is the preferred method.¹²² Youth Legal Service agreed that oral service would be useful but also warned that service by electronic means may be problematic (eg, a message is left on a mobile phone and not seen or an email is unread).¹²³ The Geraldton Resource Centre emphasised that oral service would be useful where the person bound is deliberately avoiding service but also argued that there must be a mechanism to ensure that police make efforts to serve the order personally before oral service is permitted.¹²⁴ Legal Aid stated that it 'supports in principle having a provision whereby oral service is authorised after a set period if reasonable attempts have been made to serve in person' and the current position where police have to apply to the court to enable oral service is not efficient. Nonetheless, some concern was expressed that police may resort to oral service as the default position.¹²⁵

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network indicated a number of concerns in regard to the Commission's proposal, including the difficulty in complying with all of the procedural requirements of service over the phone and that persons charged with breaching an order may argue that the order was not properly served or explained. They suggested that legislation should stipulate that police must make an application to serve the order orally after a specified period of time.¹²⁶

The Commission maintains its view that the preferred method of service should be personal service. It is essential that the person bound by the order is properly informed about the contents and consequences of the order. The provision of oral service via telephone has a number of potential difficulties including how police will verify that the person spoken to is in fact the person bound by the order. The Commission recognises that the Western Australia Police policy requires police to apply to the court for oral service after five days and believes that

121. Trevor Higgs, Submission No. 1 (6 January 2014) 3.
 122. Disability Services Commission, Submission No. 11 (31 January 2014) 5.
 123. Youth Legal Service, Submission No. 18 (12 February 2014) 18.
 124. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 21–2.
 125. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 33–4.
 126. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 36–37. This submission was endorsed by the Women's Law Centre, Submission No. 31 (28 February 2014).

more timely service can be achieved by including a legislative requirement for police to apply for oral service after a specified shorter period of time and to include in the legislation that service is to be effected as soon as possible.

RECOMMENDATION 22

Service of family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) A family and domestic violence protection order is to be served personally on the person bound by the order as soon as possible.¹²⁷
- (b) If a family and domestic violence protection order has not been served on the person bound within 72 hours, the Western Australia Police are to apply to a registrar of the court within 24 hours for oral service to be authorised and the registrar may authorise oral service if satisfied that reasonable efforts have been made to serve the order personally.

Another issue raised during consultations is that the person protected by an order is not always informed that service has been achieved. The period following service of an ex parte interim violence restraining order may be particularly dangerous for the person protected and it is important that the person protected is able to make appropriate arrangements for safety at this time. The Commission was told that victims are often in the position of having to contact the police themselves to find out if an interim order has been served. It is noted that s 59 of the *Restraining Orders Act* currently provides that, as soon as practical after a restraining order is served on the person who is bound by the order, the person who served the order is to provide the proof of service copy to the registrar and the registrar is to notify the person protected by the order as soon as practicable. Clearly there may be some delay from the time of service until the time that the person protected is notified by the registrar that the order has been served.

In response to this issue the Commission proposed that the legislation provide that the Western Australia

127. Subject to the existing provisions of the *Restraining Orders Act 1997* (WA) that provide for service by post in specified circumstances and that an order is taken to have been served if the person who is bound by the order is present in court when the order is made.

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 order has been served.¹²⁸ The Commission received unanimous support for this proposal.¹²⁹ The Western Australia Police expressed its support for the proposal so long as the full contact details (in particular, telephone numbers) of the person protected are included in the order (for police use only) and that there is not a presumption that police will attend in person to advise the person protected that service has been achieved in every instance.¹³⁰ The Commission agrees that for this proposal to work in practice the police will need the relevant contact details of the person protected and it is essential that those details are not provided to the person bound by the order. Therefore, the Commission has adjusted its original proposal to provide that, at the time of making an application for a family and domestic violence protection order, the applicant be given the option of completing a separate form in relation to preferred contact details and this document can be given to the police.

RECOMMENDATION 23

Notification of service to person protected by the order

1. That the new Family and Domestic Violence Protection Order Act provide that the Western Australia Police are required to make reasonable efforts to notify the person protected by a family and domestic violence protection order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the family and domestic violence protection order has been served on the person bound.

128. LRCWA Discussion Paper, Proposal 16.

129. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

130. Western Australia Police, Submission No. 26 (27 February 2014) 18.

2. That forms for an application for a family and domestic violence protection order include a separate document to be completed by the applicant (if he or she wishes) indicating the applicant's preferred contact details for the purpose of being notified that the person bound by a family and domestic violence protection order has been served.

Court process

Affidavits

Evidence in support of an ex parte application for an interim violence restraining order may be provided by way of affidavit.¹³¹ In its Discussion Paper, the Commission observed that 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.¹³² It was also noted that there are varying practices adopted by Western Australian courts in regard to affidavit evidence – some courts determine the application on affidavit evidence alone while others require the applicant to give oral testimony because court lists are so busy that the judicial officers do not have time to read the affidavit material.

It was suggested to the Commission during consultations that the current forms used for affidavit evidence could be improved. The form currently includes space for various personal details of the parties and 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 Commission observed that the questions are weighted heavily towards a one-off physical incident and it expressed the view that these forms need to be revised (especially if the definition of family and domestic violence is amended as was proposed in its Discussion Paper).

131. *Restraining Orders Act 1997* (WA) s 28.

132. LRCWA Discussion Paper, 80. The Department of the Attorney General did not respond to this proposal in its written submission, but noted during consultation that the use of affidavits in family and domestic violence restraining orders matters 'can be a useful tool for reducing re-victimisation': Department of the Attorney General, consultation (18 March 2014).

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 family and domestic violence protection order. The Commission proposed that the application form and form of affidavit for applications for orders be revised to incorporate a broader range of questions or headings based upon any new definition of family and domestic violence.¹³³

All submissions in response were supportive of this proposal.¹³⁴ Legal Aid suggested that the revised forms might be developed by a 'users committee' including representatives from the magistracy, Legal Aid, the Family Violence Service and the Department of the Attorney General.¹³⁵ It also stated that the advantages of having prescribed forms are consistency and minimum standards. On the other hand, prescribed forms are inflexible and do not easily allow for revision. The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network agreed with the proposal and also submitted that the forms should 'set out clearer information regarding the types of conditions that can be sought' under a family and domestic violence protection order.¹³⁶ The Commission remains of the view that the form of affidavit and application form should be revised as originally proposed.

133. Ibid, Proposal 17.

134. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

135. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 34.

136. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 37. This submission referred to the ALRC/NSWLRC's recommendation that '[a]pplication forms for protection orders ... should clearly set out the types of conditions that a court may attach to a protection order, allowing for the possibility of tailored conditions. The forms should be drafted to enable applicants to indicate the types of conditions that they seek to be imposed [and that] application forms for protection orders include information about the kinds of conduct that constitute family violence': ALRC/NSWLRC, *Family Violence – A National Legal Response* (2010) Recommendations 11-7, 18-1.

RECOMMENDATION 24

Revised forms

1. That the Department of the Attorney General amend and update the application form and form of affidavit for family and domestic violence protection orders to incorporate a broader range of questions or headings based upon the recommended new definition of family and domestic violence and to enable the applicant to clearly specify the conditions sought under the family and domestic violence protection order.
2. That, for the purpose of 1 above, the Department of the Attorney General establish a committee of relevant stakeholders to assist in the development of the new forms.
3. After the updated forms have been developed the Department of the Attorney General, in conjunction with the committee established under 2 above, consider whether these updated forms should be prescribed forms under the applicable regulations or whether they should be used on a pilot basis and then subsequently reviewed.

Mention dates

Under the current legislation, after an interim violence restraining order has been served on the respondent, he or she has 21 days 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 as it was originally made.¹³⁷

If the respondent objects to the final order being made, the registrar is required to fix a hearing date and notify all parties.¹³⁸ 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.

In its Discussion Paper, the Commission observed that different practices have developed in relation to

137. *Restraining Orders Act 1997* (WA) ss 31, 32.

138. *Restraining Orders Act 1997* (WA) s 33.

this 'final order hearing'.¹³⁹ In the Perth Magistrates Court the final order hearing is usually listed within a few weeks. This may cause difficulties because there may not be sufficient time for the applicant to obtain a grant of legal aid. In contrast, in metropolitan Magistrates Courts the time to hearing is much longer. 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 in an attempt to resolve matters without the need for a contested hearing. The Commission noted that there is some doubt about whether this process is authorised under the legislation.¹⁴⁰

After balancing concerns about enabling sufficient time for the applicant to prepare for a contested hearing (including obtaining legal aid) and the need to ensure that the respondent has an opportunity to be heard as soon as possible following the making of an interim order, the Commission indicated its preference for the setting of an early mention date in all cases where the respondent has objected to the making of a final order. An early mention date will enable the respondent to be provided with information about the process and may enable the respondent to apply for a variation of the conditions of an interim order, especially if there is a particular condition that is causing hardship. The Commission proposed that the legislation 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.¹⁴¹

A number of submissions were received in support of this proposal.¹⁴² Legal Aid agreed with the proposal but also mentioned that it is 'critical that there are sufficient advice and support services available to support victims of [family and domestic violence] and respondents to ensure that the mention date is appropriately utilised to program and/or settle

proceedings'.¹⁴³ The Commission agrees that victim support services should ideally be available at all court locations and legal advice available for both applicants and respondents.¹⁴⁴ The Commission notes that the Department of the Attorney General did not respond to this proposal in its formal submission but indicated during consultation that 'court listing practice is a matter for courts' and did not consider that the Commission's proposal for a mention date should be included in legislation.¹⁴⁵

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network suggested a period of 14 days instead of seven days for the mention date in order to provide the parties with sufficient time to obtain legal advice and consider their options.¹⁴⁶ One magistrate advised that it is impractical to set a mention date within seven days of receipt of the notice of objection from the respondent because s 56(2) of the *Restraining Orders Act* provides that notification of a hearing must be given at least seven days before the hearing date if it is given personally and at least 14 days before the hearing date if it is given by post.¹⁴⁷ It was further explained that for this reason, in the Fremantle Magistrates Court, the practice is to set the mention date 21 days from the receipt of the objection from the respondent.

The Commission has concluded that 14 days is an appropriate time period to take into account the need for parties to receive adequate notification of the mention hearing and to obtain preliminary advice. It considers that 21 days is too long given that the purpose is to enable the respondent to be provided with relevant information, to have an opportunity to be heard as soon as possible (in particular to apply for a variation of the conditions of the order) and to facilitate negotiated outcomes (where appropriate). The Commission also recommends different periods for notification and acknowledges that these periods are shorter than what is currently provided in the *Restraining Orders Act*. However, the current provisions apply to what is meant to be a final order hearing. Under the Commission's recommendation below the hearing is a mention only and an

139. LRCWA Discussion Paper, 81.

140. 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'.

141. LRCWA Discussion Paper, Proposal 18.

142. Trevor Higgs, Submission No. 1 (6 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

143. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 36.

144. The Commission makes a recommendation below in relation to the provision of legal advice and information for respondents: see Recommendation 29.

145. Department of the Attorney General, consultation (18 March 2014).

146. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 38.

147. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 10.

adjournment can always be sought where necessary and appropriate.

RECOMMENDATION 25

Mention hearings for family and domestic violence protection orders

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) Upon the registrar receiving the endorsed copy of an interim family and domestic violence protection order indicating that the respondent objects to the final family and domestic violence protection order, the registrar is to promptly fix a mention date that is 14 days after receipt of the objection or as soon as possible thereafter.
 - (b) That notice of the mention hearing date must be given to the parties at least two days prior to the hearing if the notice is given personally or at least five days prior to the hearing if the notice is given by post.
2. That the forms provided to the parties indicate that, if the respondent objects, a mention date will be set 14 days after the registrar receives notice of the objection or as soon as possible thereafter.

Information for applicants and respondents

In its Discussion Paper, the Commission referred to the information that is provided to the respondent when he or she is served with an interim violence restraining order. It was noted that the forms provided to the respondent do not advise that the respondent may apply to the court for a variation of the order. To rectify this, the Commission proposed that 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 a variation of the order.¹⁴⁸

In its submission, the Geraldton Resource Centre agreed that it would be useful if respondents were informed that they could seek variation of an interim order as well as make an objection to a final order being made.¹⁴⁹ In its joint submission the Women's Council for Domestic and Family Violence Services

148. LRCWA Discussion Paper, Proposal 18(2).

149. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 23. The proposal was also supported by the Department for Child Protection and Family Support, Submission No. 20 (14 February 2014).

and the Domestic Violence Legal Workers Network suggested that the forms provided to respondents should 'provide a range of information'.¹⁵⁰ Legal Aid also submitted that more information should be provided in the forms and suggested that the information sheets prepared by its office are a useful model.¹⁵¹

The Disability Services Commission contended that the 'contents of any approved form or information given to a person with disability must be explained to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand'.¹⁵² This was expressed as its 'overarching position' and applies equally to applicants.¹⁵³ The Commission also notes that the fact sheets and forms available on the Magistrates Court of Western Australia website are not provided in other commonly spoken languages. The Commission is of the view that the information provided for both applicants and respondents should be updated and more comprehensive. Amendments will be required if the recommendations in this Report are implemented and it is suggested that the Department of the Attorney in conjunction with a 'users committee' develop appropriate forms and information sheets for applicants and respondents, and provide these documents in accessible and appropriate formats for persons from culturally and linguistically diverse backgrounds, persons with disability and children.

RECOMMENDATION 26

Update forms and information sheets for applicants and respondents

That the Department of the Attorney General in conjunction with the committee (as established under Recommendation 24.2 above) revise and update the information sheets and forms provided for applicants and respondents to family and domestic violence protection orders to ensure that there is adequate information available in relation to the contents and consequences of family and domestic violence protection and the rights of the parties in relation thereto, and to ensure that there is accessible information for parties from culturally and linguistically diverse communities, people with disability and children.

150. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 38.

151. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 36.

152. Disability Services Commission, Submission No. 11 (31 January 2014) 6.

153. Ibid 1.

Priority listing

During consultations the Commission was informed that, in some court locations, applicants for ex parte interim violence restraining orders are required to wait in the court precincts for long periods of time. This may exacerbate the stress and trauma experienced by victims of family and domestic violence (in particular, in small regional and remote communities where family members and friends of the respondent may observe the applicant waiting outside the courtroom). The Commission proposed that the legislation provide that, as far as practicable and just, ex parte applications be heard first thing in the morning before other court proceedings are commenced and otherwise, as far as practicable, be given priority in the court list.¹⁵⁴

A number of submissions were received in support of this proposal.¹⁵⁵ Other submissions agreed that, while priority for family and domestic violence protection order hearings is important, there are instances where other court matters may take precedence. For example, the Commissioner for Children and Young People observed that the Commission's proposal may impact on other children (eg, those waiting in court for criminal matters and child protection matters).¹⁵⁶ Youth Legal Service opposed the proposal because children in custody or other children in court for criminal matters who are waiting to return to school should not be kept waiting for restraining order matters to be completed. It also stated that priority for restraining order matters is unfair for prosecutors and defence lawyers.¹⁵⁷ One magistrate stated that given 'the unpredictable nature of court lists it is very difficult to work on an appointment format' as suggested by the Commission in its Discussion Paper. Further, this submission highlighted that criminal matters are usually given priority over civil matters because of the need to deal with accused in custody expeditiously and to release police officer witnesses as soon as possible. The magistrate submitted that if the legislation is to be amended to facilitate a change to this approach it should only be reformed for family

and domestic violence matters.¹⁵⁸ Others highlighted that a requirement for the hearing to be listed 'first thing in the morning' may cause difficulties for some people (eg, persons with disability and persons who need to arrange child care).¹⁵⁹

The Commission has reconsidered its original proposal and agrees that a legislative requirement to list family and domestic violence protection orders first thing in the morning may be impractical and potentially unfair to the parties or to other people participating in other court proceedings.

RECOMMENDATION 27

Priority and specified listing times for family and domestic violence protection order hearings

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) ex parte interim family and domestic violence protection order hearings should be heard, as far as is practicable and just, as a matter of priority and wherever possible on the same day as the application is made; and
- (b) wherever possible, parties to family and domestic violence protection order hearings should be given a specified time for attendance.

Providing notice of the basis of an objection by respondent

During consultations it was argued by some lawyers who represent victims that it is unfair that the respondent is not required to disclose the foundation of his or her objection to a final violence restraining order. In contrast, the respondent is usually 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.¹⁶⁰ Although the Commission did not make a specific proposal in relation to this issue, Relationships Australia stated in its submission that the respondent should be required to disclose the

154. LRCWA Discussion Paper, Proposal 19.

155. Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

156. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 16.

157. Youth Legal Service, Submission No. 18 (12 February 2014) 19.

158. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 12.

159. Disability Services Commission, Submission No. 11 (31 January 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014). The Department of the Attorney General repeated its response to Proposal 18 (ie, that court listing practice is a matter for courts): Department of the Attorney General, consultation (18 March 2014).

160. LRCWA Discussion Paper, 33.

basis of his or her objection to the making of a final violence restraining order.¹⁶¹ The Commission agrees that if a respondent objects to the making of a final family and domestic violence protection order he or she should be required to provide the basis for the objection in very general terms at least 14 days before the date for the final hearing. As explained earlier, the Commission has recommended that a court may make a family and domestic violence order if it is satisfied that either of the two grounds for making a final family and domestic violence protection order has been established, unless there are special circumstances that make an order inappropriate. The Commission is of the view that the respondent should be required to indicate whether he or she objects to the making of a final order because the respondent disputes that the grounds are satisfied (eg, the alleged family and domestic violence did not occur); contends that there are special circumstances that make it inappropriate to make a final order; and/or, for any other reason, contends that a final order in the same terms as the interim order should not be made.

RECOMMENDATION 28

Basis of objection to final family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, if the respondent objects to the making of a final family and domestic violence protection order, the respondent is required to indicate in a form prescribed or approved by the court whether he or she objects to the making of the final order because he or she:

- (a) disputes that the grounds for making a family and domestic violence protection order can be established;
- (b) contends that there are special circumstances that make an order inappropriate, specifying the nature of the special circumstances; and/or
- (c) contends for any other reason that a final order in the same terms as the interim order should not be made, specifying the reason/s.

161. Relationships Australia, Submission No. 29 (28 February 2014) 7.

LEGAL REPRESENTATION AND ADVICE

In its Discussion Paper, the Commission highlighted that a number of stakeholders expressed concern that the lack of legal representation and advice for respondents impacts not only on the rights of respondents but also on the safety of victims because a lack of understanding and the associated stress may actually escalate the violence.¹⁶² The Commission noted that information sessions were being conducted in some metropolitan courts and feedback suggested that this process assisted in resolving tensions and potentially resolving the application to the benefit of the person seeking to be protected. For example, once respondents are made aware that the order does not constitute a criminal conviction and that orders can be sought in the Family Court in regard to access to children, a respondent may no longer object to a final order being made. The Commission proposed that the Department of the Attorney General investigate and consider options for providing information sessions and access to legal advice to respondents to family and domestic violence protection orders at all court locations across the state.¹⁶³

While the Department of the Attorney General did not respond to this proposal in its written submission, it indicated during consultations that 'it is likely that [the Department] will continue to explore the various means available to disseminate information to respondents regarding the restraining order system' and that the Commission 'should seek a response from Legal Aid regarding questions of access to government funded legal advice'.¹⁶⁴ All other submissions received in response to this proposal were supportive.¹⁶⁵

162. LRCWA Discussion Paper, 97.

163. Ibid, Proposal 27.

164. Department of the Attorney General, consultation (18 March 2014).

165. Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Anglicare, Submission No. 28 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

The joint submission from the Women’s Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network and the submission from Legal Aid indicated support for the proposal so long as resources are not redirected away from legal services to victims.¹⁶⁶ Youth Legal Service submitted that the proposal should be extended to include consideration of mediation for matters involving respondents under the age of 18 years where the person seeking to be protected is a parent or family member of the child. It explained that it had previously operated a mediation program in the Children’s Court for restraining order matters where the respondent was a child and referrals were made to the program directly by the court. The program operated from 2008 to 2010 and of the 106 mediations conducted during that period 52 involved a child respondent and a parent/family member applicant, and the process was stated as being ‘successful’ in all cases with ‘none going back to court to proceed’ with the restraining order application.¹⁶⁷ The program ceased due to a lack of continued funding. One magistrate indicated support for this program in his submission and stated that magistrates in the Children’s Court considered that this program was useful.¹⁶⁸

A recent report concerning the effectiveness of violence restraining orders observed that the male respondents who had been interviewed as part of the project reported that they understood the conditions of their order but did not understand the legal process. It recommended a ‘proactive contact and information service for men who are [violence restraining order] respondents’ and referred to the importance of ensuring that respondents understand the legal process associated with restraining orders in order to enhance safety.¹⁶⁹ The Commission has taken this report and the strong support in submissions into account and makes a recommendation in terms of its original proposal. It is also emphasised that the provision of any new services in this regard should not be funded out of existing resources for victim support services. In addition the Commission suggests that mediation options, especially for matters involving children as respondents, should be further considered.

166. Women’s Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

167. Youth Legal Service, Submission No. 18 (12 February 2014) 6.

168. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 7.

169. Women’s Council for Domestic and Family Violence Services, *Breaching Safety: Improving the effectiveness of violence restraining orders for victims of family and domestic violence* (2013) 19–21.

RECOMMENDATION 29

Information sessions and advice for respondents to family and domestic violence protection orders

That the Western Australian government investigate and consider options for providing information sessions and access to general legal advice to respondents to family and domestic violence protection order applications at all court locations across the state.

EVIDENCE AND INFORMATION

As explained earlier in this Report, one of the key themes that emerged during the Commission’s consultations is that courts are not always provided with accurate and relevant information in family and domestic violence restraining order matters.¹⁷⁰ Section 12(1) of the *Restraining Orders Act* currently provides that a court is to have regard to a number of relevant factors including the past history of the parties with respect to applications for violence restraining orders; any existing family orders; any other current legal proceedings involving the parties; any criminal record of the respondent; and any previous similar behaviour of the respondent. Despite this provision, the Commission was informed that evidence or information concerning these factors is often not produced to the court.

Reforms were made to the *Restraining Orders Act* in 2004 to facilitate the provision of information regarding the criminal record of the respondent and any previous similar behaviour of the respondent. Section 12(4) provides that:

The Commissioner of Police, is, where practicable, to provide to a court any information in the possession of the Police Force of Western Australia referred to in subsection 1(h) or (i) that is relevant to a matter before the court.

It is further provided in s 12(5) that this information is to be provided to the court in the form of a certificate signed by a police officer of or above the rank of Inspector. This certificate is prima facie evidence of the matters specified in it, without proof of the signature of the person purporting to have signed it or proof that the purported signatory was a police officer of or above the rank of Inspector.¹⁷¹

The current process in relation to these provisions is that a request for a certificate is made to the

170. See Chapter One, Information gaps.

171. *Restraining Orders Act 1997* (WA) s 12(6).

Information Release Centre of the Western Australia Police and the Commission understands that it takes between four and six weeks for a certificate to be issued. As the Commission noted in its Discussion Paper, indicative data provided by the Western Australia Police show that the provision of these certificates is uncommon (eg, only 35 certificates were issued in 2012).¹⁷²

The Commission also observed that there were problems in relation to information about existing family orders. Provision of this information to the court hearing a violence restraining order application is partly dependent on disclosure by the parties and partly on the effectiveness of information sharing protocols between the Magistrates Court and the Family Court (and other agencies). Legal Aid confirmed that the Family Court uses the information sharing protocols regularly but that these protocols are not relied on by the Magistrates Court to seek relevant information.¹⁷³ The Magistrates Court does not have direct access to the Family Court database to enable court staff or judicial officers to check if there is a family order between the parties (and, if so, the terms of that order). In contrast, the Family Court does have access to the Magistrates Court database (ICMS).

The Commission expressed the view in its Discussion Paper that processes should be developed to enable immediate access to a minimum level of information for ex parte interim family and domestic violence protection order 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, the Commission suggested that 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. It was noted that 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.

The Commission observed that its proposal represents a more practical and effective mechanism to achieve the outcomes intended by the introduction of s 12(5) certificates. It was also proposed that the Magistrates Court should 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, it was noted that this requires the development of an appropriate IT system.¹⁷⁴ In summary, the Commission's proposal is designed to enable relevant information to be provided to the court to ensure that there is more informed decision-making at the interim stage of family and domestic violence protection order applications. This is particularly important bearing in mind that the respondent is not present in court and the provision of information to the court is largely dependent on the applicant who may be facing immense pressure and stress and may be unrepresented. As Legal Aid states in its submission, 'most applicants are unrepresented and do not know what information is legally relevant and do not have the means or know how to provide it to the court, despite its relevance and importance'.¹⁷⁵

In fairness to both parties, it was also proposed that any information provided to the court should be disclosed to both parties (eg, if an interim order is made based on information provided under the Commission's proposal then the respondent should be informed that the information was provided to and relied on by the court before the final order hearing).

In regard to the interim stage of the process, the Commission limited its proposal to information concerning the criminal record of both parties, past applications for violence restraining orders, existing violence restraining orders, and family orders. This was primarily in recognition of the importance of ensuring that the safety of victims was not jeopardised as a consequence of undue delay. For final order hearings, a wider range of relevant information could be provided to the court. The Commission sought submissions about whether the legislation should provide that the court has the power to request information from relevant agencies and that the information is to be provided to the court in the form of a certificate. The range of information contemplated included the criminal record of both parties; existing and past violence restraining orders involving both parties; police orders made against either party; current charges against either party; prior involvement of the Department for Child Protection and Family Support with either party in relation to child protection concerns; existing Family Court orders and proceedings; and the details of Western Australia Police Domestic Violence Incident Reports concerning either party.¹⁷⁶ The Commission

172. LRCWA Discussion Paper, 83.

173. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 38.

174. LRCWA Discussion Paper, Proposal 20.

175. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 37.

176. LRCWA Discussion Paper, Question 11.

also noted that for final order hearings it may be necessary to modify the rules of evidence (as occurs in some other jurisdictions) to facilitate any recommendation in relation to the provision of this information to the court.

All of the submissions received in response to the Commission's proposal and question were supportive of improved processes for the provision of reliable and relevant information to courts determining family and domestic violence protection order matters. Different views were expressed in relation to the types of information that should be provided at the different stages of the proceedings and the manner in which the information should be made available to the court. Understandably, a number of agencies emphasised that additional resources will be required to implement the suggested processes.¹⁷⁷

The Commission received a significant number of submissions specifically expressing support for the Commission's proposal concerning the interim stage of the process.¹⁷⁸ Two of these submissions advocated for the proposal to also include information about police orders issued against either party.¹⁷⁹ Legal Aid stated that it is aware of cases where a person bound by a police order has, the day after being issued with the police order, successfully applied for a violence restraining order against the person protected by a

police order. It was acknowledged, however, that the provision of this information may be difficult given that it is not included on the court database.¹⁸⁰ Legal Aid also suggested that consideration should be given to providing information from the Department for Child Protection and Family Support in relation to any involvement of that Department with the parties.

A number of submissions raised concerns about the provision of the criminal record of the applicant. The Western Australia Police suggested that the provision of the criminal record of a victim (if it is disclosed to the perpetrator) may be used to exert further coercion and control.¹⁸¹ The Department for Child Protection and Family Support highlighted that appropriate education strategies for judicial officers and lawyers will be required to ensure that the criminal records of both parties can be properly interpreted in the context of family and domestic violence including the ability to consider which party is the primary aggressor.¹⁸² The Geraldton Resource Centre contended that only prior criminal convictions for violent offending are relevant and that disclosure of a criminal record to the other party may be very dangerous (eg, a perpetrator may threaten to inform the victim's family of a prior criminal record unless the victim abandons the application for a family and domestic violence protection order).¹⁸³ The submission received from the Victim of Crime Representatives on the Victims of Crime Reference Group argued that the provision of the applicant's criminal record will result in reluctance on the part of victims to report family and domestic violence.¹⁸⁴ Equally, it may also result in reluctance to seek family and domestic violence protection orders.

In regard to the development of an IT process that enables the Magistrates Court and the Family Court of Western Australia to have access to each other's records, the Family Court stated that it supports the principle that a court determining a family and domestic violence protection order application should have and consider any current family orders. However, it was explained that the Family Court database (Casetrack) does not have a record of all family orders especially those made some time ago and that family orders made in regional Magistrates

177. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Family Court of Western Australia, Submission No. 25 (27 February 2014) 2; Western Australia Police, Submission No. 26 (27 February 2014) 6. The Commission notes that the formal written submission from the Department of the Attorney General did not respond to this proposal or question but in subsequent consultation with the department it was stated that the proposal and question 'raise fundamental legal policy issues, and would require in depth consultation including with the judiciary, and consideration': Department of the Attorney General, consultation (18 March 2014).

178. Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Family Court of Western Australia, Submission No. 25 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

179. Legal Aid Western Australia, Submission No. 35 (7 March 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 39.

180. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 37.

181. Western Australia Police, Submission No. 26 (27 February 2014) 6.

182. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 4.

183. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 24.

184. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 2.

Courts are not included in Casetrack.¹⁸⁵ In a subsequent consultation with the Principal Registrar, it was confirmed that consent orders are currently not recorded on Casetrack (although this is expected to change in the next 12 to 18 months). Apart from orders made by regional magistrates, all other family orders made for approximately the past nine years should have been included in Casetrack. It was further noted that Magistrates Courts in regional areas do not record family orders electronically.¹⁸⁶

Legal Aid agreed with the Commission's proposal that, to ensure procedural fairness, any information admitted into evidence should be disclosed to the parties and suggested that processes used in the Family Court should be adopted.¹⁸⁷ This was subsequently explained: the judicial officer considers safety issues before releasing certain information to the parties that has been obtained from external agencies and certain information may be de-identified.¹⁸⁸ The Commission notes that the family law legislation enables a court to make an order in child-related proceedings for the provision of specified information from prescribed government agencies. The court must not disclose information that could identify a person who made a notification of suspected child abuse unless the person consents to the disclosure or the court is 'satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice'.¹⁸⁹ The Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network agreed with the proposal so long as there is no risk to the safety of victims and children.¹⁹⁰

The Commission also received a number of submissions agreeing with its proposition that the court should be able to request information from relevant agencies and that this information should be provided by way of a certificate.¹⁹¹ Again, there was

a degree of disquiet in regards to the provision of the criminal record of the applicant¹⁹² and concerns in relation to the capacity of agencies to provide the requested information in the absence of additional resources.¹⁹³

Legal Aid submitted that there should be a provision that ensures that this information is always obtained and prima facie admissible (eg, based on ss 12(4)–(6) of the *Restraining Orders Act*).¹⁹⁴ It also submitted that the strict rules of evidence should not apply in final family and domestic violence protection order proceedings and the court should be able to 'decide what weight to give evidence that does not comply with strict rules of evidence'.¹⁹⁵

One magistrate noted that the types of information listed in the Commission's question are, for the most part, already covered by the provisions of s 12 of the *Restraining Orders Act*. The Commission agrees, but emphasises that the contemplated reforms are designed to ensure that the information is actually available to the decision-maker. This submission also argues that the provision of Domestic Violence Incident Reports (DVIRs), as suggested in the Commission's question, is an additional piece of information and states that these reports are 'prepared by a police officer noting his or her perception of the incident in question' and the contents have not been verified by either party or subject to a finding by a court.¹⁹⁶ It was suggested that DVIRs may be used in cross examination and subsequently become admissible

185. Family Court of Western Australia, Submission No. 25 (27 February 2014) 1–2.
186. Principal Registrar David Monaghan, email consultation (31 March 2014).
187. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 38.
188. Julie Jackson, Legal Aid, email consultation (31 March 2014).
189. *Family Court Act 1997* (WA) s 202K.
190. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 39.
191. Trevor Higgs, Submission No. 1 (6 January 2014); Maggie Woodhead, Submission No. 4 (17 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February

2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).
192. Martin Chape JP, Submission No. 10 (29 January 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 26; Western Australia Police, Submission No. 26 (27 February 2014) 18; Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014). The Gosnells Community Legal Centre submitted that the national criminal records should be provided: Gosnells Community Legal Centre, Submission No. 12 (31 January 2014).
193. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Family Court of Western Australia, Submission No. 25 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014) 18.
194. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 39.
195. *Ibid* 40.
196. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 13.

following this process. The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also expressed some caution in relation to police DVIRs because there is sometimes a 'lack of narrative' in these reports and instances where both parties are described as persons of interest.¹⁹⁷ It was suggested that the DVIR template should be reviewed before any reform that enables the provision of DVIRs to the court.

The Commission understands that there are legal and practical impediments to the sharing of information between government agencies and the subsequent disclosure of that information to the court. For example, s 33 of the *Magistrates Court Act 2004* (WA) deals with access to the court's records and, as one submission highlighted, it appears that these provisions prohibit a judicial support officer from accessing the court records for the purpose of assessing whether a party to restraining order proceedings has a criminal record.¹⁹⁸ Nonetheless, if legal restrictions apply they can be overcome where appropriate. For example, under the family law provisions discussed above (that enable a court to request a government agency to provide certain information), a 'written law has no effect to the extent that it would, apart from this subsection, hinder or prevent a prescribed government agency complying with the order'.¹⁹⁹ Practical impediments include technical barriers to the exchange of information and the necessary resources needed to overcome such barriers.

The Commission has carefully considered the opinions expressed in submissions and maintains its view that improved processes are required to ensure that decision-makers in family and domestic violence protection order matters are as reliably and fully informed as possible. This is not only in the best interests of victims of family and domestic violence but also for respondents who may face false allegations.

Rather than considering what information should be provided at the interim stage and the final stage of proceedings, the Commission has approached this issue by reference to the nature of the information. The first category of information concerns court records (eg, orders, reasons, judgments and pending applications). The Commission is of the view that all Western Australian courts that may potentially deal with an application for a family and domestic violence

protection order should have the ability to check its own records and the records of the other courts to find out if there is an existing family and domestic violence protection order between the parties (or prior violence restraining order) and whether there is a pending application for such an order between the parties. The Commission notes that this could be facilitated by enabling judicial officers (and/or judicial support officers) to have direct access to the relevant database(s).

Likewise, and bearing in mind that the *Restraining Orders Act* currently requires courts to have regard to any family orders, the Commission is of the view that courts determining applications for family and domestic violence protection orders should have access to existing family orders between the parties and whether there are any current Family Court proceedings involving the parties.

The second category of information is criminal records. The Commission originally proposed that an appropriate IT system be developed between the Western Australia Police and the Department of the Attorney General to enable this information to be disclosed to the court promptly (because it is relevant and important information for interim applications). The concerns expressed in relation to the provision of the applicant's criminal record are valid. On the other hand, as the Commission has been informed on a number of occasions, the applicant may in fact be the perpetrator of the family and domestic violence and the respondent may be the victim. The provision of the applicant's criminal record may be highly relevant in such circumstances. The Commission has taken into account the risk of potential harm to both parties in its recommendation below.²⁰⁰

The final category of information is information provided to the court by external agencies. This information may include information discussed above but may also encompass other forms of information such as that which may be provided by the Department for Child Protection and Family Support. The Commission is of the view that the court determining a family and domestic violence protection order should be enabled (but not required) to seek information from other agencies and that the legislation should enable most of this information to be provided by way of a certificate (as is currently the position in relation to criminal records from the Western Australia Police). However, the provision of DVIRs and information from the Department for Child Protection and Family Support is in a different category because this information is potentially far

197. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 40.

198. Martin Chape JP, Submission No. 10 (29 January 2014) 4–8.

199. *Family Court Act 1997* (WA) s 202K(4).

200. This recommendation has been partly modelled on s 55 of the *Domestic and Family Violence Protection Act 2012* (Qld).

broader than the other categories discussed above. Accordingly, the Commission does not consider that it is appropriate in these two instances to specify in legislation that a certificate will be prima facie evidence of the materials specified in it. The most effective way to facilitate the provision of all of the relevant information (including DVIRs and information from the Department for Child Protection) is for one agency to obtain and collate the information as is currently done by the Family Violence Services for the provision of bail risk assessment reports. In the absence of such a process (under the Commission's recommendation below) a court will be able to request information concerning DVIRs and prior involvement of the parties with the Department for Child Protection and Family Support. Its manner of provision and the evidential weight it will be afforded will be determined by the court.

RECOMMENDATION 30

Provision of information to the court in family and domestic violence protection order matters

1. That the Department of the Attorney General ensure that all Western Australian courts that have jurisdiction to determine a family and domestic violence protection order are able to access the relevant databases to check whether there are existing or past family and domestic violence protection orders (or violence restraining orders) or pending family and domestic violence protection order applications (or violence restraining order applications) between the parties to a family and domestic violence protection order application.
2. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access the records of any court with jurisdiction to make a family and domestic violence protection order for the purpose of determining if there are any existing family and domestic violence protection orders (or similar orders under the *Restraining Orders Act 1997* (WA)) between the person seeking to be protected and the respondent, and whether there is any existing application for a family and domestic violence protection made by either the person seeking to be protected or the respondent.

3. That the Department of the Attorney General develop an IT process that enables all courts that have jurisdiction to determine family and domestic violence protection order applications to access the records of the Family Court of Western Australia to determine if there are existing family orders or proceedings involving the parties to the application.
4. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access Family Court records in relation to the existence and contents of family orders and the existence of pending Family Court proceedings between the person seeking to be protected and the respondent.
5. That the Department of the Attorney General and the Western Australia Police investigate the feasibility of developing an IT system that enables a court determining an application for a family and domestic violence protection order to access the Western Australia Police criminal history of the respondent and the person seeking to be protected.
6. That the new Family and Domestic Violence Protection Act provide that any information obtained by a court determining an application for a family and domestic violence protection order pursuant to 1–5 above be disclosed to the applicant (in the case of an interim protection order hearing) and the parties (in the case of an opposed final protection order hearing) but also that the court need not comply with the requirement to disclose the information if disclosure would place a party (or a child of either party) at an increased risk of family and domestic violence or would otherwise be contrary to the public interest. Further, the legislation provide that if the court determines that disclosure would place a party at an increased risk of family and domestic violence the court is not entitled to rely on the information provided.
7. That the new Family and Domestic Violence Protection Act provide that a court determining a family and domestic violence protection order application may request from a government agency any of the following information:

- (a) The criminal record for both the respondent and the person seeking to be protected.
 - (b) Existing and past family and domestic violence protection orders and violence restraining orders made against or in favour of the respondent 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 respondent and the person seeking to be protected.
 - (e) Whether the Department for Child Protection and Family Support has had previous involvement with the person seeking to be protected or the 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
8. That the new Family and Domestic Violence Protection Order Act provide that information provided in response to a request, as set out in 7(a), (b), (c), (d) and (f) above, may be provided to the court in the form of a certificate signed by an officer (of a level to be specified) of the relevant government agency and the certificate is prima facie evidence of the matters specified in it, without proof of the signature of the person purporting to have signed it or proof that the purported signatory was of an officer of the specified level.
9. That the new Family and Domestic Violence Protection Order Act provide that for the purposes of determining a family and domestic violence protection order application the strict rules of evidence do not apply.

Medical evidence

In its submission Legal Aid advised that the provision of medical evidence causes problems in violence restraining order proceedings. It stated that:

Much time, expense and inconvenience occurs in [violence restraining order] proceedings through

having to call doctors to have medical reports of injuries admitted. With very few exceptions, the medical evidence is not contested, particularly as the medical practitioner has no first hand knowledge of how the injuries were caused.²⁰¹

It suggested that because medical practitioners spend a lot of time in court there is reluctance to properly document family and domestic violence assaults and, in some instances, doctors may refuse to treat victims because of fear of being called as a witness in court. Legal Aid submitted that legislation should be amended to provide that a summonsed report from a qualified medical practitioner should be prima facie admissible in violence restraining order proceedings (without the need to call the medical practitioner). Either party should be able to require the attendance of the medical practitioner upon giving reasonable notice to the other party. It was contended that this would 'retain the right of parties to call and cross examine medical practitioners, but would minimise the time, expense and inconvenience associated with calling medical practitioners'.²⁰²

The Commission notes that in criminal proceedings the need to call a medical practitioner to give evidence may be negotiated between the state and defence counsel. An agreed position is obviously more difficult in civil proceedings if one or both of the parties is unrepresented. Nevertheless, the listing of a mention hearing (as recommended in this Chapter²⁰³) by the registrar after a respondent provides his or her objection to a final family and domestic violence protection order may facilitate the resolution of the need to call a medical practitioner. The Commission has recommended above that, for family and domestic violence protection order proceedings, the strict rules of evidence should not apply and considers that this recommendation will be sufficient to deal with the problem identified by Legal Aid. However, if this issue continues to be a problem in practice, the Commission suggests that it be reviewed and in doing so the views of medical practitioners and other relevant stakeholders be sought.

DURATION

Currently, s 16(5) of the *Restraining Orders Act* provides 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. Despite the fact that a final violence restraining order can be made for any duration, in practice the usual duration is two

201. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 40.

202. Ibid.

203. See Recommendation 25.

years. The Commission was told during consultations that some judicial officers believe that a violence restraining order cannot be made for a period for longer than two years and that, for others, there is a general reluctance to impose orders in excess of two years. In other words, the default position appears to be the accepted rule. However, there are situations where a longer order is important (eg, the respondent is serving a prison sentence for the majority of the two year period) and longer orders avoid the need for the person protected by the order to apply for an extension or a new order (and the resulting re-traumatisation that this may entail).

The Commission proposed that any new legislation provide (as is currently the case) that final family and domestic violence protection orders remain in force for the period specified in the order or, if no period is specified, for two years. It further proposed that a final family and domestic violence protection order may be made for a period of more than two years if the court is satisfied that there are reasons for doing so.²⁰⁴ This proposal was designed to make it clear that final orders can and should be made for longer than two years where appropriate.

The Commission did not receive any submissions opposing this proposal.²⁰⁵ A number of submissions raised additional issues in relation to the duration of final orders.²⁰⁶ Legal Aid agreed with the Commission's proposal but also suggested that there should be grounds or criteria included in the legislation to provide guidance to demonstrate when an order

204. LRCWA Discussion Paper, Proposal 21.

205. Submission were received in support from Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

206. Two submissions stated that, if a violence restraining order is in force for the protection of a child, it should be renewed automatically until there is evidence to demonstrate that the respondent is no longer a risk to the child: Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). The Commission notes that these submissions also advocated for the automatic inclusion of any dependent children of a protected person irrespective of whether there is any evidence to demonstrate a risk to the child and on that basis it would be inappropriate for an order to be automatically renewed.

for more than two years would be appropriate.²⁰⁷ The Commission is of the opinion that the relevant factors for consideration in determining the terms of a family and domestic violence protection (as set out in Recommendation 12 above) are sufficient and appropriate for determining the duration of the order – which is a term of the order. Specific examples of when an order for longer than two years might be appropriate (eg, respondent is serving a custodial sentence, or respondent will be out of the jurisdiction for a period of time) should be included in judicial training.

Youth Legal Service highlighted that currently a final violence restraining order cannot be made against a child for a period of more than six months and submitted that this limitation should continue to apply.²⁰⁸ In view of the Commission's conclusion that legislation should specify that the special needs of children who are perpetrators should be taken into account, it agrees that the new legislation should include this provision.

RECOMMENDATION 31

Duration of final family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) a final family and domestic violence protection order remains in force for the period specified in the order or, if no period is specified, for two years;
- (b) a final family and domestic violence protection order may be made for a period of more than two years if the court is satisfied that there are special reasons for doing so; and
- (c) a final family and domestic violence protection order made against a child is to have a duration of six months or less unless the order is made automatically upon conviction for a specified offence (as per Recommendation 57 below).²⁰⁹

CONDITIONS

The Commission made a recommendation above concerning the factors that should be considered by a court when determining the terms of a family and domestic violence protection order. In recognition of

207. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 41.

208. Youth Legal Service, Submission No. 18 (12 February 2014) 20.

209. See Chapter Four, Recommendation 57.

the reality that some applicants may benefit from a family and domestic violence protection order, even though they intend to continue to live together or maintain contact, the Commission recommended that the court consider the circumstances of the relationship and the wishes of the applicant in this regard. To support a more flexible approach to the determination of the terms of an order, and to enable 'non-molestation' orders to be made where appropriate, the Commission indicated that it favoured the inclusion of a standard condition in every family and domestic violence protection order that the person bound is not to commit family and domestic violence against the person protected and is not to expose a child to family and domestic violence. Bearing in mind that the Commission has now recommended that exposure of a child to family and domestic violence be included within the definition of family and domestic violence, it recommends that every family and domestic violence protection order include a condition that the person bound by the order is not to commit family and domestic violence against a person protected by the order.

RECOMMENDATION 32

Standard condition not to commit family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide that every family and domestic violence protection order include the following condition: that the person bound by the order is not to commit family and domestic violence against a person protected by the order.

The only other issue raised in the Commission's Discussion Paper in relation to the terms of a family and domestic violence protection order concerned conditions preventing the person bound from remaining on, or entering, specified premises. The *Restraining Orders Act* currently enables such conditions to be imposed even where the person bound has a legal right to be on the premises.²¹⁰ It was suggested during consultations that it may be necessary to provide that a court has the power to remove the person bound from a tenancy agreement (as is available in some other jurisdictions) and the Commission sought submissions about whether any reform is required.²¹¹ The Commission received a number of submissions supporting reform²¹² and, in

210. *Restraining Orders Act 1997* (WA) s 13(4).

211. LRCWA Discussion Paper, 88, Question 12.

212. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Anglicare,

particular, some noted that there should be power to remove either the person bound by the order or the person protected by an order (depending on the circumstances). For example, there may be situations where the person protected by a family and domestic violence protection order should be relieved of the obligations under a tenancy agreement where it is necessary for that person to relocate for safety purposes. As noted in one submission, however, a power to remove the name of a tenant from a tenancy agreement has implications for the landlord²¹³ (and potentially other third parties). The Department of the Attorney General suggested that feedback is required from the Department of Commerce (which is the government department responsible for administering the *Residential Tenancies Act 1987* (WA)).²¹⁴ The Commission received a comprehensive and very helpful submission from Tenancy WA in response to its question with numerous suggestions for reform.²¹⁵ The Commission is of the view that the matters raised in submissions and the suggested reforms from Tenancy WA warrant serious consideration; however, given that the Commission has not had feedback by way of submissions from relevant agencies such as the Department of Commerce and the Department of Housing, it is of the opinion that a review of the interaction of the *Residential Tenancies Act* and family and domestic violence protection order system should be undertaken by the Department of Commerce.

RECOMMENDATION 33

Review of family and domestic violence protection orders and the *Residential Tenancies Act 1987* (WA)

That the Department of Commerce undertake a review of the interaction of the *Residential Tenancies Act 1987* (WA) and family and domestic violence protection orders to consider whether any reforms are necessary or appropriate to accommodate the circumstances of tenants who may be subject to or protected by a family and domestic violence protection order.

Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Tenancy WA, Submission No. 41 (3 April 2014).

213. Youth Legal Service, Submission No. 18 (12 February 2014).

214. Department of the Attorney General, consultation (18 March 2014).

215. Tenancy WA, Submission No. 41 (3 April 2014).

VARIATION AND CANCELLATION OF VIOLENCE RESTRAINING ORDERS

The Commission has examined various provisions under the *Restraining Orders Act* in relation to the variation or cancellation of violence restraining orders and these are discussed in detail in the Discussion Paper.²¹⁶ The main issue raised during consultations was how best to ensure victim safety while at the same time recognising victim autonomy when the person protected by the order applies to have the order cancelled soon after the order was made.

Application by person protected

The person protected by a violence restraining order may apply for the order to be cancelled and this application can be heard in the absence of the person bound by the order. Where such an application is made on the basis that the parties have resumed their relationship and/or the person protected by the order no longer has any concerns in relation to family and domestic violence, it is important that the court endeavours to obtain accurate information about any risk posed to the safety of the person protected. It is well-accepted that some victims will seek a cancellation of an order because of pressure exerted by the perpetrator or because of fear.

In its Discussion Paper, the Commission proposed that legislation should provide that, if the person protected by the order applies for the order to be cancelled, the court should not cancel the order immediately unless satisfied that there is no substantial risk to the safety of the person protected. It was also proposed that information be obtained from the Western Australia Police, Family Violence Services and the Department for Child Protection and Family Support and that the court ensure that the person protected has first spoken with a victim support worker.²¹⁷ Submissions were also sought about whether the hearing of an application to cancel an order should be adjourned to enable relevant information to be provided and, if so, whether the court should consider a variation of the order in the meantime.²¹⁸

A number of submissions were received in full support of the Commission's proposal.²¹⁹ Others expressed

qualified support.²²⁰ The critical issues raised in these submissions included the difficulty in assessing the risk to the safety of the person protected (and children) especially in remote areas where services such as the Family Violence Service and Victim Support Services are not available, and the need to recognise victim autonomy in decision-making (and the risk that if this is not done victims may be discouraged from seeking family and domestic violence protection orders in the first place). Peel Community Legal Service referred to these tensions and suggested that the legislation should require that applications for variation or cancellation of the order by the person protected should be 'accompanied by a certificate stating that the applicant has had legal advice or information from victim support services and understands the effect of the variation or cancellation'.²²¹ Legal Aid also supported legislative reform that required a protected person seeking to cancel an order being referred to a support service or a duty lawyer (where these services are available).²²² It also suggested that the use of 'non-molestation' orders in these circumstances may be beneficial so that, even if contact is allowed by a variation of the order, there is still an order prohibiting the person bound from committing family and domestic violence.

Legal Aid also highlighted that the person protected can apply for a cancellation of an order on an ex parte basis but cannot apply for a variation in this manner. There may be circumstances where the person protected wishes to enable the person bound to attend a particular event (eg, funeral or school function). The Commission agrees that it should not be more difficult for a person protected to apply for a variation that reduces the restrictions on a person

216. LRCWA Discussion Paper, 88–91.

217. *Ibid*, Proposal 23.

218. *Ibid*, Question 13.

219. Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

220. Maggie Woodhead, Submission No. 4 (17 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

221. Peel Community Legal Service, Submission No. 30 (28 February 2014) 10.

222. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 43.

bound, than it is to apply for a cancellation of the order.

One magistrate suggested that the most effective way to deal with applications to cancel family and domestic violence protection orders that are lodged within a short time after the order was made is to obtain a risk assessment report from the Family Violence Service.²²³ The Commission agrees that this is the ideal approach and notes that it has recommended in Chapter Four that adequate resources be provided to the Family Violence Service to enable risk assessment reports to be prepared in a wider range of cases than is currently the case.²²⁴

The Department of the Attorney General advised the Commission that it considers the current discretion in relation to varying or cancelling orders is appropriate but arguably the court should be required to consider characteristics of family and domestic violence in making an order to vary or cancel the order.²²⁵ The Commission notes that its original proposal was worded in such a way as to limit discretion – it stated that the court is not to cancel an order immediately unless satisfied that there is no substantial risk to the safety of the person protected. The Commission has revised its position and is now of the view that the court should be empowered (rather than required) to refuse to vary or cancel an order in specified circumstances. The Commission also considers that specific criteria are worthy of inclusion in relation to applications that are made by the person protected to cancel the order or to vary the conditions in such a way that will reduce the scope of the restraints imposed on the person bound. This way, the decision maker will be clearly directed to the relevant considerations and the difficult balancing exercise that must be undertaken in cases where the person protected seeks variation or cancellation of the order. The Commission has modelled this aspect of the recommendation partly on the criteria adopted in Victoria and Queensland.²²⁶

RECOMMENDATION 34

Application to vary or cancel a family and domestic violence protection order by person protected by the order

That the new Family and Domestic Violence Protection Order Act provide that:

223. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

224. Chapter Four, Recommendation 49.

225. Department of the Attorney General, consultation (18 March 2014).

226. *Family Violence Protection Act 2008* (Vic) s 100(2); *Domestic and Family Violence Protection Act 2012* (Qld).

- (a) A person protected by a family and domestic violence protection order may apply for a variation or cancellation of the order and may request that the application be heard *ex parte*.
- (b) Before making an order that varies or cancels a family and domestic violence protection order, the court must ensure that the person protected by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).
- (c) That a court may refuse to vary or cancel the family and domestic violence protection order, may vary the order in a way that differs from the variation sought or may vary the order instead of cancelling it, if the court is satisfied that it is necessary to do so to ensure the safety of a person protected by the order.
- (d) That a court must give a person bound by a family and domestic violence order a reasonable opportunity to be heard before varying an order if the order as proposed to be varied would be more restrictive on the person bound.
- (e) When determining whether to vary or cancel an order upon an application by a person protected by the order the court is to have regard to:
 - (i) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (ii) any current contact between the person protected and the person bound by the order;
 - (iii) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent;
 - (iv) the safety of the protected person and any other person who is protected by the order; and
 - (v) if the order is proposed to be varied and the order, as varied, would be more restrictive on the person bound, the matters referred to in Recommendation 13 above.

Application by person bound

The Commission also explained in its Discussion Paper that the person bound by a violence restraining order may apply to vary or cancel the order but the court is required to first determine, in the absence of the person protected by the order, whether to grant leave for the person bound by the violence restraining order to continue with the application. The Commission indicated that no specific reform was required to these provisions.²²⁷ However, the Commission recommends in this Chapter that a mention date be fixed by the registrar 14 days after the registrar receives a notice of objection to the making of a final order from the respondent, or as soon as possible thereafter.²²⁸ In relation to this recommendation it is explained that the mention date would provide an opportunity for the respondent to seek a variation of the order if particular conditions were causing undue hardship. However, under the current provisions of the *Restraining Orders Act* the respondent would have to make an application to vary the order and apply for leave to continue with the application before the order could be varied. The Commission is of the view that, given that both parties are required to attend the mention date, it should be possible for an application to vary the order to be dealt with by consent at this hearing. The respondent should also be permitted to apply for leave to continue with a contested application to vary the order on this date.

RECOMMENDATION 35

Application to vary a family and domestic violence protection order by person bound by the order

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) The person bound by an interim family and domestic violence protection order may apply to vary the order on the mention hearing date that is listed 14 days after the registrar receives the endorsement copy of the family and domestic violence protection order (or as soon as possible thereafter), indicating that the respondent objects to a final order being made (as recommended by Recommendation 25).
- (b) On the mention hearing date, the court may vary the interim order if the variation sought is consented to by the person protected by the order so long as the person protected

by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).

- (c) On the mention hearing date, the court may refuse to vary the family and domestic violence protection order or may vary the order in a way that differs from the variation sought, if the court is satisfied that it is necessary to do so to ensure the safety of person protected by the order (or any other person protected by the order).
- (c) In determining under (b) above, whether to vary the family and domestic violence protection order, the court is to have regard to:
 - (i) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (ii) any current contact between the person protected and the person bound by the order;
 - (iii) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent; and
 - (iv) the safety of the protected person and any other person who is protected by the order.
- (e) On the mention hearing date, the court may determine whether to grant leave for the person bound by the order to continue with the application to vary the order and leave is to be granted if the court is satisfied that there is evidence to support a claim that the restraints imposed by the order are causing the person bound by the order serious and unnecessary hardship and that it is appropriate that the application is heard as a matter of urgency.
- (f) If leave is granted to the person bound by the order, the court may deal with the application to vary the interim order on this date if the person protected by the order consents to the court dealing with the application on this date. If leave is granted, the court is to have regard to the matters set out in Recommendation 13 above when determining whether to vary the order.

227. LRCWA Discussion Paper, 89.

228. See Recommendation 25.

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. In its Discussion Paper, the Commission expressed the view that this power should be extended. It did so because of the reported high incidence of cases where the person protected by an order initiates or encourages contact. The Commission observed that if a court has sufficient information before it to justify a variation or cancellation of a violence restraining order, the court should be able to vary or cancel the order without first requiring the person bound by the order or the person protected by the order to lodge an application in the registry. It noted that 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 report for this purpose from the Family Violence Service. The Commission proposed that the legislation provide that a court may vary or cancel a family and domestic violence order on its own initiative but only if the person protected by the order has been given an opportunity to be heard.²²⁹ The primary purpose of this proposal was to minimise duplication for the parties.

Responses to this proposal were varied with some expressing support²³⁰ and others opposing the proposal primarily because of concerns that any relevant behaviour of the person protected by the order may well have occurred as a result of coercion or fear.²³¹ Legal Aid submitted that, although the proposal may have benefits, it is concerned that there will be an excessive focus on whether the person protected contacted the person bound. Instead, consideration should be given to the reasons for

the contact, the existence of family and domestic violence and the level of risk.²³² It suggested that an extension of a power for the court to vary or cancel a family and domestic violence protection order on its own motion should be accompanied by adequate judicial education, a proper risk assessment and the inclusion of relevant criteria.

Having reviewed the submissions, the Commission believes that there may have been some misunderstanding about the underlying purpose of the proposal. The Commission was endeavouring to avoid the situation where both parties are in court for criminal proceedings and the circumstances demonstrate that an order for a variation or cancellation of the order is clearly appropriate, but such an order cannot be made at the time because an application has not been made. It was intended to avoid the need for one of the parties having to lodge an application and for the matter to be determined at a subsequent time. The Commission has made this clear in its recommendation below.

RECOMMENDATION 36

Variation or cancellation of a family and domestic violence protection order on the courts own motion or on an application by either party to the proceedings

1. That the new Family and Domestic Violence Protection Order Act provide that a court exercising criminal jurisdiction may vary or cancel a family and domestic violence protection order on its own motion or upon an application by either party to the proceedings without an application for a variation or cancellation being lodged by the person protected by the order or the person bound by the order, provided that both the person protected by the order and the person bound by the order have been provided with an opportunity to be heard.
2. That the new Family and Domestic Violence Protection Order Act provide that when determining whether to vary or cancel a family and domestic violence protection order, the court is required have regard to the matters specified in Recommendations 13 and 35(d) above.

229. LRCWA Discussion Paper, Proposal 24.

230. Submissions in support were Disability Services Commission, Submission No. 11 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014).

231. Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

232. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 46.

TREATMENT INTERVENTION FOR RESPONDENTS

As will be discussed in the next chapter, perpetrators who are convicted of family and domestic violence related criminal offences may be required to complete treatment programs as part of the sentencing process.²³³ Specifically, in Western Australia, offenders participate in programs as part of the specialist metropolitan Family Violence Courts and the Bardimalgu Aboriginal Family Violence Court in Geraldton. However, the Commission explained in its Discussion Paper that, unlike some other jurisdictions, there is no provision for treatment programs for persons bound by violence restraining orders in Western Australia.²³⁴

It was noted that there is mixed evidence in regard to the effectiveness of treatment programs for family and domestic violence perpetrators but also that few evaluations in Australia have been undertaken. The Commission explained that it was aware that evaluations of the Family Violence Courts and the Bardimalgu Aboriginal Family Violence Court in Geraldton had been undertaken but it had not been granted access to the report(s) of these evaluations at the time of writing its Discussion Paper. The Commission stated that, given that it was not provided with this information, it was unable to make any proposal in relation to the provision of treatment programs for persons bound by violence restraining orders. Therefore, the Commission sought submissions from stakeholders about whether courts should be able to enable a person bound by a violence restraining order to participate in a treatment program and, if so, under what circumstances.²³⁵

The Commission received varying responses from submissions; many were in favour of providing for a person bound by a violence restraining order to participate in a treatment program as a condition of the order,²³⁶ but there were also a number of

submissions against this proposal.²³⁷ One practical impediment highlighted in a number of submissions is the lack of available and suitable programs in Western Australia.²³⁸

The Department for Child Protection and Family Support emphasised that, in its view, recidivism should not be considered the 'primary measure of success' for men's behaviour change programs (MBCPs). It argued that 'good practice' for MBCPs includes the provision of safety planning for the victim, 'increased capacity to monitor risk' to the victim, 'greater capacity to detect and report further offending (which is why recidivism may be detected for men involved in MBCP)', and the ability to provide information about violence restraining orders and associated processes to perpetrators.²³⁹ Legal Aid argued for evidence-based reform in this area. Nonetheless, it also stated that, given the feedback from Aboriginal women during the review of the *Restraining Orders Act* in 2008 (ie, that 'they wanted their partners to change'), Legal Aid would support a pilot program in a regional area.²⁴⁰

Gosnells Community Legal Centre stated that any decision in relation to treatment programs as part of the civil restraining order system should be postponed to assess the evaluation of the only program operating in the court system in Western Australia.²⁴¹ As noted above, the Commission had not been granted access to the report of the review of the Family Violence Courts and the Bardimalgu Aboriginal Family Violence Court at the time of preparing its Discussion Paper. Given its apparent relevance to issues being considered by the Commission and the formulation

233. See Chapter Four, Perpetrator programs.

234. LRCWA Discussion Paper, 91.

235. *Ibid.*, Question 14.

236. Hayley Barbarich, Submission No. 8 (28 January 2104); Martin Chape JP, Submission No. 10 (29 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Anglicare, Submission No. 28 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

237. Maggie Woodhead, Submission No. 4 (17 January 2014); Magistrate Liz Langdon, Submission No. 15 (31 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). In a subsequent letter from the Women's Council for Domestic and Family Violence Services it was stated that non-attendance at a behaviour change program should be considered a breach of a violence restraining order if attendance has been ordered by the court unless there are 'extreme circumstances as to why the perpetrator was unable to attend and had notified the program of this': Women's Council for Domestic and Family Violence Services, letter (22 April 2014).

238. For example, Disability Services Commission referred to the lack of programs available for perpetrators with disability and perpetrators from culturally and linguistically diverse backgrounds: Disability Services Commission, Submission No. 11 (31 January 2014).

239. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 5.

240. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 47.

241. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 13.

of its final recommendations, and that the aspects of a draft of the report had been referred to in the media, the Commission again sought access to the report. It was, however, again refused access to the report by the Department of the Attorney General. The media report suggests that the draft report concluded that the treatment programs associated with these specialist courts have not resulted in reduced recidivism and that these courts are less successful in terms of reducing reoffending than mainstream courts.²⁴²

The Commission is attracted to the suggestion of a pilot program and notes that the provision of treatment for a person bound by a family and domestic violence protection order may well complement orders that enable the parties to remain living together. However, given that the Commission is unable to make any assessment of the success or otherwise of the only existing court-based treatment programs for perpetrators of family and domestic violence, it considers that it is unable to make a properly informed recommendation in this regard. To do so would be contrary to an evidence-based approach to law reform.

BREACH OF VIOLENCE RESTRAINING ORDERS AND POLICE ORDERS

As mentioned in the Introduction to this Report, one of the matters that had been raised in the public domain prior to the Commission receiving this reference was the sentencing practices for breaches of violence restraining orders.²⁴³ Specifically, it was asserted 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. This issue was frequently mentioned during the Commission's consultations; many people consulted contended that the penalties imposed for breaching violence restraining orders and police orders are too lenient. The concern is that inadequate sentencing sends the wrong message that breaches are not treated seriously by the justice system and victims may, therefore, be discouraged from reporting breaches or the future commission of family and domestic violence.

The Commission considered s 61A of the *Restraining Orders Act* in detail in its Discussion Paper and noted that one perceived problem with the interpretation of

this provision is that offenders are able to accumulate a very high number of charges of breaching an order and, by having these dealt with by a court on the same day, potentially avoid the presumptive sentence of imprisonment.²⁴⁴ This interpretation was confirmed in *D'Costa v Roe*.²⁴⁵ This decision was appealed and the decision of the Court of Appeal was handed down on 6 June 2014.²⁴⁶ It was held that, for the purpose of s 61A(2), the current offence must have been committed after the relevant prior convictions. In addition, the offender must have accumulated at least two prior convictions within the specified two-year period and each of these offences must have been committed on separate days and subject to convictions on separate days.²⁴⁷ In its submission, the Western Australia Police argued that 'consideration should be given to preventing offenders grouping multiple breaches together to form one conviction date'.²⁴⁸ On 11 June 2014, it was reported in the media that the Attorney General would consider whether any amendment was necessary in light of the Court of Appeal's decision.²⁴⁹ Given how recently the Court of Appeal's decision was handed down, the fact that the Attorney General will separately be considering this issue and that the issue was not fully canvassed in submissions, the Commission does not make any recommendations for reform in relation to this issue. The Commission notes that, where multiple breaches are dealt with on one day, the court retains its discretion to impose a significant penalty where the conduct indicates serious and persistent offending. It is also highlighted that other recommendations in this Report will assist in ensuring that courts are able to more accurately assess the seriousness of breaches of family and domestic violence protection orders.²⁵⁰

In response to the concern that exists in relation to perceived lenient sentences, the Commission sought submissions about whether any amendment is required to s 61A of the *Restraining Orders Act*. Further, the Commission noted that some stakeholders had expressed the view that persons bound by a police order did not appreciate that breaching a police order carries with it the same consequences as breaching a violence restraining order. The Commission, therefore, queried whether the presumptive sentence of imprisonment for repeat

242. Banks A, 'Domestic Violence Courts Fail', *The West Australian* (Perth), 12 April 2014.

243. Introduction: Background to reference. See also LRCWA Discussion Paper, 3–4.

244. Ibid 93–5.

245. [2013] WASC 99.

246. *Roe v D'Costa* [2014] WASCA 118.

247. Ibid [42] (Mazza JA; McLure P & Buss JA concurring)

248. Western Australia Police, Submission No. 26 (27 February 2014) 7.

249. Banks A, 'Violence changes looms', *The West Australian* (11 June 2014) 14

250. See Recommendation 9 (Enhancing understanding about the content and context of breaches of protection orders) and Recommendation 70 (Judicial education programs).

offenders pursuant to s 61A should continue to apply to breaches of police orders.²⁵¹

The vast majority of submissions received in reply to this question did not support any changes to the current provision that would modify the presumptive sentence of imprisonment to a mandatory sentence of imprisonment.²⁵² The Chief Justice of Western Australia indicated that he strongly opposed any reform to the current provision that would 'reduce or eliminate the limited discretion currently conferred on courts' and highlighted the importance of discretion to enable the individual circumstances of the offending to be taken into account.²⁵³ The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network highlighted that full mandatory sentencing may in fact penalise victims of family and domestic violence because there are instances where victims may be inappropriately subject to violence restraining orders or police orders and they may be charged with breaching an order as a result of retaliation or defensive conduct.²⁵⁴

The Commission maintains its original view that the current limited discretion should be retained and is in agreement with the majority of submissions that full mandatory sentencing is inappropriate. It is also emphasised that the Commission has recommended earlier in this Chapter that, where an accused is charged with breaching a family and domestic violence protection order or police order by communicating with the person protected by the order, the Western Australia Police should ensure that sufficient information to demonstrate the content and context of that communication is included in the police brief for prosecution as early as possible.²⁵⁵ This recommendation coupled with improved judicial education²⁵⁶ should ensure that breaches of family and domestic violence protection orders and police orders are treated seriously where this is warranted.

251. LRCWA Discussion Paper, Question 15.

252. Path of Hope, Submission No. 14 (31 January 2014); Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

253. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 4.

254. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 50.

255. See Recommendation 9.

256. See Recommendation 70.

The Commission received some submissions advocating for increased discretion,²⁵⁷ in particular, for young offenders. The Commissioner for Children and Young People referred to the provisions of the *Young Offenders Act 1994* (WA) which state that detention and imprisonment of a child should only be used as a last resort and for the shortest appropriate period of time. It was further noted that the equal application of the presumptive sentence of imprisonment for repeated breaches of violence restraining orders and police orders is contrary to the principle that young offenders should be treated differently from adult offenders.²⁵⁸ The Commission notes that, although the current provision applies equally to young offenders and adult offenders, it does not stipulate the period of detention or imprisonment that should be imposed for a repeat offender. Therefore, there is scope for a sentencing court to take into account that the offender is a child when determining the appropriate period of detention. In addition, the provision enables a court not to impose a custodial penalty if such a penalty 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 a person protected or the community generally'. The Commission has not been provided with any case examples to illustrate that this provision has operated unfairly in regards to an offender who is a child. It considers that in the course of sentencing for breach offences the fact that the offender is a child would be considered as part of the circumstances of the person.

For those submissions that specifically responded to the Commission's question about the appropriateness of applying the presumptive sentence of imprisonment to police orders, the views were unanimous. All supported the status quo so that police orders and violence restraining orders are treated in exactly the same manner.²⁵⁹ Accordingly, the Commission does not recommend any changes in this regard.

257. A Murad, Submission No. 7 (28 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014). Only one submission advocated for full mandatory sentencing for breaches of violence restraining orders Hayley Barbarich, Submission No. 8 (28 January 2104).

258. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 17.

259. Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

The Western Australia Police raised a further issue; namely, that where breaches of a violence restraining order are dealt with by a single charge of aggravated stalking, this offence should be included within the current sentencing provision.²⁶⁰ The Commission notes that an offence of stalking may be aggravated by virtue of the fact that the conduct constitutes a breach of an order made or registered under the *Restraining Orders Act*.²⁶¹ The Commission sees merit in this suggestion because, if an offender is convicted of aggravated stalking where the conduct constitutes a breach of a family and domestic violence protection order, the offender should be liable to the same penalty as would apply if he or she has instead been convicted of breaching the order.

RECOMMENDATION 37

Penalty for repeated breach of family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act include a provision modelled on s 61A of the *Restraining Orders Act 1997* (WA) with the only substantive change being that the relevant offences for which the presumptive sentence of detention or imprisonment applies includes the offence of aggravated stalking where the circumstances of aggravation are that the conduct of the offender in committing the offence constituted a breach of a family and domestic violence protection order or a police order.

Mitigation in sentencing

Reforms to the *Restraining Orders Act* in 2011 had the effect that a person protected by an order cannot be charged with an offence of aiding or enabling a person to breach the order even if that person actively initiated or encouraged the breach. In addition, s 61B(2) was inserted into the Act and it provides that:

In the sentencing of a bound person for an offence under s 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 position prior to 2004 where consent was a defence to breaching a violence restraining order.

260. Western Australia Police, Submission No. 26 (27 February 2014) 7.

261. *Criminal Code* (WA) ss 221, 338D.

In its Discussion Paper, the Commission explained that 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.²⁶² The Commission was told of examples where the person protected by an order had 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 instances where contact or communication is uninvited or where there is further family and domestic violence committed. In response, the Commission proposed that the applicable legislation enable the circumstances where the person protected by an 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).²⁶³

The Commission received 11 submissions in response to this proposal. The Geraldton Resource Centre opposed the proposal stating that violence restraining orders are 'orders of the court that must be treated seriously by the person bound regardless of the conduct of any other person, including the protected person. Anything else would have the potential to further enhance the attitude that they are just a worthless bit of paper'.²⁶⁴ Eight submissions supported the proposal in full.²⁶⁵ In addition, Legal Aid indicated its approval but also stressed the importance of appropriate education for the police and the judiciary to ensure that proper assessments are made about whether any perceived 'consent' to a breach was in fact genuine and whether or not there has been any other conduct that constitutes family and domestic violence.²⁶⁶

262. LRCWA Discussion Paper, 96.

263. *Ibid*, Proposal 25.

264. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 31–32. This submission stated that, if the person protected actively invites or encourages the person bound to breach the order, this should be grounds for the court to consider a variation or cancellation of the order as is currently the position under s 61B of the *Restraining Orders Act 1997* (WA).

265. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

266. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 50. It was also stated that there should be the ability for a court to make a referral for a more sophisticated

In addition to indicating its agreement with the Commission's proposal, Youth Legal Service submitted that, where there is a power imbalance such as between a child perpetrator and a parent, if the parent makes contact with the child during the order this should constitute a complete defence.²⁶⁷ The Commission does not agree that there should be a complete defence based on the consent of the person protected or behaviour of that person that encourages or initiates contact even where there is a power imbalance as a consequence of a parent/child relationship. A family and domestic violence protection order is to be made for the purpose of protection and this purpose will be undermined if the person bound is not required to comply with the order in its entirety. The Commission is of the view that its proposal to enable encouragement or initiation of contact by the person protected to be taken into account in mitigation is sufficient to ensure that no injustice results.

The Chief Justice of Western Australia submitted that s 61B(2) of the *Restraining Orders Act* is 'contrary to general and well-established sentencing principle'. He observed that this provision was presumably introduced 'to respond to concerns that offenders were relying upon the conduct of the protected person as mitigatory, when in fact the protected person was pressured or intimidated into the conduct relied upon'. However, he stated that in such circumstances the conduct of the protected person would not be mitigatory.²⁶⁸ In addition, it was submitted that the Commission's proposal—to only enable active invitation or encouragement on the part of the person protected to be considered as a mitigating factor where there is no other conduct on the part of the person bound that would amount to family and domestic violence—should not be so restricted. The Chief Justice argued that where there is other conduct that is

of a sufficiently serious character to preclude treating active invitation or encouragement as a mitigating factor, one would expect that other conduct to involve the commission of a separate offence, for which the court can and no doubt would impose a separate and distinct penalty determined without regard to the fact that the offender was invited or encouraged to breach the violence restraining order. To cater for those circumstances in which there was no other charge laid in respect of the other conduct, the legislation could require that the court take into

assessment of risk by a person with expertise in family and domestic violence, such as a worker from the Family Violence Service.

267. Youth Legal Service, Submission No. 18 (12 February 2014) 23.

268. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 5.

account any other conduct by the offender which constitutes family and domestic violence when assessing whether and if so the extent to which the conduct of the person protected by the order is a mitigating circumstance. Such an approach would, in my view, be preferable to an absolute bar, although in practice in most cases one would expect the result to be the same.²⁶⁹

Bearing in mind the Commission's proposed definition of family and domestic violence in Chapter Two of this Report, it is highlighted that not every family and domestic violence incident will constitute a criminal offence. For example, behaviour that intimidates, coerces or controls a person (or is likely to intimidate, coerce or control a person) and that adversely affects or is likely to cause a person to apprehend that his or her safety or wellbeing will be adversely affected will not necessarily amount to criminal conduct. However, such behaviour may well indicate that any apparent encouragement or invitation on the part of the person protected was in fact done under pressure or as a result of fear. Although the Chief Justice rightly suggests that family and domestic violence could be taken into account when assessing whether the conduct of the person protected in fact amounts to mitigation, the Commission is concerned about creating additional situations where a person protected may be required to give evidence about the impact of the family and domestic violence on their decision-making process and the resultant re-victimisation that this might entail. On balance, the Commission is of the view that its original proposal provides a reasonable balance between the competing considerations identified above.

RECOMMENDATION 38

Mitigation in sentencing for breaches of family and domestic violence protection orders and police orders

That s 61B(2) of the *Restraining Orders Act 1997* (WA) be repealed and the new Family and Domestic Violence Protection Order Act provide that circumstances where the person protected by a family and domestic violence protection order or police order has actively invited or encouraged the person bound to breach the order may 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).

269. Ibid 6.

Defences

Currently, s 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.

During consultations, it was suggested to the Commission that this provision is incomplete 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). The Commission observed in its Discussion Paper that many violence restraining orders include a condition to the effect that such behaviour does not constitute a breach of the order and that it would be sensible to include this in the legislation for completeness. Accordingly, it proposed that the applicable legislation provide that any contact between the person bound and the person protected by the 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.²⁷⁰

All submissions received in relation to this proposal were supportive.²⁷¹ The Gosnells Community Legal Centre agreed with the proposal but also submitted

270. LRCWA Discussion Paper, 96–7, Proposal 26.

271. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Family Court of Western Australia, Submission No. 25 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia,

that it should be accompanied by a recommendation for appropriate training for court staff (in particular, court orderlies who are employed by private contractors). It was stated that, although court security staff are usually trained to ensure that the person bound by an order and the person protected are separated in the court waiting area, the position is different once the parties are requested to enter the courtroom. At times the person bound and the person protected by an order have been asked to sit near one another and this may cause 'great distress' to the person protected. It was also stated that lawyers have complained only to be told that there are staff present to deal with any trouble if it arises.²⁷² A similar sentiment was expressed in the joint submission from the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network²⁷³ and in the submission from Legal Aid.²⁷⁴

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also supported the Commission's proposal providing there is no other conduct that amounts to family and domestic violence or that breaches the terms of the order.²⁷⁵ Likewise, Legal Aid stated that the 'defence needs to be drafted in a way that makes it sufficiently clear that an ability to attend Court does not permit a person bound to approach or communicate with the person protected or to engage in other acts of family and domestic violence at court or in the court precincts'.²⁷⁶ Its submission refers to an example where a person bound by a violence restraining order engaged in abusive conduct at court but the police did not charge the person because of an express exception noted in the order that permitted him to attend court. The Commission agrees and makes this clear in its recommendation below. It is also recommended that court staff receive adequate training in relation to family and domestic violence.

Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

272. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 14.

273. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 51.

274. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 51.

275. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 51. This was also stated in the submissions from the Family Court and the Geraldton Resource Centre: Family Court of Western Australia, Submission No. 25 (27 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).

276. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 50.

RECOMMENDATION 39

Defence for breaching a family and domestic violence protection order

1. That the new Family and Domestic Violence Protection Order Act provide that contact or communication that occurs between a person bound by an order and the person protected by an order that is necessary to comply with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a family and domestic violence protection, so long as the person bound by the order does not engage in any conduct that constitutes family and domestic violence.
2. That the Western Australia government ensure that adequate training in relation to family and domestic violence is provided to court security staff (including staff employed by private contractors).

MISCONDUCT RESTRAINING ORDERS

Violence restraining orders are available under the *Restraining Orders Act* to protect persons who are not in a family and domestic relationship. In addition, the Act provides for misconduct restraining orders where the behaviour does not constitute personal violence. A misconduct restraining order can be made if the respondent is likely to engage in intimidating or offensive behaviour, cause damage or behave in a manner that is, or is likely to lead to, a breach of the peace. However, misconduct restraining orders cannot be made where the parties are in a family and domestic relationship.²⁷⁷

There is a potential gap in protection available for persons in a family and domestic relationship, including, in particular, where the relevant behaviour is a breach of the peace.²⁷⁸ Such behaviour may not amount to family and domestic violence and, therefore, if the parties are in a family and domestic relationship no restraining order can be made. In its Discussion Paper, the Commission sought submissions about whether misconduct restraining orders should be available for persons in a family and domestic relationship so long as there is no family and domestic violence involved.²⁷⁹

A number of submissions were opposed to any reform that enabled misconduct restraining orders

277. *Restraining Orders Act 1997 (WA)* ss 34 and 35A.

278. If the behaviour amounts to ongoing intimidating or offensive conduct or to damage to property, it would fit within the definition of an act of family and domestic violence under the current legislation.

279. LRCWA Discussion Paper, Question 16.

to be made for persons in a family and domestic relationship.²⁸⁰ The Western Australia Police contended that a misconduct restraining order should never be made where the parties are in a family and domestic relationship because the court 'could never be satisfied that the misconduct does not constitute an act of family and domestic violence'.²⁸¹ Legal Aid suggested that enabling misconduct restraining orders to be made where the parties are in a family and domestic relationship would be a retrograde step and could result in courts inappropriately making misconduct restraining orders.²⁸²

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network emphasised that for the most part any behaviour that would justify a misconduct restraining order would amount to family and domestic violence in any event (noting the exception of a breach of the peace). Their submission expressed a cautionary approach to this issue noting that a misconduct restraining order may be preferable to no order at all in circumstances where a violence restraining order is considered inappropriate. However, it also emphasised that if this reform is made there is the potential that some victims will fail to benefit from the protection of a family and domestic violence protection order (with its more stringent penalties).²⁸³

In contrast, some submissions agreed that it may be useful to enable misconduct restraining orders to be made where parties are in a family and domestic relationship but only where there has not been and is unlikely to be any family and domestic violence (and provided that the parties are not precluded from applying for a family and domestic violence protection in the future).²⁸⁴ One magistrate agreed that there are occasionally cases where a misconduct restraining order would be more appropriate than a violence restraining order and suggested that s 35 of the *Restraining Orders Act* could be amended to provide that a court 'is not to make a misconduct

280. Patricia Giles Centre, Submission No. 5 (24 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

281. Western Australia Police, Submission No. 26 (27 February 2014) 7.

282. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 52.

283. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 55. This submission was endorsed by the following submissions: Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).

284. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 14; Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 5; Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 8–9.

restraining order where the person seeking to be protected is in a family and domestic relationship with the person bound, unless satisfied that the conduct committed is not an act of family and domestic violence as defined in s 6(1).²⁸⁵

Another magistrate advocated for a more flexible approach to the granting of misconduct restraining orders, even where family and domestic violence is alleged. This submission explains that for Aboriginal communities the definition of a 'family and domestic relationship' means that the remedy of a misconduct restraining order is unavailable in situations where it may be available for other members of the community. Pursuant to s 4 of the *Restraining Orders Act* (and under the Commission's recommendations in this Report) the definition of a family and domestic relationship includes persons who are related to each other and the term 'related' is defined with reference to the cultural, social or religious backgrounds of the persons. As noted in the submission, this means that the definition 'encompasses a large number of community members, not biologically, but culturally related'.²⁸⁶ It was argued that the legislation should enable an applicant to choose 'a consented misconduct restraining order where there has been an objection lodged to a violence restraining order' and this may reduce the number of contested violence restraining order hearings.

As noted above, in certain respects persons in a family and domestic relationship are not able to obtain a restraining order in respect of conduct which might be sufficient to warrant granting a misconduct restraining order. For example, it is possible in theory for a person to have engaged in behaviour that constitutes a breach of the peace but does not constitute family and domestic violence. However, in this regard it has been observed that there is a breach of the peace 'whenever harm is actually done, or is likely to be done, to a person, or, in his presence, to his property, or a person is in fear of being so harmed through an assault, an affray or a riot'.²⁸⁷ On balance, the Commission has concluded that a clear case has not been established to warrant expanding the availability of misconduct restraining orders to family and domestic relationships, particularly given potential difficulties and risks with such an expansion. These include the risk of misconduct restraining orders being imposed inappropriately as an alternative to a family and domestic violence protection order.

285. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 16.

286. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 7.

287. *Tomarchio v Pocock* [2002] WASCA 156 [54].

UNDERTAKINGS

In its Discussion Paper the Commission referred to a number of concerns among stakeholders in relation to undertakings.²⁸⁸ Undertakings are promises by one party (or sometimes both parties) not to behave in a particular manner and are sometimes entered into by parties in lieu of a final violence restraining order. 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 this type of undertaking and they are not enforceable by the police. However, a breach of an undertaking may be evidence to support a future application for a violence restraining order.

There was significant concern expressed during consultations that victims of family and domestic violence are being pressured into accepting undertakings instead of proceeding with their application for a violence restraining order. This pressure may arise because of a fear of or lack of understanding of the process or because the applicant is unrepresented. It was suggested that pressure to enter into undertakings is sometimes applied by the magistrate because of workload and court listing demands. As an alternative to undertakings, it was suggested to the Commission that there could be provision for an enforceable order that can be made with the consent of the parties (ie, something less than a violence restraining order but more than an undertaking). The Commission observed that such an order could be enforced by the imposition of sanctions such as a bond, a fine or even imprisonment; however, it was mentioned that the option of imprisonment might not be appropriate in this context because arguably there would be little to distinguish such orders from violence restraining orders if the same penalties were available.

The Commission 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 unenforceable undertakings used in violence restraining order matters. The Commission sought submissions about the potential for the option of 'consent orders' with the following characteristics:

288. LRCWA Discussion Paper, 98.

- A consent order is an order of the court and is to be specifically registered.
- 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.
- The court making the consent order is to provide a copy of the order to the Western Australia Police.
- 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.
- 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.
- 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.²⁸⁹

The Commission received mixed views in response to this question, although the majority of submissions were in favour of the suggested approach.²⁹⁰ One submission expressed the view that this option would be particularly useful for parties who do not intend to end their relationship.²⁹¹ However, it was also mentioned in this submission that the sanction of a fine may be problematic where the parties remain in a relationship or have responsibility for children. In a submission received from a magistrate it was stated that undertakings 'are of little effect where there has been ongoing abuse' and the introduction of a consent order with 'meaningful sanctions and the possibility of a respondent consenting to an intervention program is supported'.²⁹²

289. LRCWA Discussion Paper, Question 17.

290. Trevor Higgs, Submission No. 1 (6 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

291. Trevor Higgs, Submission No. 1 (6 January 2014) 5.

292. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 17.

Anglicare expressed a degree of interest in the option of consent orders but indicated concern about replicating the current system of undertakings where victims are pressured and intimidated into agreeing to such orders.²⁹³ The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network also indicated support but queried whether consent orders would in practice be enforced. It was suggested that any new option in this regard be carefully monitored and adequate data be collected.²⁹⁴ Likewise, Legal Aid stated that it has concerns that police and other authorised persons may not enforce non-compliance with consent orders and, therefore, it would be up to the victim to take action. In many cases this may be difficult and would mean that the victim would be more likely to reapply for a family and domestic violence protection order. It was also highlighted that the terminology adopted by the Commission ('consent orders') may create confusion with the current process under the *Restraining Orders Act* of enabling respondents to consent to the making of a violence restraining order. Also, as an alternative, it was submitted that legislation could provide that if a court is satisfied that a person has breached an undertaking, the court can make a family and domestic violence protection order without the need to be satisfied of the grounds for an order.²⁹⁵

The option of 'consent orders' was not supported by a number of submissions.²⁹⁶ The Department for Child Protection and Family Support stated that it 'does not consider that there are any occasions in which family and domestic violence can be suitably managed by either an undertaking or a consent order' because these options do not provide adequate remedies in the event of non-compliance.²⁹⁷ It was further stated that the 'use of undertakings or consent orders may undermine or minimise the significance of family and domestic violence including that it is criminal behaviour'. However, the Commission notes that not

293. Anglicare, Submission No. 28 (28 February 2014) 34.

294. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 57.

295. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 53.

296. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014). The Peel Community Legal Service stated that it does not generally support the idea of violence restraining orders by consent but emphasised the importance of ensuring that victims have legal advice before consenting to an order: Peel Community Legal Service, Submission No. 30 (28 February 2014) 11.

297. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 6.

all forms of family and domestic violence constitute criminal behaviour.

Overall, the Commission maintains its view that the provision of a more enforceable option to the current process of undertakings has merit. The Commission does acknowledge, however, the major concern that victims of family and domestic violence may be equally pressured into agreeing to such orders and as a consequence has included in its recommendation below a requirement to ensure that the applicant has had the opportunity for legal advice before agreeing to an order (and it is also suggested that wherever possible the applicant should be provided with an opportunity to seek advice from an appropriate victim support service). The Commission agrees that the use of the term 'consent order' is potentially confusing and has changed the terminology to a 'family and domestic protection undertaking'.

RECOMMENDATION 40

Family and Domestic Violence Protection Undertakings

That the new Family and Domestic Violence Protection Act provide for the making of family and domestic violence protection undertakings that have the following characteristics:

- (a) A family and domestic violence protection undertaking is to take effect upon making of an order of the court and is to be specifically registered.
- (b) The court approving the family and domestic violence protection undertaking is to provide a copy of the undertaking to the Western Australia Police.
- (c) Failure to comply with the conditions of the family and domestic violence protection undertaking 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 in the appropriate circumstances) and non-compliance can attract specified civil enforcement sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
- (d) A court is to be satisfied that a person has failed to comply with the conditions of the family and domestic violence protection undertaking on the balance of probabilities.
- (e) A finding that a person has failed to comply with the conditions of a family and domestic violence protection undertaking is sufficient evidence to satisfy a court that the grounds

for a family and domestic violence protection order have been established, unless there are exceptional circumstances to decide otherwise.

- (f) A family and domestic violence protection undertaking can only be approved by a court if the applicant for a family and domestic violence protection order and the respondent have been provided with the opportunity to obtain independent legal advice.
- (g) A family and domestic violence protection undertaking may include any requirements to be complied with by the respondent that a court could impose if it made a family and domestic violence protection order.

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.²⁹⁸ 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.²⁹⁹ The Commission noted in its Discussion Paper that there does not appear to be any major concerns in relation to the registration of interstate orders.³⁰⁰ Nonetheless, the 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. The Commission generally sought submissions from interested stakeholders about whether there is any need for reform in relation to interstate orders.³⁰¹

The Commission received a number of submissions expressing support for a national register of family and domestic violence protection orders.³⁰² The

298. *Restraining Orders Act 1997* (WA) s 75.

299. *Restraining Orders Act 1997* (WA) s 76(1).

300. LRCWA Discussion Paper, 100.

301. *Ibid.*, Question 18.

302. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service, Submission No. 17 (a) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal

Aboriginal Social Workers Association of Western Australia suggested that such a register should be accessible by police and courts in all jurisdictions.³⁰³ Anglicare also drew attention to the lack of information available to victims about what to do if they move between jurisdictions.³⁰⁴ The Western Australia Police confirmed that a national violence restraining order scheme has been discussed and indicated that the issues were complex but did not elaborate further.³⁰⁵

The Commission is not aware of the status of current discussions in relation to a national register for family and domestic violence protection orders. However, it highlights that the recommendations in this report will have the effect that Western Australia will have specific family and domestic violence orders and this may assist in revisiting this issue in the future.

DATA

In its Discussion Paper the Commission referred to various data in relation to violence restraining orders. Data provided by the Department of the Attorney General showed the gender and age breakdown for persons protected by violence restraining orders. However, data in relation to Aboriginal status and whether the protected person was from a culturally and linguistically diverse (CALD) background was not provided and the Department indicated that available data in relation to Aboriginality is unreliable and no record is kept of CALD status.³⁰⁶ Information was provided in relation to the proportion of violence restraining orders that are made where the parties are in a family and domestic relationship and the department explained that this data is based on the relationship as stated by the applicant in the application form. On that basis, 59% of final violence restraining orders made in 2012 involved parties who were in a family and domestic relationship. The Commission highlights that its recommendation for new legislation and the provision of family and domestic violence protection orders will enable more accurate data to be collected in this regard.

A few submissions raised issues in relation to data recording and collection. A justice of the peace commented that the form required to be completed by justices of the peace when dealing with an interim violence restraining order application

includes a box to be completed in regard to the parties' ethnicity. While it was acknowledged that the information recorded on these forms may not have been transferred to an accessible database, it is clear that the information exists.³⁰⁷ In relation to the Commission's recommendation for updated application forms and affidavits,³⁰⁸ the Department for Child Protection and Family Support stated that it 'encourages the Department of the Attorney General to use [the] opportunity to also consider how data capture related to [violence restraining order] proceedings can be improved'.³⁰⁹ In its submission, the Commissioner for Children and Young People recommended that agencies providing family and domestic violence services should ensure data collection 'includes data specific to children and young people, to support the development and monitoring of evidence-based responses aimed at reducing children and young people's exposure to family and domestic violence'.³¹⁰ The Commission noted above that data was not available in relation to the number of violence restraining orders that have been extended to protect children and other persons in addition to the person protected by the order.

The Commission is of the view that the implementation of recommendations in this Report provides a useful opportunity for the Department of the Attorney General to review its data recording and collection processes for family and domestic violence matters and makes a recommendation that this be undertaken.

RECOMMENDATION 41

Data collection

That if the recommendations in this Report are implemented, the Department of the Attorney General consider appropriate and reliable ways to ensure that full and accurate data is recorded in an accessible format in regards to family and domestic violence protection orders including (but not limited to) the number of applications made for interim and final orders and the number of such orders made; the circumstances to explain why interim orders are not converted into final orders; the number of family and domestic violence protection undertakings made; and the characteristics (eg, age, gender, ethnicity and disability) of applicants and respondents to family and domestic violence protection order applications.

Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

303. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014) 13.

304. Anglicare, Submission No. 28 (28 February 2014) 35.

305. Western Australia Police, Submission No. 26 (27 February 2014) 8.

306. LRCWA Discussion Paper, 57.

307. Martin Chape JP, Submission No. 10 (29 January 2014) 12.

308. See Recommendation 24 above.

309. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 3.

310. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 5.

Chapter Four

Criminal Justice Response to Family and Domestic Violence

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Introduction

The legal definition of family and domestic violence encompasses a broad range of behaviour – a large proportion of this behaviour is contrary to the criminal law (eg, offences of violence, sexual offences, kidnapping, deprivation of liberty, damage, threats and stalking). In the previous chapter the Commission examined the response of police to family and domestic violence and the civil restraining order system. Where the relevant behaviour does not constitute a criminal offence (or where there is insufficient evidence to support a criminal prosecution¹), a violence restraining order is the only legal remedy available. However, where criminal behaviour has occurred and the alleged offender has been charged with an offence, the civil and criminal justice responses to family and domestic violence may overlap. In its Discussion Paper, the Commission observed that in this context the criminal and civil responses should, where possible, operate together in a seamless and integrated manner to maximise victim safety and perpetrator accountability; reduce family and domestic violence; and minimise unnecessary duplication.² In this Chapter, the Commission considers the criminal justice response to family and domestic violence related offences and the intersection of the criminal justice system and the civil protection order system.

1. In its Discussion Paper, the Commission referred to indicative data provided by the Western Australia Police, which showed that Domestic Violence Incident Reports (DVIRs) classified as crimes (as opposed to 'general') accounted for 40% of all DVIRs in 2012: Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) 103.
2. Ibid.

Family and domestic violence related offences

As noted above, there are numerous offences under the *Criminal Code* (WA) that may potentially apply to family and domestic violence. In its Discussion Paper, the Commission examined criminal offences that are most commonly connected with family and domestic violence and how they are classified or dealt with under the criminal law.¹

AGGRAVATING CIRCUMSTANCES

A number of offences under the *Criminal Code* are subject to a higher maximum penalty if they are committed in 'circumstances of aggravation'. Circumstances of aggravation include that the offender is in a family and domestic relationship with the victim of the offence.² The term 'family and domestic relationship' is defined by reference to the meaning of that term under the *Restraining Orders Act 1997* (WA).³

The Commission highlighted in its Discussion Paper 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. In other words, for these offences there is no express recognition under the *Criminal Code* that the offence is considered more serious by virtue of the existence of a family and domestic relationship between the offender and the victim. In order to assess the appropriateness of the current law in this regard, and to determine if any reform is required, the Commission categorised these offences into three groups:

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 105–9.
2. The definition of 'circumstances of aggravation' under s 221 of the *Criminal Code* also includes that 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'. If the Commission's recommendation for a new Family and Domestic Violence Protection Order Act is implemented, this definition will need to be amended to include reference to a breach of a family and domestic violence protection order or other order made under the new Act.
3. Under the Commission's recommendations, the definition of 'a family and domestic relationship' will appear in the new Family and Domestic Violence Protection Order Act.

- **Offences with a maximum penalty of life imprisonment:** Murder, manslaughter, criminal damage by fire and attempted murder all carry a maximum penalty of life imprisonment.⁴ Logically, these offences do not attract a statutory higher penalty if committed in circumstances of aggravation because there is no higher penalty available under the criminal law. However, this does not mean that the existence of a family and domestic relationship will not be taken into account by the sentencing court when determining the actual penalty to be imposed. Indeed, s 63B(1) of the *Restraining Orders Act* specifically requires this to occur,⁵ but only in respect to the offences of murder, manslaughter and attempt to kill. The offence of criminal damage by fire is omitted from s 63B. This does not mean that a sentencing court cannot take into account the existence of a family and domestic relationship as an aggravating factor for that offence; it just means that taking into account the existence of family and domestic relationship is not legislatively prescribed.
- **Offences with a maximum penalty of 20 years' imprisonment:** A number of offences under the *Criminal Code* that potentially apply in cases of family and domestic violence are subject to a maximum penalty of 20 years' imprisonment (eg, 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)). 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

4. The offence of murder carries a presumptive sentence of life imprisonment: see *Criminal Code* (WA) s 280(4).
5. Section 63B(1) of the *Restraining Orders Act 1997* (WA) provides that when a person has committed 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'.

for circumstances of aggravation. 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 currently include 'circumstances of aggravation' and are, therefore, subject to a higher statutory penalty where the offender and victim are in a family and domestic relationship (eg, stalking, grievous bodily harm, wounding, assault occasioning bodily harm, assault with intent, assault and indecent assault).⁶ However, there are some notable omissions: deprivation of liberty, threats, criminal damage and assault causing death. Deprivation of liberty and threats are covered by s 63B of the *Restraining Orders Act* but criminal damage and assault causing death⁷ are not.

As a result of this analysis, the Commission expressed the view in its Discussion Paper that the manner in which the legislation deals with circumstances of aggravation involving family and domestic violence is confusing and inconsistent. In order to provide greater clarity and consistency, the Commission proposed a number of amendments to s 63B of the *Restraining Orders Act* (ie, the inclusion of the offences omitted as discussed above) and the specification of circumstances of aggravation for offences (with a current maximum penalty of less than 20 years' imprisonment) that do not currently provide for an aggravated penalty.⁸ In recognition that s 63B of the *Restraining Orders Act* concerns sentencing practices for family and domestic violence related offences, the Commission sought submissions about whether this provision should be transferred from the *Restraining Orders Act* and inserted into either the *Criminal Code* or the *Sentencing Act 1995* (WA).⁹

All submissions received in response to the Commission's proposal were supportive¹⁰ with some

6. In its Discussion Paper the Commission included a table which shows the difference in the statutory maximum penalty where these offences are committed in circumstances of aggravation: LRCWA Discussion Paper, 107.
7. Due to significant concerns about the offence of assault causing death in the context of family and domestic violence, this offence is separately discussed below.
8. LRCWA Discussion Paper, Proposal 28.
9. LRCWA Discussion Paper, Question 19.
10. Path of Hope, Submission No. 14 (31 January 2014); Office of the Director of Public Prosecutions, Submission No. 16 (4 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Relationships Australia, Submission No. 29 (28 February

suggesting that s 63B of the *Restraining Orders Act* should apply to all family and domestic violence related offences.¹¹ The Commission prefers the current approach where relevant criminal offences include circumstances of aggravation in the offence provision and the ambit of s 63B is expanded only for those offences where a higher statutory penalty is unfeasible (ie, where the current maximum penalty is already life imprisonment or 20 years' imprisonment).

Legal Aid agreed with the proposal in so far as it applies to adults but did not support the proposed amendments for children because 'it is understood that children offend for complex reasons and that juvenile offenders are commonly victims of trauma and abuse themselves'.¹² The Commission agrees that the special needs and circumstances of child perpetrators should be taken into account during sentencing. However, it does not consider that 'circumstances of aggravation' (as they appear in specific offence provisions) or s 63B of the *Restraining Orders Act* should be expressed not to apply to children. The *Young Offenders Act 1994* (WA) currently provides a different approach for sentencing juveniles and the statutory maximum penalty for an offence or the specification that the existence of a family and domestic relationship is an aggravating factor does not preclude a sentencing court from applying the general principles of juvenile justice.

In response to the Commission's question whether s 63B should be moved from the *Restraining Orders Act*, only one submission supported its continued inclusion in restraining order legislation.¹³ Six submissions were received expressing support for the provision to appear in either the *Criminal Code* or the *Sentencing Act*.¹⁴ One of these submissions specifically selected the *Sentencing Act* as the most

2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). The Department for Child Protection and Family Support indicated its support for Proposal 28(2) but did not comment on the remainder of the proposal: Department for Child Protection and Family Support, Submission No. 20 (14 February 2014).

11. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014). This submission was endorsed by Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014).
12. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 54.
13. Youth Legal Service, Submission No. 18 (12 February 2014).
14. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March

appropriate location.¹⁵ The Commission agrees that the amended s 63B should be transferred into the *Sentencing Act* because its subject matter is primarily related to sentencing.

RECOMMENDATION 42

Aggravating circumstances for family and domestic violence related offences

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 ss 338A–C, and assault causing death under s 281, if the offence is committed in circumstances of aggravation as defined under s 221.¹⁶
3. That on the basis of the addition of circumstances of aggravation to additional offences as recommended in 2 above, 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*.
4. That s 63B of the *Restraining Orders Act 1997* (WA) (as amended by this recommendation) be transferred from the *Restraining Orders Act 1997* (WA) and inserted into the *Sentencing Act 1995* (WA).

2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

15. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

16. 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.

Data

The definition of 'circumstances of aggravation' under the *Criminal Code* includes four distinct components: the existence of a family and domestic relationship; the presence of a child when the offence was committed; a victim who is of or over the age of 60 years; and conduct that constitutes a breach of a restraining order. The Commission was told during consultations that it is not always possible to identify the nature of the 'circumstances of aggravation' when looking at criminal records and court documentation. This may cause difficulties for particular agencies when dealing with the offender or victim if they are unaware of the nature of the relationship between them. The Commission sought submissions about whether the Western Australia Police should 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. The Commission also asked whether this information should be recorded in the statement of material facts, the prosecution notice or elsewhere.¹⁷

All submissions received by the Commission agreed with its proposition that the existence of a family and domestic relationship should be recorded as part of the offence description.¹⁸ A number of submissions advised that this information would ordinarily already be included in the statement of material facts and the prosecution notice. One magistrate explained that if this information is missing from the prosecution notice it is usually amended at the first court appearance.¹⁹ The main problem appears to arise because the particular circumstance of aggravation is not recorded on the offender's criminal record. The Western Australia Police clarified that, when a charge is selected from the police database, a 'list of relevant aggravating circumstances usually

17. LRCWA Discussion Paper, Question 20.

18. Maggie Woodhead, Submission No. 4 (17 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

19. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 17.

populates the charge wording automatically and any irrelevant references are removed by the officer'. However, currently the criminal record only shows the offence type and the fact that it was committed in circumstances of aggravation. The Western Australia Police agreed that the particular circumstance of aggravation should appear on the criminal record but advised that funding has not been provided for any changes to its IT system to enable this to occur.²⁰

Although the practice is to record the nature of the circumstance of aggravation in the statement of material facts and prosecution notice, it seems that this does not occur in every instance. Most significantly, this information is not included in the criminal record. The Commission is of the view that it is essential that the Western Australia Police IT system enables the existence of a family and domestic relationship between the offender and the victim to be recorded on the criminal record. If this information appears on the criminal record it will provide an alert for agencies that are required to supervise, monitor or assist the offender (and/or the victim). It will also enable judicial officers, lawyers and prosecutors when dealing with the offender for a subsequent offence to easily identify that the past offence was family and domestic violence related.

RECOMMENDATION 43

Recording of circumstances of aggravation

That the Western Australia Police develop an appropriate system to ensure that the existence of a family and domestic relationship between the offender and the victim for an offence committed in circumstances of aggravation is recorded in every case on the Statement of Material Facts, the Prosecution Notice and the offender's Criminal Record.

Assault causing death

The Commission observed, in its Discussion Paper, that 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. This bill was defeated.²¹

As a consequence of the public concerns and views expressed during consultations, the Commission examined the use of the offence of assault causing death and considered a number of specific cases. The Commission concluded that there is insufficient evidence to demonstrate that the offence of assault causing death has been inappropriately charged in cases of family and domestic violence related fatalities. There were a number of reasons for this view including that, at the time of the Discussion Paper, there had only been six convictions for this offence where the parties were in a family and domestic relationship. It was also observed that in some cases an offender will be convicted of assault causing death as an alternative to murder or manslaughter; that the choice to indict for assault causing death may be appropriate if there are evidentiary issues concerning the cause of the death and the accused is likely to be able to rely on the defence of accident; and 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 also formed the view 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).²² The Commission sought submissions about whether the penalty for assault causing death should be increased to 20 years' imprisonment where the offence is committed in circumstances of aggravation.²³ All submissions received in response to this question supported an increase in the penalty with eight out of nine of these submissions supporting a maximum penalty of 20 years' imprisonment. Recognising that the sentencing court retains discretion to impose a penalty up to the statutory maximum (and that it can therefore take into account the individual circumstances of the offence and the offender) the Commission agrees that a maximum penalty of 20 years' imprisonment is appropriate where the offence is committed in circumstances of aggravation.

20. Western Australia Police, Submission No. 26 (27 February 2014) 9.

21. LRCWA Discussion Paper, 3, 109.

22. This is included in Recommendation 42.2 above.

23. LRCWA Discussion Paper, Question 21.

RECOMMENDATION 44

Assault causing death

That s 281 of the *Criminal Code* (WA) be amended to provide that if the offence of assault causing death is committed in circumstances of aggravation the maximum penalty for the offence is 20 years' imprisonment.

STALKING

It appears that family and domestic violence is increasingly being committed by electronic means and a particular form of this type of behaviour is 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.²⁴

Section 338E(1) of the *Criminal Code* provides for the indictable offence of stalking and requires proof that the accused pursued a person with 'intent to intimidate²⁵ that person or a third person'. The simple offence of stalking is set out in s 338E(2) and it provides that:

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.

The term 'pursue' is defined in s 338D(1) to mean '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

24. Ogilvie E, 'Cyberstalking' (2000) 166 *Australian Institute of Criminology Trends & Issues* 1.

25. 'Intimidate' is defined in s 338D(1) of the *Criminal Code* (WA) 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'.

to such a place'; and 'whether or not repeatedly, to do any of the foregoing in breach of a restraining order or bail condition'. The Commission commented in its Discussion Paper that it is arguable whether the definition of 'pursue' adequately covers 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*.²⁶ In its submission, Anglicare stated that 'negative posts on Facebook and other social networking sites are methods used by perpetrators to intimidate victims' and contended that such conduct 'should be addressed as stalking'.²⁷

Some 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'.

Considering that the offence of stalking covers conduct that extends beyond family and domestic violence (and the complexity of the issues involved), the Commission proposed 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.²⁸ The majority of submissions received in answer to this proposal were supportive.²⁹ Two of these submissions argued that any review of cyberstalking laws should extend beyond family and domestic violence and also consider cyberstalking and cyberbullying committed against or by children and young people generally.³⁰

26. LRCWA Discussion Paper, 112.

27. Anglicare, Submission No. 28 (28 February 2014) 16.

28. LRCWA Discussion Paper, Proposal 29.

29. Path of Hope, Submission No. 14 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

30. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014).

Legal Aid did not support the Commission's proposal. It stated that stalking laws 'are probably sufficiently broad to include communication and pursuit by cyber/electronic means'. However, it argued that the applicability of the current criminal law to other behaviour (eg, 'threats to publish or disclose intimate photos/videos'; the 'use of GPS and other electronic tracking devices to track phones, vehicles and persons of partners/ex-partners'; and the 'use of technology to access computers, emails and phone messages of partners/ex-partners') should be considered. It was submitted that, at a minimum, legislation should provide that publishing or threatening to publish or disclose intimate personal photos or videos without the participant's consent is a criminal offence. Further, such conduct should be specified as a ground of emotional abuse in family and domestic violence protection order legislation.³¹

The Commission has concerns about recommending the introduction of a new offence (which would have application outside the context of family and domestic violence) in the absence of a full review of the current laws in relation to cyberstalking and similar behaviour. Given the timeframe for this reference and the complexities involved (including that cybercrime may be captured by both federal and state laws), the Commission considers that its original proposal is the best way forward. It also suggests that a review of cyberstalking laws should also consider broader issues such as cyberstalking and cyberbullying committed by and against children and young people.

RECOMMENDATION 45

Review of cyberstalking and other forms of threatening or abusive behaviour committed via electronic means

That the Western Australian government undertake a review of the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of threatening or abusive behaviour that are undertaken by electronic means.

31. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 55–6.

Criminal practice and procedure

BAIL

If a person has been charged and arrested for a family and domestic violence related offence, he or she may be released on bail on specific conditions. Frequently, in such matters, the police and/or the court will impose what are referred to as 'protective bail conditions'.¹ Protective bail conditions for family and domestic violence related offences will often provide that the accused is not to have any contact whatsoever with the victim of the offence and specific conditions may 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 family and domestic violence protection orders

An accused may be subject to both protective bail conditions and a violence restraining order (if such an order has been obtained by the victim of the offence or if the court has made an order under s 63 of the *Restraining Orders Act 1997* (WA)).² Alternatively, an accused may only be subject to protective bail conditions. The Commission was informed during consultations that some judicial officers are reluctant to make violence restraining orders in criminal proceedings and consider that protective bail conditions are sufficient. However, if the charge is dismissed or otherwise dealt with, there is no ongoing legal protection for the victim of the offence (unless and until a violence restraining order is then sought and obtained) because the bail conditions will lapse.

1. Protective bail conditions are imposed under clauses 2(2)(c) and (d) of Part D, schedule 1 of the *Bail Act 1982* (WA). Under these provisions, 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'.
2. Section 63 of the *Restraining Orders Act 1997* (WA) enables a court exercising criminal jurisdiction to make a violence restraining order in certain circumstances.

The Commission noted in its Discussion Paper that clause (2a) of Part D, schedule 1 of the *Bail Act 1982* (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.

This provision supports a practice of utilising either protective bail conditions or violence restraining orders to ensure the safety and welfare of the victim of an offence. The Commission expressed the view that the making of a violence restraining order should ideally be considered as a possible additional option to protective bail conditions and proposed that clause 2(2a) of Part D, Schedule 1 of the *Bail Act* should be amended to ensure that the use of both options is encouraged.³

The Commission received 10 submissions in response to this proposal. One submission opposed the proposal on the basis that violence restraining orders should only be issued following an application by the victim.⁴ Six submissions fully supported the proposal,⁵ with the remaining three expressing a preference for a system whereby family and domestic violence protection orders are automatically or routinely imposed at the time an accused first appears in court on a family and domestic violence related charge.⁶ The Commission examines this option later in this

3. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper'), Proposal 30.
4. Youth Legal Service, Submission No. 18 (12 February 2014) 26.
5. Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).
6. Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

Chapter but remains of the view that its proposal is an appropriate alternative to such a system.

RECOMMENDATION 46

Concurrent protective bail conditions and family and domestic violence protection orders

That, if Recommendation 57 below is not implemented, 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 family and domestic violence protection order, or protective bail conditions, or both.

In addition, the Commission observed in its Discussion Paper that, where both protective bail conditions and a family and domestic violence protection order are in place, it is important that the conditions are not contradictory in order to avoid confusion and unintended breaches. The Commission proposed that the conditions of concurrent orders should be compatible unless adopting this approach would pose a risk to the safety of the victim.⁷ No submissions were received in opposition to this proposal. Eight submissions supported the proposal⁸ and the Department for Child Protection and Family Support also argued that the conditions of bail and the conditions of a family and domestic violence protection order should be compatible unless to do so would pose a risk to children in the care of the adult victim.⁹ Legal Aid effectively repeated its views expressed in relation to the above proposal by stating that the 'prima facie starting point' for adult accused should be the imposition of protective bail conditions and an interim family and domestic violence protection order for family and domestic violence offences.¹⁰ Taking into account the support

7. LRCWA Discussion Paper, Proposal 31.

8. Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

9. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 6.

10. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 56.

received, the Commission has concluded that it is appropriate to make a recommendation in similar terms to its original proposal. The only change reflects the concern expressed by the Department for Child Protection and Family Support. The Commission considers that it is appropriate to require the court to have regard to the risk to a child of the victim in circumstances where the family and domestic violence protection order has been extended to a child of the victim.

RECOMMENDATION 47

Consistency between protective bail conditions and family and domestic violence protection orders

That the *Bail Act 1982* (WA) be amended to provide that before setting or amending protective bail conditions for an offence where the accused and the victim are in a family and domestic relationship (as defined under the new Family and Domestic Violence Protection Order Act), the judicial officer or authorised officer must consider whether there is an existing interim or final family and domestic violence protection order (where the accused is the person bound by the order and the victim is the person protected by the order). If so, the judicial officer or authorised officer is to ensure that the conditions of bail and the conditions of the family and domestic violence protection order are compatible unless to do so would pose a risk to the safety of the victim or would pose a risk to the safety of a child who is also protected by the family and domestic violence protection order.

Jurisdiction to grant bail for breaching a violence restraining order

As mentioned in Chapter Three, s 16A(3) of the *Bail Act* currently 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, bail can only be considered by a court and, as noted during consultations, an accused may be kept in custody overnight until he or she can be brought before a court. In its Discussion Paper, the Commission observed that s 16A(3) may have the unintended consequence of encouraging police to use the summons process for an offence of breaching a violence restraining order instead of arrest. It also stated that it is inconsistent that accused persons in the metropolitan area must be brought before

court for bail to be considered while accused persons in regional locations can have their bail set by the police.¹¹

While the Commission acknowledged 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 concluded that it is anomalous and potentially unfair that the accused are treated differently in this respect simply because of their location. Therefore, the Commission proposed that s 16A(3) of the *Bail Act* be repealed.¹² All but one submission responding to this proposal agreed with the Commission's conclusion.¹³ The conflicting submission was received from the Disability Services Commission. After stating its disagreement, it submitted that people from regional areas are at a greater risk of being remanded in custody for longer periods and this is of particular concern for people with disability. It was further suggested that police should retain discretion to determine whether an accused should be remanded in custody after considering the safety of both the victim and the accused.¹⁴ This reasoning, in fact, indicates support for the Commission's approach and it is assumed that this submission has misunderstood the effect of the proposal. By repealing s 16A(3) of the *Bail Act*, police in the metropolitan area will have the same discretion as is currently available to police in regional areas to consider whether it is appropriate to release an accused on bail for an offence of breaching a family and domestic violence protection order. It is anticipated that this will have the practical consequence of decreasing the extent by which accused are summonsed in order to circumvent the restriction on granting bail where police consider it unfair or inappropriate to remand an accused in custody to appear at the next court sitting.

RECOMMENDATION 48

Repeal of s 16A(3) of the *Bail Act 1982 (WA)*

That s 16A(3) of the *Bail Act 1982 (WA)* be repealed.

11. LRCWA Discussion Paper, 116.
12. *Ibid*, Proposal 32.
13. Path of Hope, Submission No. 14 (31 January 2014); Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).
14. Disability Services Commission, Submission No. 11 (31 January 2014) 8.

Bail risk assessment reports

In its Discussion Paper, the Commission described the current practice of preparing written bail risk assessment reports for the specialist Family Violence Courts in the metropolitan area. These reports are usually prepared by the Family Violence Service of the Department of the Attorney General following a request from the court when a participant in the Family Violence Court program seeks a variation of protective bail conditions. They are also sometimes 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.¹⁵ The Commission noted that the reports usually include information in relation to current protective bail conditions; input from the victim; 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; and a recommendation from the Family Violence Service in relation to the proposed variation of protective bail conditions.

The Commission was told during its consultations that these bail risk assessments reports usually 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). Magistrates consulted by the Commission explained that the information contained in these reports is invaluable and the assessments appear to be widely supported by magistrates and many lawyers. Given the overwhelming support for the expanded use of bail risk assessments¹⁶ and the Commission's view

15. LRCWA Discussion Paper, 117.
16. The Commission noted in its Discussion Paper that some defence lawyers were concerned that these reports contain 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 observed that s 22 of the *Bail Act 1982 (WA)* 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 1982 (WA)*. The Commission also mentioned that a judicial officer who has read the material contained in a bail risk assessment report will disregard irrelevant matters in subsequent sentencing

that in family and domestic violence matters it is vital that decision-makers are properly informed, it proposed that additional resources should be provided to enable these reports to be prepared and used in all relevant bail proceedings.¹⁷ Given that the *Bail Act* currently authorises bail decision-makers to take into account such information as they think fit, the Commission observed that legislative reform does not appear necessary; however, it was suggested to the Commission that the legislation should recognise bail risk assessment reports to encourage their expanded use. The Commission sought further submissions on this subject.¹⁸

The very positive sentiment expressed during consultations in relation to bail risk assessment reports was repeated in submissions. Fifteen submissions were received in favour of the Commission's proposal for increased funding to be made available to enable the expanded use of bail risk assessment reports.¹⁹ The Gosnells Community Legal Centre stated that bail risk assessment reports are 'probably the best information which courts will have at their disposal when making bail decisions'.²⁰ In a submission from one magistrate, it was contended that sufficient funding should be provided to enable bail risk assessment reports to be provided to the court with a one week turnaround.²¹ The Department of Corrective Services noted that additional resources should be provided to all agencies that contribute

to the preparation of bail risk assessment reports.²² Legal Aid stated that any 'concern about resource implications in an environment of limited funding might be addressed through appropriate monitoring and evaluation'.²³ The Commission notes that the Department of the Attorney General did not respond to this proposal in its written submission but did state during subsequent consultation that the 'feasibility and utility of extending bail risk assessment reports would need to be explored'. It also commented that any delay caused by the preparation of such reports may be greater in regional and remote areas.²⁴

The Commission has concluded that the approach undertaken in relation to bail risk assessment reports is vital in terms of enhancing decision-making and maximising victim safety. In cases where an accused seeks a relaxation of protective bail conditions in order to enable contact to occur between the accused and the victim, it is necessary for the court to properly assess the risk to the safety of the victim before making a decision. In the past, such a decision would ordinarily have been made only after hearing from the accused (or his or her lawyer) and the prosecutor (possibly including the views of the victim). As noted above, a bail risk assessment report includes relevant information from a range of agencies and also a professional assessment of the risk to the victim. Accordingly, the Commission makes a recommendation in similar terms to its original proposal. The only change is to include a requirement for the use and effectiveness of bail risk assessment reports to be monitored and for funding to also be provided to any relevant agency involved in the preparation of the reports.

proceedings (assuming that the judicial officer in fact recalls that information).

17. LRCWA Discussion Paper, Proposal 33.
18. *Ibid*, Question 22.
19. Maggie Woodhead, Submission No. 4 (17 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). One magistrate indicated her support for bail risk assessment reports: Magistrate Liz Langdon, Submission No. 15 (31 January 2014).
20. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014) 16.
21. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 18.

RECOMMENDATION 49

Funding for bail risk assessment reports

1. That funding be provided to the Family Violence Service (and other relevant agencies) to enable bail risk assessment reports to be prepared for the purpose of considering bail conditions for all family and domestic violence related 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).
2. That the use and effectiveness of bail risk assessment reports be monitored on an ongoing basis.

22. Department of Corrective Services, Submission No. 23 (25 February 2014) 5.

23. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 57.

24. Department of the Attorney General, consultation (18 March 2014).

In reply to the Commission's question concerning the need for legislative recognition of bail risk assessment reports the responses were varied. A number of submissions supported the inclusion of reference to bail risk assessment reports in the *Bail Act*.²⁵ On the other hand, one magistrate indicated that without resources to enable bail risk assessments reports to be prepared there is little point in including provision for them in legislation and noted that the *Bail Act* currently enables a court to request 'any report necessary to inform itself in relation to determining a bail application'.²⁶ The Western Australia Police did not specifically address the issue of legislative recognition but highlighted that family and domestic violence is of a 'completely different nature and dynamic to other types' of violence and risk should be assessed before an accused is released on bail.²⁷ Legal Aid did not support a discretionary approach whereby legislation enables a court to request a bail risk assessment report and instead submitted that the legislation should provide for a bail risk assessment report to be prepared in every family and domestic violence matter.²⁸

One magistrate agreed that the *Bail Act* should provide for the ability to request a bail risk assessment report. This submission highlighted relevant provisions of the *Bail Act* and suggested one possible amendment to facilitate the provision of bail risk assessment reports.²⁹ Section 22 of the *Bail Act* currently provides that, when considering a case for bail, a court may 'receive and take into account such information as [it] thinks fit whether or not the same would normally be admissible in a

court of law'. Clearly this section would cover the provision of bail risk assessment reports. Section 9 of the *Bail Act* enables a case for bail to be deferred for a period not exceeding 30 days if necessary:

- (a) to obtain more information for the purpose of making a decision in accordance with this Act; or
- (b) to take any step authorised by section 24(1) or 24A(1) or (2).

Sections 24 and 24A enable a court to request information from a police officer or a community corrections officer to verify matters put forward by the accused as well as generally seeking information from police and community corrections in regard to the matters that must be considered when determining bail (eg, whether the accused is likely to commit an offence or endanger the safety, welfare or property of any person). The submission contended that s 9 should explicitly include a power to defer consideration of bail 'for the purpose of ascertaining what, if any, conditions may need to be put in place to protect any complainant in a family and domestic violence matter'.

While the Commission agrees with Legal Aid that ideally bail risk assessment reports should be prepared in all relevant cases, in the absence of a commitment to provide resources for this to occur, a mandatory legislative provision is pointless. The Commission agrees with the approach suggested above; namely, that the *Bail Act* should expressly enable bail to be deferred for the purpose of considering what conditions should be imposed to protect a victim of a family and domestic violence related offence.

25. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

26. Magistrate Liz Langdon, Submission No. 15 (31 January 2014) 2.

27. Western Australia Police, Submission No. 26 (27 February 2014) 9.

28. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 57.

29. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 18.

RECOMMENDATION 50

Deferral of bail to consider conditions to protect a victim of family and domestic violence

That section 9 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer or authorised officer may defer consideration of a case for bail for a period not exceeding 30 days if he or she thinks it is necessary to obtain more information for the purpose of ascertaining what, if any, conditions should be imposed to protect a victim of a family and domestic violence related offence.

SENTENCING

In Chapter Three, the Commission has already examined the primary issue raised during consultations and research in regard to sentencing for family and domestic violence offences; that is, the perceived inadequate sentences imposed for repeat breaches of violence restraining orders.³⁰ Apart from this issue, a number of discrete matters concerning sentencing were considered in the Commission's Discussion Paper and these are examined separately below.

National criminal records

The Commission was informed during consultations that it is common for offenders to be sentenced in the absence of a full national criminal record. Although there may be some practical difficulties in ensuring a full national criminal record is attached to the prosecution brief, the Commission expressed the view that 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. Therefore, the Commission proposed 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.³¹ All of the 12 submissions received in relation to this proposal were fully supportive.³² The Western Australia Police and the Law Society maintained that the proposal should be extended to all offences³³ and, accordingly, the Commission makes a recommendation in these terms.

30. See Chapter Three: Breach of violence restraining orders and police orders.

31. LRCWA Discussion Paper, Proposal 34. The Commission observed that national criminal records should be provided for every offence.

32. Trevor Higgs, Submission No. 1 (6 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Law Society of Western Australia, Submission No. 27 (25 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

33. Western Australia Police, Submission No. 26 (27 February 2014) 23; Law Society of Western Australia, Submission No. 27 (25 February 2014) 7.

RECOMMENDATION 51

National criminal records

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every offence includes the accused's national criminal record as soon as is practicable after the person is charged.

Perpetrator programs

The Commission observed in its Discussion Paper that group perpetrator programs are currently 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.³⁴

It was contended by stakeholders that programs for perpetrators must be culturally appropriate because of the multitude of factors that contribute to family and domestic violence in Aboriginal communities (including substance abuse, intergenerational violence, past trauma, breakdown in culture and social disadvantage), and 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. Aboriginal offenders participating in the Family Violence Court programs are able to access an Indigenous Family Violence Program run by the Department of Corrective Services (or can choose to participate in the mainstream program). The group program for the Barndimalgu Court is also an Aboriginal-specific program but is delivered by Communicare.

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. However, as the Commission noted in its Discussion Paper, there is a degree of uncertainty in regard to the effectiveness of treatment programs for perpetrators of family and domestic violence in terms of reducing recidivism.³⁵ While acknowledging that the evidence-base for success of these programs in terms of reduced recidivism is limited, the Commission noted that,

34. LRCWA Discussion Paper, 119.

35. Ibid 118. See also Family and Domestic Violence Unit, Department for Child Protection and Family Support, *Perpetrator Accountability in Child Protection Practice* (2013) 66.

anecdotally, some programs appear to have an impact on future behaviour. In particular, the Commission was told that Barndimalgu Aboriginal Family Violence Court program has achieved successful outcomes for a number of its past and current participants.

However, at the time of writing the Discussion Paper, the Commission had requested but had not received copies of the evaluation reports for the Family Violence Courts and the Barndimalgu Court.³⁶ In the absence of these reports, the Commission did not consider that it was appropriate to express a view about the effectiveness of such programs for perpetrators of family and domestic violence. Nonetheless, it commented that there are significant gaps in access to perpetrator programs, particularly in remote areas of Western Australia. The Commission proposed that the Department of the Attorney General and the Department of Corrective Services undertake a full audit and review of the success or otherwise of existing programs for family and domestic violence perpetrators (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).³⁷

A number of submissions were received in support of this proposed review.³⁸ The Commissioner for Children and Young People recommended that the review should specifically include consideration of the 'extent to which existing programs are appropriate and adequate to the needs of children and young people who perpetrate family and domestic violence' and noted that programs for child perpetrators need to address issues such as the intergenerational transmission of violence, substance abuse and

mental health issues.³⁹ One regional magistrate stated that '[r]elevant and intensive programmatic intervention is non-existent on community-based orders' and treatment programs need to be available across the board (ie, not just in specialist family violence courts).⁴⁰

Another submission emphasised that the findings of any such review should be publicly disseminated and suggested that the findings from past reviews have not been released because they 'reflect poorly on the interventions and their outcomes'.⁴¹ The Department of Corrective Services indicated its support in principle for the proposal and stated that it will further consider the proposed review following 'consideration of the report on the evaluation of the Family Violence Courts and Barndimalgu Family Violence Court'.⁴² The Department of the Attorney General did not respond to this proposal in its written submission; however, it subsequently told the Commission that feedback should be obtained from the Department for Child Protection and Family Support and the Department of Corrective Services in relation to this proposal.⁴³ Both of these departments expressed their support for the proposal. The Commission has since been advised by the Department for Child Protection and Family Support that a working group has been established with representatives from the Department of Corrective Services, the Department of the Attorney General and the Department for Child Protection and Family Support to 'examine service specifications and service standards' for family and domestic violence offender programs.⁴⁴

The Commission directed its proposal to the Department of the Attorney General (in addition to the Department of Corrective Services) because it envisaged that the proposed audit and review would include (although not be limited to) consideration of the evaluation of the Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court. Since the publication of its Discussion Paper, the apparent failure of these courts in terms of recidivism has been referred to in the media. The media report observed that a 'review by the Department of the Attorney General has found that offenders who complete programs after being diverted to the

36. The Attorney General advised the Commission in writing that he was awaiting advice on the effectiveness of the specialist family violence courts and will need to consider this advice prior to making any decision regarding the release of the reports: Attorney General, letter (2 December 2013).

37. LRCWA Discussion Paper, Proposal 35.

38. Maggie Woodhead, Submission No. 4 (17 January 2014); Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

39. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 17.

40. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 3, 6.

41. Maggie Woodhead, Submission No. 4 (17 January 2014) 7.

42. Department of Corrective Services, Submission No. 23 (25 February 2014) 6.

43. Department of the Attorney General, consultation (18 March 2014).

44. Sherrilee Mitchell, Director, Family and Domestic Violence Unit, Department for Child Protection and Family Support, email correspondence (9 May 2014).

Metropolitan Family Violence Courts, which cost millions of dollars a year to run, are 2.4 times more likely to reoffend than matched offenders in the mainstream system'.⁴⁵ Following this media report, the Commission has repeated its request for a copy of the reports of this review.⁴⁶ The Attorney General recently advised the Commission in writing that the draft evaluation reports would not be released to the Commission because 'the evaluations effectively relate to operational matters rather than the need for legislative change and are considered outside the scope of the Commission's reference'.⁴⁷ The Attorney General confirmed that 'before any final decision is made by Government on the future of these courts, further consultation needs to occur with the Reference Committees that were involved in the evaluations' and that he would consider the Commission's findings prior to the draft evaluation report and findings being finalised.⁴⁸

In the Commission's view, evidence as to the effectiveness of perpetrator programs in Western Australia may be relevant to whether the law ought to be reformed insofar as it concerns family and domestic violence. As the Commission is not in a position to make specific evidence-based findings, it maintains the view that a full audit and review of all such programs (including those available in specialist family violence courts) should be undertaken. The Commission agrees with submissions that this review should specifically consider the availability and effectiveness of programs for child perpetrators and it should also consider the availability and effectiveness of programs for other vulnerable groups including Aboriginal people, people with disability, and people from culturally and linguistically diverse communities. Despite the response from the Department of the Attorney General to this proposal, the Commission maintains its opinion that the Department should be involved in this review because it clearly has already undertaken a review of the specialist family violence courts. In consideration of the involvement of the Department for Child Protection and Family Support in this area, the Commission has added that Department to its recommendation.

45. Banks A, 'Domestic Violence Courts Fail', *The West Australian* (Perth), 12 April 2014.

46. On 17 April 2014, the Commission was advised by the Department of the Attorney General that the Commission will not be provided with copies of the evaluation reports of the Family Violence Courts and the Barndimalgu Aboriginal Family Violence in Geraldton.

47. Attorney General, letter (23 May 2014) (received by the Commission on 29 May 2014).

48. *Ibid.*

RECOMMENDATION 52

Review of programs for perpetrators of family and domestic violence

That the Department of the Attorney General, the Department of Corrective Services and the Department for Child Protection and Family Support undertake a review of the availability and effectiveness of programs for perpetrators of family and domestic violence across Western Australia including but not limited to:

- (a) consideration of the availability and effectiveness of such programs for Aboriginal perpetrators, perpetrators with disability, perpetrators from culturally and linguistically diverse communities, perpetrators in remote areas and perpetrators who are children;
- (b) consideration of the effectiveness of programs delivered as part of the metropolitan Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court; and
- (c) consideration of the availability and effectiveness of such programs delivered in prisons and detention centres and as part of a community-based sentencing disposition.

Sentencing options

It was indicated to the Commission during consultations that current sentencing options are limited for family and domestic violence offenders. For example, 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 for some family and domestic violence cases where the offender is a fly-in fly-out worker. 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). Others contended that fines are not necessarily appropriate in family and domestic violence cases because if the parties are still in a relationship the victim may also suffer financial stress. In this regard, it has been observed that fines may also 'exacerbate the risk of further violence if the offender is already aggrieved about financial matters'.⁴⁹ The current limitation

49. Victorian Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report* (2013) 47.

on sentences of imprisonment to more than six months was also mentioned as a problem during consultations.⁵⁰

At the time of writing its Discussion Paper, a review of the *Sentencing Act 1995* (WA) had been undertaken by the Department of the Attorney General but it was not publicly available.⁵¹ The Commission indicated that there appeared to be merit in expanding available sentencing options for family and domestic violence offenders; however, any reform would have wider implications. In the absence of consideration of the review of the *Sentencing Act* and knowledge of any likely proposed amendments, the Commission did not consider that it was appropriate to recommend any specific reforms. It 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.⁵²

The Commission has now had the opportunity to consider the report of the statutory review of the *Sentencing Act* and notes that it recommends (among other things) that consideration be given to expanding the availability of pre-sentence orders; the introduction of suspended fines; the provision of a stand-alone community work order as an alternative to a fine; the introduction of partially suspended imprisonment orders; and increasing flexibility for conditional suspended imprisonment orders. Of particular relevance in the current context, the report noted that stakeholders were divided in relation to the option of periodic detention. The report concludes that:

There may be an argument that periodic detention provides a legitimate and rehabilitative sentencing avenue for certain offenders to be punished whilst continuing to contribute to society, retain employment and maintain family and social responsibilities. However, as indicated by some stakeholders, the practicalities and cost of operating periodic detention throughout the state, including the types of offenders to whom it would best be suited, would need to be carefully considered. Some stakeholders have also identified several other credible, rehabilitative and cost effective alternatives. This report suggests that options of partially suspended sentences and electronic tagging could have the same impact at

lower cost and should be considered in preference to any proposal for periodic detention.⁵³

The report also recommended that the restriction of sentences of six months' imprisonment or less should be abolished and the minimum imprisonment sentence be returned to a period of three months.⁵⁴

The Commission received eight submissions all supporting its proposal.⁵⁵ It received one submission advocating for a 'real increase in resources allocated to an expansion of intensive interventionist programmes deliverable on conditional bail programmes, community-based orders and pre-sentence orders'.⁵⁶ It appears that some of the recommendations made following the review of the *Sentencing Act* may better accommodate family and domestic violence cases such as alternatives to fines and the introduction of partially suspended sentences. In addition, although the option of periodic detention appears unlikely, it has not been dismissed outright. The Commission has concluded that in responding to the recommendations of the review of the *Sentencing Act*, the Western Australia government should specifically consider whether the recommendations (or any alternative options) are appropriate for the sentencing of family and domestic violence offenders.

RECOMMENDATION 53

Review of sentencing options under the *Sentencing Act 1995* (WA)

That when responding to the review of the *Sentencing Act 1995* (WA), the Western Australian government specifically consider whether the recommendations of that review provide adequate options for family and domestic violence offenders and whether any additional reforms are required to ensure that the available sentencing options are appropriate.

50. See LRCWA Discussion Paper, 120–1.

51. 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 the Discussion Paper was finalised): *Statutory Review of the Sentencing Act 1995* (WA) (October 2013).

52. LRCWA Discussion Paper, Proposal 36.

53. Department of the Attorney General, *Statutory Review of the Sentencing Act 1995* (WA) (October 2013) 57.

54. *Ibid* 58.

55. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

56. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 6.

Parole

During consultations for this reference, 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). This approach is based 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:

[T]he 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'.⁵⁷

Importantly, it was also clarified that these considerations are taken into account where there is a history of family and domestic violence offending even if the current offence is not a family and domestic violence related offence. However, the information available in relation to past cases is limited to earlier Prisoners Review Board files where the past offence resulted in imprisonment or, if the Board is aware that a prior offence listed on the offender's criminal history involved family and domestic violence, the Board can request information from the police. Since it is not always clear from the record whether the offence occurred in a family and domestic violence context, the Commission has recommended earlier in this Chapter that the Western Australia Police should ensure that the existence of a family and domestic relationship between the offender and the victim for an offence committed in circumstances of aggravation is included on the criminal record.⁵⁸ If the criminal history of an offender includes 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.

As explained in the Discussion Paper, the Prisoners Review Board is particularly concerned about gaps in information about violence restraining orders. If the board is aware that a violence restraining order is in existence it 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. It was suggested to the Commission that there should be a central database that includes all violence restraining orders made by the Magistrates Court, the District Court and the Supreme Court. The Commission proposed that the Department of the Attorney General develop an IT process that enables all family and domestic violence protection orders to be included in one database and accessible by the Prisoners Review Board.⁵⁹

All submissions received by the Commission directly responding to this proposal were supportive;⁶⁰ however, the Department of the Attorney General did not address the proposal in its written submission. During subsequent consultation with the Department it indicated that it will 'review this proposal to determine the feasibility of developing an information technology process that would enable all family and domestic violence restraining orders to be accessible by the Prisoners Review Board'.⁶¹ It was also confirmed that the Prisoners Review Board currently cannot access the relevant database (ICMS) (nor can officers from the Department of Corrective Services).⁶² It was further commented that in view of the fact that the Prisoners Review Board is part of the Department of the Attorney General there does not appear to be any reason why it should not be able to access ICMS.

The Department of Corrective Services contended that its lack of access to ICMS (specifically information concerning family and domestic violence restraining orders) has implications in relation to assessing risk, preparing pre-sentence reports and monitoring offenders subject to a community-based order. It submitted that any new IT process developed should

59. LRCWA Discussion Paper, Proposal 37.

60. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

61. Department of the Attorney General, consultation (18 March 2014).

62. Stephen Boylen, Manager Strategic Policy, Policy Directorate, Department of the Attorney General, email correspondence (28 March 2014).

57. See LRCWA Discussion Paper 121.

58. See Recommendation 43 above.

also enable the Department of Corrective Services to access this information.⁶³

In view of the response from the Department of the Attorney General, the Commission has concluded that its original proposal in relation to enabling the Prisoners Review Board to access records of family and domestic violence protection orders is appropriate. Further consideration needs to be given to whether it is appropriate or possible for officers of the Department of Corrective Services to also have access to records concerning family and domestic violence protection orders and the Commission recommends that the departments further liaise in this regard.

RECOMMENDATION 54

Access to records of family and domestic violence protection orders

1. That the Department of the Attorney General develop an IT process that enables all family and domestic violence protection orders to be included in one database and accessible by the Prisoners Review Board.
2. That the Department of the Attorney General liaise with the Department of Corrective Services in order to consider the feasibility of enabling the Department of Corrective Services to have access to the relevant database of all family and domestic violence protection orders.

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). Also, as the Commission explained in its Discussion Paper, GPS tracking is permitted for offenders subject to parole but it is not legislatively authorised for offenders subject to sentencing orders. There is also no legislative provision enabling GPS tracking of persons bound by a violence restraining order.⁶⁴ In January 2013, the Attorney General stated that the government was considering legislation to enable GPS tracking of 'repeat domestic violence offenders'.⁶⁵

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 adopted a cautionary approach noting that GPS tracking has limitations. Such limitations include that GPS tracking only enables a person's whereabouts to be monitored and, therefore, does not capture threatening or abusive behaviour conducted electronically or by a third person on behalf of the perpetrator. Further, 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. Also the system is not foolproof; signals can be lost and perpetrators can remove the device (although if this occurs there will be an alert). 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.

In its Discussion Paper, the Commission expressed the preliminary view that GPS tracking should only be adopted 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. However, it also stated that, given that the current regime for GPS tracking of serious sex offenders is very new, any legislative reform to expand GPS tracking should not be made prematurely. It was proposed that after a period of two years the Department of Corrective Services should 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.⁶⁶

Some submissions responded positively to the Commission proposal for a review,⁶⁷ while other respondents put forward their views in relation to the merits of GPS tracking. One submission advocated for GPS tracking for cases where the current offence is not serious enough to justify an accused being remanded in custody but where the history of violence indicates a high risk of future violence.⁶⁸

66. LRCWA Discussion Paper, Proposal 38.

67. Maggie Woodhead, Submission No. 4 (17 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

68. Trevor Higgs, Submission No. 1 (6 January 2014) 5. See also Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014).

63. Department of Corrective Services, Submission No. 23 (25 February 2014) 6.

64. See further LRCWA Discussion Paper, 122–124.

65. Hon Murray Cowper & Hon Michael Mischin, 'Government to Expand GPS Tracking of Offenders', *Ministerial Media Statements*, 20 January 2013.

The Department of Corrective Services explained that a dual evaluation of the public protection unit and the GPS tracking system is intended to commence prior to 1 July 2014; however, it was highlighted that given the small number of offenders currently subject to GPS tracking, this evaluation may be limited.⁶⁹ The Department also stated its in-principle support for an expansion of the GPS tracking system. The Western Australia Police noted that if GPS tracking is expanded to apply to family and domestic violence offenders, additional resources will be required.⁷⁰

The Department for Child Protection and Family Support opposed the Commission's proposal because it considered that the introduction of GPS monitoring for high risk family and domestic violence offenders should commence immediately as a two-year pilot.⁷¹ It argued that GPS tracking should be available in high risk cases and expressed the view that a comparison with the monitoring of serious sex offenders is inappropriate because these cohorts have different offending profiles. Specifically, it was noted that the range of persons at risk of danger from family and domestic violence offenders is usually finite and small (eg, partner and children) and this enables the use of split devices. Furthermore, there are already interagency case management systems in place for family and domestic violence offenders to complement any GPS tracking system.

In contrast, the joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network supported the proposed review so long as any proposal to introduce a GPS monitoring scheme for family and domestic violence offenders is open for public consultation. In particular, concern was expressed about such a scheme applying to persons bound by a family and domestic violence protection order where no criminal offence had been proven.⁷² In subsequent correspondence, the Women's Council for Domestic and Family Violence Services clarified that the council (and not the Domestic Legal Workers Network) supports consideration of GPS tracking as a condition of a family and domestic violence protection order.⁷³

69. Department of Corrective Services, Submission No. 23 (25 February 2014) 7.

70. Western Australia Police, Submission No. 26 (27 February 2014) 24.

71. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 6.

72. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

73. Angela Hartwig, CEO, Women's Council for Domestic and Family Violence Services, correspondence (22 April 2014).

While the Commission understands the potential benefits of GPS tracking for high risk family and domestic violence offenders, it remains of the view that consideration should first be given to the effectiveness of the existing scheme for sex offenders. The Commission understands that there are differences between sex offenders and family and domestic violence offenders; however, lessons learned about the effectiveness of GPS monitoring for dangerous sex offenders may well influence any future scheme for family and domestic violence offenders and should be taken into account before embarking on an extension of the current system. The Commission proposed that a review of the current GPS scheme (which commenced in May 2013) should be undertaken after two years of operation. In view of the clear support for an expansion of GPS tracking for family and domestic violence offenders and the fact that the Department of Corrective Services is planning an evaluation this year, the Commission does not intend to restrict its recommendation in that manner. As soon as the planned evaluation has been undertaken, it is recommended that any proposal to expand the scheme should be carefully investigated and subject to public consultation before implementation.

RECOMMENDATION 55

GPS tracking for family and domestic violence offenders and persons bound by family and domestic violence protection orders

1. That the Department of Corrective Services conduct a review of the effectiveness of the current GPS tracking system for dangerous sex offenders (including consideration of the number of offenders subject to GPS tracking, the cost of GPS tracking per offender, practical issues such as the incidence of deliberate and accidental interference with the electronic devices, the circumstances in which alerts are received by the monitoring unit, the effectiveness and timeliness of the response to those alerts, and any other relevant matter).
2. That following that review the Department consider whether the system should be extended to family and domestic violence offenders and/or persons bound by family and domestic violence protection orders and, if so, provide a reasonable opportunity for members of the public and interested stakeholders to provide their views on any such proposal.

RESTRAINING ORDERS DURING CRIMINAL PROCEEDINGS

As explained in Chapter One, a key theme that emerged from the Commission's consultations and research was duplication of family and domestic violence related legal proceedings.⁷⁴ One of the ways in which unnecessary duplication may occur is where victims and perpetrators of family and domestic violence are required to participate and give evidence in criminal proceedings and, separately, participate and give identical or similar evidence in family and domestic violence protection order proceedings. This type of duplication may result in re-traumatisation for victims who are required to repeat their accounts of violence; additional stress and time spent in court; impact on the resources of the court, lawyers and other agencies; and delays caused by the adjournment of one legal proceeding to await the outcome of the other. One of the Commission's objectives for reform is to improve integration and coordination in relation to family and domestic violence in the legal system and this section examines how this may best be achieved where family and domestic violence protection order matters and criminal proceedings intersect.

The current law

Currently, s 63 of the *Restraining Orders Act* enables a court exercising criminal jurisdiction to make a restraining order against a person who has been charged with an offence. However, there are various conditions attached to the exercise of this discretion including that the court must be satisfied of the grounds for making a restraining order under the relevant provisions of the Act and the person who would be bound by the order must be present and be given an opportunity to be heard. A restraining order can be made under this provision on the initiative of the court or at the request of a party to the proceedings (eg, prosecution). During consultations for this reference, the Commission was repeatedly told that this provision is underutilised. In the Discussion Paper, it was noted that this observation is supported by 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 of the *Restraining Orders Act* by the lower courts remains small (48 orders in 2010; 31 in 2011; and 21 orders in 2012).⁷⁵

74. See Chapter One, Duplication.

75. LRCWA Discussion Paper, 124.

In addition to the discretionary power under s 63 of the *Restraining Orders Act*, s 63A provides for an automatic process for making violence restraining orders for specified 'violent personal offences'. If a court convicts a person for a 'violent personal offence' it is required to make a final violence restraining order for the protection of the victim unless there is already such an order in force 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.

The definition of a 'violent personal offence' covers the following offences under the *Criminal Code*: attempt to kill (s 283); 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). Section 63A 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.

In its Discussion Paper, the Commission observed that there are two notable omissions from the list of offences included in the definition of a 'violent personal offence': 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 expressed 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.⁷⁶

The Commission received a number of submissions in support of this proposal.⁷⁷ Some of these submissions

76. LRCWA Discussion Paper, Proposal 39.

77. Maggie Woodhead, Submission No. 4 (17 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); , Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014). Two of these submissions argued that if an automatic lifetime order is made it should also automatically apply to any dependent

expressed support for the range of offences covered by s 63A to be expanded; however, the Commission discusses these views below in relation to its proposal for increasing the incidence of family and domestic violence protection orders made during criminal proceedings. The Chief Judge of the District Court acknowledged that it is 'incongruous' that s 63A currently applies to the offence of grievous bodily harm but not to the offence of causing grievous bodily harm with intent. However, the Chief Judge expressed a preference for the removal of mandatory lifetime violence restraining orders and suggested that for serious cases of violence an application for an order should be made by the prosecution at the sentencing hearing.⁷⁸ It was also submitted that the provision inappropriately applies to some offences.

The Commission maintains its view that, in the absence of other reforms discussed below, s 63A should be amended to include the offences of acts intended to cause grievous bodily harm or prevent arrest (s 294) and kidnapping (s 332). Bearing in mind that s 63A currently applies to offences outside the context of family and domestic violence, the Commission does not consider it appropriate to restrict the application of s 63A by removing offences from its ambit or altering its automatic nature. However, if the recommendations in this Report are implemented, it will be necessary to distinguish violence restraining orders made under this provision from family and domestic violence protection orders for data purposes.

RECOMMENDATION 56

Automatic lifetime violence restraining orders

1. 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).
2. That s 63A of the *Restraining Orders Act 1997* (WA) be amended to provide that if the offender and the victim are in a family and domestic relationship the court is to make a family and domestic violence protection order instead of a violence restraining order.

children of the victim: Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014). However, the Commission does not consider this is appropriate because the particular circumstances of the case should be considered to determine whether the child needs protection.

78. Chief Judge of the District Court of Western Australia, Submission No. 36 (11 March 2014) 1.

Increasing the incidence of family and domestic violence protection orders made during criminal proceedings

In the 2008 review of the *Restraining Orders Act* it was commented 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.⁷⁹

As observed by the Commission in its Discussion Paper, the difference between this suggested approach and the current legislative regime is that a violence restraining order can only be imposed under s 63 of the Act if the court is satisfied that the grounds for making a violence restraining order have been established. The existence of a charge for a family and domestic violence related offence is not necessarily sufficient to establish on the balance of probabilities that an act of family and domestic violence has occurred and is likely to occur again or that the victim of the offence reasonably fears that the accused will commit an act of family and domestic violence.⁸⁰

During consultations it was acknowledged by some lawyers that this may explain why some judicial officers are reluctant to make 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 evidence of an applicant, there is an argument that a decision by police to charge an accused with a family and domestic violence related criminal offence coupled with a statement obtained from the victim provides an equally appropriate basis for an interim order. Also, as noted above, protective bail conditions that prohibit or restrict contact between the accused and the victim (including preventing the accused from entering specified premises) may be imposed upon an accused merely as a result of being charged.

The Commission observed that the making of an interim violence restraining order at the stage of the criminal process where the accused has been charged (but not convicted) has two main advantages:

79. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 36.

80. Ibid 125.

the order will not lapse when the charge is finally dealt with, and the victim is not required to attend court at a different time and provide evidence to obtain an interim order. Other jurisdictions provide for restraining orders to be made during criminal proceedings – New South Wales adopts a more ‘automatic’ or routine approach than currently exists in Western Australia.

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,⁸¹ the 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.

However, 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 specified offence and again the court can decline to make a final order if satisfied that the order is not required. The Commission was told by a senior solicitor in the family and domestic violence section of Legal Aid New South Wales that it is very rare for an order not to be made upon charge and conviction for a relevant offence.⁸² It was further noted during this consultation that even though the legislation provides some discretion not to impose an order, the general approach of the judiciary is to grant orders. The main circumstances where an order is not made include where the accused is dealt with under mental health legislation or the victim has moved out of New South Wales and, therefore, does not require protection. A key concern raised during this consultation is that the operation of the scheme in practice is too inflexible and more consideration needs to be given to the wishes of the victim. In particular, victims are frequently unhappy with the imposition of an order and, in such cases, contact between the victim and the accused continues in spite of the existence of the order.

81. A serious offence is defined in s 40(5) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) 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 personal violence offence is defined in s 4 which contains a large list of specified offences.

82. Angela Jones, Senior Solicitor, Family and Domestic Violence, Legal Aid NSW, telephone consultation (26 March 2014).

During consultations there was strong support for an expanded regime for the ‘automatic’ or more frequent 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 should be conditional upon the views of the victim being put forward to the court.

In its Discussion Paper, the Commission formed the preliminary view that only interim orders should be made prior to conviction. Currently, under s 63 of the *Restraining Orders Act* 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 considered that 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 made a proposal designed to establish a more automatic scheme for the making of interim and final orders during criminal proceedings and sought submissions about the range of specified offences that should be covered by this proposal.⁸³ In summary, it was proposed that interim orders should be made if a person is charged with a specified offence and a final order upon conviction. However, it was also proposed that both parties must be given a reasonable opportunity to be heard and a court is not to make an order if it is satisfied that the order is unnecessary for the protection of the safety of the person who would be protected by the order.

The views expressed in submissions in regard to this proposal were mixed. A number of respondents were in favour of the proposed regime.⁸⁴ Some submissions

83. LRCWA Discussion Paper, Proposal 40 and Question 23.

84. Trevor Higgs, Submission No. 1 (6 January 2014); Maggie Woodhead, Submission No. 4 (17 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014). Two of these submissions stated that the proposal should include a requirement to consider dependent children of the victim.

advocated for the New South Wales model.⁸⁵ Legal Aid stated that the process in New South Wales 'would be simpler, more certain and more efficient'.⁸⁶ It also submitted that there needs to be a presumption in favour of making an order and that the legislation should provide that an order must be made unless the court is 'satisfied that the victim's safety or wellbeing will not be at risk in any way, effectively reversing the onus of proof'. Legal Aid reiterated the concerns expressed to the Commission during consultations that Western Australian criminal courts are reluctant to make violence restraining orders during criminal proceedings. Likewise, the joint submission from the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network stated that 'it is our experience that the discretion to make a [violence restraining order] during criminal and other proceedings is vastly underutilised and contributes to duplication as outlined in the discussion paper'.⁸⁷

The Chief Justice of the Supreme Court of Western Australia provided a response in relation to the making of interim orders upon charge. This aspect of the proposal was not supported on the basis that it is 'inconsistent with the presumption of innocence'. The Chief Justice further elaborated that the ability for the court to decline to make an interim order if satisfied that an order is unnecessary would 'reverse the usual onus of proof in criminal proceedings, which an accused person could only discharge by surrendering his or her "right to silence"'.⁸⁸ As a comparison, the Commission notes that an accused may feel compelled to provide information to a court to support an application for bail before determination of the charge and thereby effectively surrender his or her right to silence. However, s 23 of the *Bail Act* provides that an accused is not bound to supply information whether on oath or otherwise for the purpose of having his or her case for bail considered. Section 25 provides that a 'statement made by an accused to a judicial officer or authorised officer for the purpose of a decision whether bail should be granted to him for any appearance in court for an offence shall not be admissible in evidence against him at his trial for that offence'. Similar provisions

could be enacted in relation to the Commission's proposal.

The Office of the Director of Public Prosecutions (DPP) did not support the proposal because it will place prosecutors 'in a position where they are required to effectively represent and appear on behalf of a victim in relation to a hearing before making a final violence restraining order' and that an obligation to appear in civil restraining order proceedings is outside the functions undertaken by state prosecutors. It was further stated that the proposal 'places the prosecutor in a relationship with the victim which is incompatible with the role of the independent prosecutor' and will have an impact on resources of the DPP. It was noted that if violence restraining order are compulsory then there is no necessity for the prosecutor to act in a solicitor/client relationship.⁸⁹

However, the *DPP Prosecution Guidelines*⁹⁰ make reference to the role of prosecutors in seeking violence restraining orders during sentencing proceedings. The DPP can request that a court make a violence restraining order and this should be done after conviction and during the sentencing process and where 'there is a fear of a violent personal offence being committed'.⁹¹ The guidelines make reference to the definition of a violent personal offence under the *Restraining Orders Act* (which is limited for the purpose of s 63A to offences against ss 283, 297, 325, 326, 327 and 328 of the *Code*) but also suggest that an application is to be made for a wider range of offences including common assault, assault occasioning bodily harm, indecent assault, kidnapping, deprivation of liberty, stalking, and threats.⁹² The guidelines stipulate that in requesting a violence restraining order for a victim, the DPP is not acting for the victim but is 'making the request on behalf of the State for the complainant/victim to ensure their safety post-trial'.⁹³ It is also clarified that generally 'no request would be made at the bail hearing, or any occasion prior to sentencing or in the event of a dismissal'.⁹⁴ The Chief Judge of the District Court also had concerns in relation to the making of interim orders upon charge and expressed preference for the imposition of protective bail conditions rather

85. Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

86. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 60.

87. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 68.

88. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 6–7.

89. Office of the Director of Public Prosecutions, Submission No. 16 (4 February 2014) 1.

90. Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Appendix 2 – Applying for Violence Restraining Orders Pursuant to the *Restraining Orders Act 1997*.

91. *Ibid*, cl 2, 4, 5.

92. *Ibid*, cl 15.

93. *Ibid*, cl 6.

94. *Ibid*, cl 11.

than violence restraining orders where a person has been charged with a relevant offence.⁹⁵

Two submissions responding to the Commission's question in relation to the range of offences that should be covered by its proposal were broadly in favour of including any family and domestic violence related offence.⁹⁶ The Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network stated that (in addition to the offences currently included in s 63A) the proposal should apply to the offences included in the definition of a violent personal offence in s 63B, the offences included in s 6 of the *Restraining Orders Act*, any indecency or sexual offence and any family and domestic violence related offence that results in imprisonment.⁹⁷

Legal Aid submitted that the current lifetime orders under s 63A should be extended for adults to include all s 63B offences, stalking, any family and domestic violence offence that results in imprisonment and all family and domestic violence offences in relation to sexual offences or indecency offences against children.⁹⁸ One magistrate submitted that the offences under ss 317 and 338E when committed in circumstances of aggravation should be included.⁹⁹

After considering all the views expressed in submissions and, in particular, the concerns in regard to the making of interim orders, the Commission has revised its original view and concluded that the issues mentioned in relation to the making of interim orders upon charge have some validity. Accordingly, the Commission has determined that there should be a mandatory requirement for the court to consider whether an interim order should be made; however, the court must continue to be satisfied that the grounds for making an order have been established. The Commission believes that strikes an appropriate balance between encouraging a more proactive approach to issuing family and domestic violence protection during criminal proceedings and ensuring that unconvicted persons are not unduly subject to restrictions on their lawful activities. The Commission also notes that the existence of a relevant charge, the strength of the prosecution case including a signed witness statement from the victim

95. Chief Judge of the District Court of Western Australia, Submission No. 36 (11 March 2014) 2.

96. Gosnells Community Legal Centre, Submission No. 12 (31 January 2014); Western Australia Police, Submission No. 26 (27 February 2014).

97. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 69.

98. Legal Aid Western Australia, Submission No. 35 (7 March 2014); , Submission No. 35 (7 March 2014) 61–2.

99. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 19.

and the accused's history of prior convictions may be sufficient to enable a court to be satisfied that the grounds have been established on the balance of probabilities.

The Commission considers that the position with respect to the making of final orders upon conviction for specified offences is different. The *Restraining Orders Act* already provides for mandatory orders upon conviction without any need for the court to consider whether the grounds for making a violence restraining order have been established. The fact that an accused has been convicted of a specified family and domestic violence related offence is sufficient, in the Commission's view, to establish a presumption in favour of making a family and domestic violence protection order.

RECOMMENDATION 57

Making of interim and final family and domestic violence protection orders during criminal proceedings

In addition to s 63A of the *Restraining Orders Act 1997* (WA) as amended by Recommendation 56 above, the new Family and Domestic Violence Protection Order Act provide that:

1. If a person is charged with a specified offence, the court must consider whether it is appropriate to make an interim family and domestic violence protection order against the accused and for the protection of the alleged victim until such time as the charge is determined.
 - (a) The court may make an interim family and domestic violence protection order under 1 above:
 - (i) if it is satisfied that there are grounds for making a family and domestic violence protection order (as set out under Recommendation 12 of this Report);
 - (ii) if it has considered the factors that are relevant (as set out under Recommendation 13 of this Report); and
 - (iii) the person who would be bound by the order and the person who would be protected by the order have been given a reasonable opportunity to be heard.
 - (b) The court is not to make an interim family and domestic violence protection order if

- the person who would be protected by the order objects to it being made.
2. If a person is convicted of a specified offence, the court is to make a final family and domestic violence protection order.
 - (a) If the offence is a violent personal offence as currently defined under s 63A (or as defined under Recommendation 56 above) the family and domestic violence protection order is to be imposed for life.
 - (b) In any other case, the court has discretion to determine the duration of the order; however, the court is required to ensure that the duration of the order is for a sufficient period in excess of the period of time that the offender will serve in custody under any sentence of imprisonment imposed for the offence.
 - (c) A court is not to make a final family and domestic violence protection order under (b) above unless the person who would be bound by the order and the person who would be protected by the order have been provided with a reasonable opportunity to be heard in relation to the making of the order.
 - (d) A court is not to make a final family and domestic violence protection order if the person who would be protected by the order objects to it being made.
 - (e) The court is not to make a final family and domestic violence protection order if it is satisfied that the order is unnecessary for the protection of the safety of the person who would be protected by the order.
 3. A specified offence be defined as one of the following offences where the accused and the victim are in a family and domestic relationship as defined under the Act:
 - (a) the offences under the following sections of the *Criminal Code*:
 - (i) s 283 (attempt to kill)
 - (ii) s 292 (disabling in order to commit an indictable offence)
 - (iii) s 293 (stupefying in order to commit an indictable offence)
 - (iv) s 297 (grievous bodily harm)
 - (v) s 294 (acts intended to caused grievous bodily harm)

- (vi) s 320 (sexual offences against children under 13 years)
 - (vii) s 321 (sexual offences against children of or over 13 years but under 16 years)
 - (viii) s 321A (persistent sexual conduct)
 - (ix) s 329 (sexual offences by relatives)
 - (x) s 330 (sexual offences against incapable persons)
 - (xi) s 325 (sexual penetration without consent)
 - (xii) s 326 (aggravated sexual penetration without consent)
 - (xiii) s 327 (sexual coercion)
 - (xiv) s 328 (aggravated sexual coercion)
 - (xv) s 332 (kidnapping)
 - (xvi) s 333 (deprivation of liberty)
 - (xvii) ss 338A–C (threats)
 - (xviii) s 338E (stalking)
 - (xix) s 444 (criminal damage)
- (b) any other offence under Part V of the *Criminal Code* where the offender is sentenced to a term of immediate imprisonment.
4. A court exercising criminal jurisdiction may make a family and domestic violence protection order for any other offence if satisfied that the grounds for making the order are established and the person who would be bound by and the person who would be protected by the order have been provided with a reasonable opportunity to be heard. The court is not to make a family and domestic violence protection order under this provision if the person who would be protected by the order objects to it being made.

EVIDENCE

The Commission has made a recommendation in Chapter Three of this Report in relation to the provision of information and evidence in family and domestic violence protection order proceedings. It has recommended, among other things, that the strict rules of evidence should not apply to such proceedings.¹⁰⁰ In regard to criminal proceedings, the Commission has considered some of the issues

100. See Chapter Three, Recommendation 30.9.

that arise because victims of family and domestic violence are often reluctant to give evidence. 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. These problems may occur because of the fear of facing the perpetrator in court and the trauma of re-living events of family and domestic violence. Apprehension about the court process itself may also compound the problem.

Special witness provisions

In its Discussion Paper, the Commission considered the application of the special witness provisions under the *Evidence Act 1906* (WA) to victims of family and domestic violence.¹⁰¹ Under these provisions, if a court makes an order declaring a person to be a special witness, certain arrangements can be made that will provide support to the person while he or she is giving evidence (eg, provision of a support person or communicator and the provision for evidence to be given by video link or from behind a screen). 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. 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.¹⁰²

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.¹⁰³

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. However, 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 from its perspective, there are no problems encountered in practice. The Commission was also informed that CCTV facilities are utilised in the Magistrates Court. Because there did not appear to be any difficulty in practice in obtaining a special witness order, the Commission did not propose any reform. However, the Commission sought submissions about whether any problems have been encountered in practice for victims of family and domestic violence in regard to the special witness provisions.¹⁰⁴

A number of submissions reiterated that fear and the potential for re-traumatisation impact on victims' willingness to cooperate with criminal prosecutions.¹⁰⁵ A regional magistrate stated that the failure of victims to attend criminal hearings is a 'well-known phenomenon' and the 'further one gets from the metropolitan region, and therefore, support services, the greater the frequency of the phenomenon'.¹⁰⁶ Path of Hope noted that women with disabilities and women from culturally and linguistically diverse backgrounds require specific support and assistance in relation to special witness provisions.¹⁰⁷ In its submission, Anglicare stated that the system works well in superior courts but in Magistrates Court proceedings (ie, violence restraining order and criminal matters) victims are not informed of the existence of special witness provisions and the provisions are not routinely used.¹⁰⁸ This sentiment was echoed by Legal Aid which stated that the special witness provisions under the *Evidence Act* and comparable provisions under the *Restraining Orders Act* are not often used in practice.¹⁰⁹

One magistrate noted that regulation 10A of the *Restraining Orders Regulations 1997* (WA) makes 'specific provision for the use of closed circuit television or screening arrangements' and that sub-

101. LRCWA Discussion Paper, 127–8.

102. *Evidence Act 1906* (WA) ss 106R(3).

103. *Evidence Act 1906* (WA) ss 106R(3a).

104. LRCWA Discussion Paper, Question 24.

105. Merryn Bojcun, Submission No. 9 (29 January 2014); Relationships Australia, Submission No. 29 (28 February 2014) 18.

106. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 3.

107. Path of Hope, Submission No. 14 (31 January 2014) 27. The Disability Services Commission stated that there are no difficulties with the provisions so long as individual circumstances are taken into account: Disability Services Commission, Submission No. 11 (31 January 2014) 8.

108. Anglicare, Submission No. 28 (28 February 2014)

109. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 62.

regulation 10A(5) provides that 'whenever a matter relating to a violence restraining order comes before a court, the court must consider whether it ought to make arrangements under sub-regulation (1)'.¹¹⁰ This submission indicated that these provisions supersede the provisions under the *Evidence Act* for violence restraining order proceedings. Like the provisions under the *Evidence Act*, these provisions do not provide any certainty for victims of family and domestic violence because the decision to make special provisions for the manner in which evidence is given is discretionary.

The Office of the Director of Public Prosecutions submitted that all child witnesses (excluding an accused who is a child) should be automatically declared as a special witness. It was explained that under the current provisions the prosecutor must apply for special witness status for a child who has witnessed a serious family and domestic violence offence (including the murder of a parent). Automatic status would avoid the need for additional court hearings, legal argument, delay, exposure of the child to an additional assessment, and a period of uncertainty for the child. It was further elaborated that from a practical point of view, it is easier to inform a child witness that he or she can give evidence by CCTV rather than stating that a judge is likely to enable the child witness to give evidence by CCTV.¹¹¹ The Commissioner for Children and Young People also emphasised that children appearing as witnesses in 'family and domestic violence matters are a particularly vulnerable group' and that child witnesses should be automatically covered by the special witness provisions and only give evidence in open court if they wish to do so. It was contended that providing a degree of certainty about the process will assist in reducing stress for child witnesses.¹¹²

Several submissions argued that the special witness provisions should apply automatically to victims of family and domestic violence.¹¹³ In other words, victims of family and domestic violence should be declared as special witnesses without the need for an application to be made but such victims should

retain the right to waive the protections provided if they so wish. Legal Aid stated that victims of family and domestic violence should have special witness status automatically for criminal and violence restraining order proceedings with the court retaining discretion to 'change the arrangement if it is not necessary in the circumstances'.¹¹⁴ As highlighted by one magistrate:

In order to provide the alleged victim with an additional sense of security and immediacy of action the *Evidence Act* should be amended to automatically declare victims of family and domestic violence as 'special witnesses'. The need for an application to the Court seeking a declaration should not be required as this simply adds a layer of process to a process that already intimidates and marginalises the victim.¹¹⁵

The Commission agrees that the special witness provisions under the *Evidence Act* and the comparable provisions under the *Restraining Orders Regulations* should be reformed to require special arrangements to be made for victims of family and domestic violence related offences and for applicants in contested family and domestic violence protection order proceedings unless the court is satisfied that the grounds for making a special witness declaration do not apply and the witness wishes to give evidence in the usual manner in open court. It is also agreed that this recommendation should extend to children who are witnesses in family and domestic violence matters.

RECOMMENDATION 58

Special witness provisions for family and domestic violence matters

That the *Evidence Act 1906* (WA) and the *Restraining Orders Regulations 1997* (WA) be amended to provide that victims of family and domestic violence related offences, applicants in contested family and domestic violence protection order proceedings and child witnesses in either proceedings be deemed to have special witness status unless the court is satisfied that the provision of special arrangements for the giving of evidence is unnecessary in the circumstances.

110. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 19.

111. Office of the Director of Public Prosecutions, Submission No. 16 (4 February 2014) 2.

112. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 18–19.

113. Merryn Bojcun, Submission No. 9 (29 January 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Deen Potter, Submission No. 43 (14 April 2014).

114. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 62.

115. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 4.

Prior inconsistent statements

As observed in its Discussion Paper, a significant obstacle to the successful prosecution of 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).¹¹⁶ Not only does this impact on the likelihood of conviction, it may also discourage police from charging perpetrators if they believe that the victim is likely to recant from his or her original statement. The 2008 review of the *Restraining Orders Act* suggested that one solution to this problem is to reform the provisions of the *Evidence Act* that deal with the admissibility of prior inconsistent statements.¹¹⁷ Under these provisions, the prosecution is unable to cross examine a victim about the existence of a prior inconsistent statement unless the victim is declared a hostile witness.¹¹⁸ Further, the prior statement cannot be admitted into evidence for the purpose of establishing the truth of its contents (even though the original statement may be more likely to represent the truth because of the subsequent pressure placed on the victim to recant).¹¹⁹ 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.¹²⁰ 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 sought further submissions.¹²¹

A number of submissions supported the suggested reform so that a prior inconsistent statement can be admitted into evidence to establish the truth of its contents.¹²² Legal Aid stated that it supported the reform as long as the original statement of the victim was video-recorded.¹²³ In other words, it was submitted that the practice of pre-recording statements in child sexual abuse cases and sexual

assault matters should be replicated for family and domestic violence matters. A regional magistrate submitted that the 'suggested use of an original statement as the "best evidence" has some merit' but also highlighted that the original statement may be 'plagued with the very same problems that exist when an alleged victim currently attends court'.¹²⁴ It was also suggested that a video recording of the initial statement may be appropriate.

In contrast, the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network did not have a 'definitive position' on this issue but encouraged any reform to be based on evaluations of similar provisions in other jurisdictions.¹²⁵ One magistrate highlighted that the suggested reform is 'contrary to well established rules of evidence'.¹²⁶

The Commission sees merit in further investigation of the option of pre-recording statements for victims of family and domestic violence related offences (especially serious offences) but does not consider that it is in a position to make a recommendation in that regard. Further consultation would be required with relevant stakeholders including the Western Australia Police and consideration of the resourcing impact of such a reform.

116. LRCWA Discussion Paper, 128.

117. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 38.

118. See *Evidence Act 1906* (WA) s 21.

119. Government of Western Australia, Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 39.

120. *Ibid*, Recommendation 9.

121. LRCWA Discussion Paper, Question 25.

122. Trevor Higgs, Submission No. 1 (6 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

123. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 63. A similar submission was received from Merryn Bojcun, Submission No. 9 (29 January 2014).

124. Magistrate Deen Potter, Submission No. 43 (14 April 2014) 4.

125. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 70; See also Women's Law Centre, Submission No. 31 (28 February 2014).

126. Magistrate Pamela Hogan, Submission No. 38 (21 March 2014) 3.

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. In its Discussion Paper, the Commission provided an overview of the metropolitan Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court in Geraldton and this overview was principally informed by the Commission's observations of these courts and extensive consultations with various stakeholders who work in these courts.¹ The discussion, therefore, focused on the current practices adopted by these specialist courts. As explained earlier, it has been reported in the media that the results of evaluations of these specialist family violence courts indicate that they are not as successful in reducing recidivism as mainstream courts. The media report stated that the Attorney General has received a draft report on the review and is considering the future of specialist courts but before making a final decision the Attorney General would 'carefully consider all views and a pending report by the WA Law Reform Commission on its inquiry into family and domestic violence laws'.² As noted above, the Commission has not been given access to the draft report by the Attorney General because in his view the evaluations effectively relate to operational matters rather than the need for legislative change and are considered outside the scope of the Commission's reference. While the Commission's capacity to recommend evidence-based reforms to the law in regard to the operation of these courts is therefore limited, based upon the practical issues raised during consultations and research, the Commission makes a number of proposals for reform.

The Commission's approach in this Report to its proposals and questions concerning specialist family violence courts is to indicate where it considers a recommendation is warranted on the proviso that it is assumed that the courts will continue. Where it does not consider that it is in a position to make a recommendation, it says so explicitly.

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper'), 130–5.
2. Banks A, 'Domestic Violence Courts Fail', *The West Australian* (Perth), 12 April 2014.

CURRENT ISSUES

Increasing participation in Family Violence Courts

The Commission explained in its Discussion Paper that, although it is intended for all family and domestic violence offences to be first listed in the relevant metropolitan Family Violence Court, this does not always occur. It was suggested by some stakeholders that legislation should provide that all family and domestic violence related charges must 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 concluded that this would not be appropriate because there may be cases where an accused has been refused bail and the matter should be brought before a court as soon as possible (and the Family Violence Courts only sit in each court location on one day each week). Instead, the Commission proposed that 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. It was also proposed that this requirement should be included as part of regular training.³

Only a small number of submissions were received in response to this proposal but all were supportive.⁴ The Western Australia Police explained that the requirement should be included in its prosecution policy rather than the family and domestic violence policy, and it should be communicated to police officers by way of an agency wide broadcast. The Commission

3. LRCWA Discussion Paper, Proposal 41.
4. Patricia Giles Centre, Submission No. 5 (24 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

agrees with these suggestions. Assuming that the metropolitan Family Violence Courts are to continue for the time being, the Commission considers that it is appropriate to make a recommendation. In the event that the position changes in the future, this requirement can be removed from the Western Australia Police policy.

RECOMMENDATION 59

Western Australia Police policy on listing family and domestic violence related offences

1. That the Western Australia Police Prosecution Policy 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 this policy be communicated within the Western Australia Police by an agency wide electronic broadcast and included in any family and domestic violence training programs.

Co-located DCPFS

Based on its observations of the operation of the Midland Family Violence Court, the Commission formed the view that the inclusion of an officer from the Department for Child Protection and Family Support (DCPFS) in the court process (over and above the usual practice where such an officer is part of the case management team) has merit. Two Family Violence Court magistrates specifically expressed their support for the co-location of a DCPFS officer at the court. The Commission proposed that the DCPFS enable an officer to attend the Family Violence Court in each location.⁵ A number of submissions expressing strong support for this proposal were received.⁶ However, the DCPFS

5. LRCWA Discussion Paper, Proposal 42.
6. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal

stated that this proposal is not supported and the Department will continue to provide an officer to participate in the court's case management team. It also suggested other options to ensure that the most up-to-date information is available to the court including integrated databases and changes to the timing of case management meetings.⁷ In view of the clear resource implications of this proposal and the uncertainty surrounding the continuation of Family Violence Courts, the Commission does not consider that it is appropriate to recommend the injection of additional resources at this stage.

Deferral of sentencing

Offenders who participate in the Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court are placed on conditional bail during the program following a plea of guilty. In other words, these programs 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 these specialist 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. It was explained that where the six-month period has expired an offender will usually be sentenced to a community-based disposition to complete the group program. However, if this occurs the interagency approach of the specialist courts is lost – the offender is solely supervised by the Department of Corrective Services. Magistrates, lawyers and many others involved in the specialist 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. The Commission made a proposal in those terms.⁸

All submissions received in reply to this proposal were unanimous in their support.⁹ Given that the

Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

7. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 7.
8. LRCWA Discussion Paper, Proposal 43.
9. Patricia Giles Centre, Submission No. 5 (24 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia,

Commission has previously made this recommendation in a broader context¹⁰ and considers that it has benefits irrespective of the future continuation of the specialist family violence courts, it sees no reason not to make a recommendation for reform.

RECOMMENDATION 60

Deferral of sentencing

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.

Legislative recognition

The Commission observed in its Discussion Paper that the Family Violence Courts and the Barndimalgu Court have no legislative recognition in Western Australia.¹¹ In contrast, the Drug Court is prescribed as a speciality court¹² and this enables the Drug Court to sentence offenders to a conditional suspended imprisonment order.¹³ 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.

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, the Commission expressed the preliminary view that 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 specialist family violence courts in Western Australia. Having said that, the Commission could 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. Therefore, it proposed that these courts be prescribed as speciality courts under the *Sentencing Act*.¹⁴

Again all submissions commenting on this proposal were in agreement.¹⁵ It is noted that the 2013 statutory review of the *Sentencing Act* recommended greater flexibility in the availability of conditional suspended imprisonment, noting that currently this option can only be imposed by the Supreme Court, District Court, Children's Court and the Perth Drug Court. It recommended that 'consideration be given to amending Regulation 6B of the *Sentencing Regulations 1996* (WA) to extend the authority to impose conditional suspended imprisonment to Magistrates Courts'.¹⁶ The Commission does not consider that it is appropriate to make a recommendation for the specific legislative recognition of specialist family violence courts given its lack of access to reports reportedly concluding that these courts are unsuccessful in terms of recidivism. However, it is emphasised that if the recommendation of the statutory review of the *Sentencing Act* is implemented this will achieve the main purpose of the Commission's original proposal – that the specialist family violence courts will have the power to make conditional suspended imprisonment orders for family and domestic violence offenders.

INTEGRATION OF VIOLENCE RESTRAINING ORDER JURISDICTION AND CRIMINAL JURISDICTION

The Commission was impressed by the collaborative interagency approach adopted in the specialist family violence courts and the attitudes of judicial officers, prosecutors and other staff working in these courts. Improved information sharing between the various agencies is likely to result in improved

Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

10. In its reference on court intervention programs, the Commission recommended that s 16(2) of the *Sentencing Act 1995* (WA) be amended to enable sentencing to be deferred for 12 months: see LRCWA, *Court Intervention Programs*, Final Report, Project No. 96 (2009) Recommendation 13.
11. LRCWA Discussion Paper, 136.
12. 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.
13. See *Sentencing Regulations 1996* (WA) reg 6B.

14. LRCWA Discussion Paper, Proposal 44.

15. Patricia Giles Centre, Submission No. 5 (24 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).
16. Statutory Review of the *Sentencing Act 1995* (WA) (Department of the Attorney General, October 2013) 54.

decision-making and enhanced safety for victims. As the Commission explained in Chapter One, a lack of awareness and understanding of family and domestic violence by professionals working in the justice system was a key concern of stakeholders as was duplication where parties are required to appear in different court jurisdictions in regard to the same incident of family and domestic violence. Integration is undoubtedly a solution to these types of problems. In its Discussion Paper, the Commission sought submissions about the establishment of a pilot integrated specialist Family Violence Court in the 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 protection order applications (including ex parte applications and contested hearings).¹⁷

Overall, submissions were very supportive.¹⁸ Two magistrates provided detailed submissions in relation to some of the practical issues for such a pilot;¹⁹ however, bearing in mind that the Commission does not have access to the draft reports in relation to the evaluation of the current specialist family violence courts, it does not consider that it is necessary to examine the practicalities of the proposal any further. The Department of the Attorney General advised the Commission that the proposal for a pilot integrated specialist court will be considered.²⁰ The Commission certainly hopes that further consideration to this option will be examined because it provides an opportunity to deliver a more integrated response for victims of family and domestic violence. However, the Commission has not been privy to information that might help to explain why offenders in these specialist family courts appear to reoffend at a higher rate than offenders appearing in mainstream courts. It is highlighted that recidivism data is often contentious because invariably it is based on

offences reported, charged or subject to convictions. Therefore, recidivism data generally fails to take into account differences between undetected or unreported offending between comparison groups. Nor has the Commission been able to assess the time period when the relevant data was obtained and whether, at that time, the practices and procedures of the courts were different. Moreover, the Commission is unable to assess the findings of the evaluation with a view to recommending changes that may improve the outcomes of these courts, including an expansion of their jurisdiction.

17. LRCWA Discussion Paper, Question 26.

18. Abbey Cross, Submission No. 6 (28 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

19. Magistrate Liz Langdon, Submission No. 15 (31 January 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

20. The Department of the Attorney General, consultation (18 March 2014).

Chapter Five

Other Legal Responses to Family and Domestic Violence

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Interaction of violence restraining order proceedings with the Family Court

The Commission explained in Chapter One of this Report that duplication of legal proceedings was a key issue raised by a majority of stakeholders during consultations for this reference.¹ In particular, the Commission heard regular complaints about 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'). In addition to these practical difficulties, a number of people indicated a 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 of the nature and dynamics of family and domestic violence, better case management process and the availability of family consultants.

In its Discussion Paper, the Commission observed that concurrent proceedings may arise in circumstances where 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 order²). 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.³ In this section, the Commission discusses the current law and process of the Magistrates Court and the Family Court in relation to cases that intersect jurisdictions and considers the viability of expanding the jurisdiction of the Family Court to deal with violence restraining order cases.

1. See Chapter One, Duplication.

2. 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)).

3. See further discussion, Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 141.

THE CURRENT LAW AND PROCESS

Magistrates Court and Children's Court

Section 12 of the *Restraining Orders Act 1997* (WA) requires a court, when considering whether to make a violence restraining order (and the terms of the order), to have regard to any family orders⁴ and other current legal proceedings involving the respondent or the person seeking to be protected. Also, s 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'. These provisions taken together demonstrate that it is important for the Magistrates Court (or Children's Court) to be able to confirm whether or not there are existing Family Court orders or proceedings involving the parties to a violence restraining order application, and the terms of any such orders. However, as the Commission explained in its Discussion Paper, the Magistrates Court and the Children's Court essentially rely on the parties to self-report the existence of a family order and provide a copy of the order where possible.⁵ The Magistrates Court does not have direct access to the Family Court database to enable court staff or judicial officers to check if there is a family order or Family Court proceedings between the parties.

Family Court

The existence of a violence restraining order is also potentially relevant in parenting matters in the Family Court. In such matters, the court is required to take into account the best interests of the child as the paramount consideration.⁶ 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

4. A family order is defined in s 5 of the *Restraining Orders Act 1997* (WA) and, in summary, it includes a parenting order, recovery order, injunction, undertaking given to and accepted by a court, a parenting plan, and a 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).

5. LRCWA Discussion Paper, 141.

6. *Family Court Act 1997* (WA) s 66A; *Family Law Act 1975* (Cth) s 60CA.

to, or exposed to, abuse, neglect or family violence' (these are categorised as 'primary considerations').⁷ As a result of the amendments to Commonwealth family law legislation in 2012 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 order⁸ 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.⁹

Further, when considering what order 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'.¹⁰

The Family Court also 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

7. *Family Court Act 1997* (WA) s 66C; *Family Law Act 1975* (Cth) s 60CC.

8. A 'family violence order' includes an interim or final violence restraining order made under the *Restraining Orders Act 1997* (WA) between parties who are in a family and domestic relationship.

9. *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.

10. *Family Court Act 1997* (WA) s 66G; *Family Law Act 1975* (Cth) s 60CG.

order.¹¹ 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). However, in contrast to the position outlined above, the Family Court does have access to the database of the Magistrates Court.

As the Commission observed in its Discussion Paper, there are information sharing protocols between the Family Court and the Magistrates Court (as well as other agencies). Overall, the information obtained during consultations suggests that these protocols are not being widely used (in particular, by the Magistrates Court). The Commission also emphasised that 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 of this Report, the Commission has recommended that the Department of the Attorney General develop an IT process that enables all courts that have jurisdiction to determine family and domestic violence protection order applications to access the records of the Family Court to determine if there are existing family orders or proceedings involving the parties to the application.¹² This addresses the principal concern that the Magistrates Court is unable to verify whether the parties to family and domestic violence protection orders proceedings are subject to family orders or are involved in current Family Court proceedings.

In its Discussion Paper, the Commission proposed more widely that the Department of the Attorney General develop an IT process that enables the Magistrates Court and the Family Court to access each other's records in order to determine if named parties are subject to orders in the other jurisdiction,¹³ and to enable the Children's Court to access the records of the Magistrates Court and the Family Court.¹⁴ It was also proposed 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 Commission proposed that the Children's Court should be a party to the information

11. *Family Court Act 1997* (WA) s 66F; *Family Law Act 1975* (Cth) s 60CF.

12. Chapter Three, Recommendation 29.3.

13. LRCWA Discussion Paper, Proposal 20.2. Submissions in response to this proposal have been discussed in Chapter Three of this Report.

14. LRCWA Discussion Paper, Proposal 45.1.

sharing protocols. Finally, the Commission proposed that 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

All submissions received were in support of these proposals.¹⁶ As discussed in Chapter Three, the Family Court stated that it supports the principle that a court determining a family and domestic violence protection order application should have access to and consider any current family orders. However, it also explained that the Family Court database (Casetrack) does not have a record of all family orders and that family orders made in regional Magistrates Courts are not included in Casetrack.¹⁷ In a subsequent consultation with the Principal Registrar it was confirmed that consent orders are currently not recorded on Casetrack (although this is expected to change in the next 12 to 18 months). Apart from orders made by regional magistrates, all other family orders made for approximately the past nine years should have been included in Casetrack. It was further noted that Magistrates Courts in regional areas do not record family orders electronically.¹⁸

While recognising these limitations, the Commission maintains its views that the Magistrates Court, the Children's Court and the Family Court should be able to search each other's databases to determine if parties to proceedings are subject to family and domestic violence protection orders or family orders. In response to the proposal, the Department of the Attorney General told the Commission that the 'value of information sharing between court jurisdictions is acknowledged' and the 'feasibility and resource requirements of enhancing information sharing will continue to be explored within courts administration'.¹⁹

15. Ibid, Proposal 45.2.

16. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Family Court of Western Australia, Submission No. 25 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Family Law Practitioners' Association of Western Australia (Inc), Submission No. 33 (4 March 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

17. Family Court of Western Australia, *Submission No 25* (27 February 2014) 1–2.

18. Principal Registrar David Monaghan, email consultation (31 March 2014).

19. Department of the Attorney General, consultation (18 March 2014).

On that basis, the Commission considers that it is appropriate to make a recommendation reflecting its original proposals (other than access to the Family Court database which is subject of Recommendation 29 in Chapter Three).

RECOMMENDATION 61

Information sharing between the Magistrates Court, the Children's Court and the Family Court of Western Australia

1. That the Department of the Attorney General develop (or maintain) an IT process that enables the Family Court of Western Australia to access the records of the Magistrates Court and the Children's Court to determine if named parties are subject to family and domestic violence protection orders and 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

As mentioned earlier in this Chapter, 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.

In its Discussion Paper, the Commission provided a brief overview of how this might work in practice but explained that despite the clear benefits in terms of reducing re-traumatisation and limiting duplication, there are considerable practical barriers

to implementing this option.²⁰ As outlined in the Discussion Paper, these barriers include that:

- The potential benefit of avoiding two separate hearings is unlikely to be realised in practice because of the long delays currently experienced in the Family Court. 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).
- 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. If this was the case, the inclusion of violence restraining order proceedings may significantly protract the outcome in the parenting order matter

20. LRCWA Discussion Paper, 144–5.

(and this may not be in the best interests of the child).

The Commission indicated in its Discussion Paper that there is 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 involved in parenting order proceedings in the Family Court. However, given the impediments to implementing this option in practice, the Commission did not consider that such a proposal, at this stage, was feasible. It was explained that the Commission had 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. The Commission observed 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.

The Commission received four submissions that discussed the interaction of violence restraining order proceedings and parenting order matters in the Family Court. One magistrate expressed the view that the determination of whether an interim or final violence restraining order should be made should remain within the jurisdiction of the Magistrates Court. However, it was also submitted that where a violence restraining order is made and there are outstanding issues between the parties in relation to children or property disputes, the violence restraining order should be sent to the Family Court and serve as an initiating application in the Family Court for those matters to be resolved.²¹

The Family Law Practitioners Association provided the Commission with an extensive submission advocating for more detailed consideration to be given to enabling a limited expansion of the jurisdiction of the Family Court to permit violence restraining order cases to be transferred from the Magistrates Court to the Family Court where there is an existing case before the Family Court involving the same parties.²² Legal Aid explicitly supported the position adopted by the Family Law Practitioners Association.²³ Both

21. Magistrate Stephen Wilson, Submission No. 3 (6 January 2014) 1–2.

22. Family Law Practitioners' Association of Western Australia (Inc), Submission No. 33 (4 March 2014).

23. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 72. Legal Aid also submitted that the power of the

submissions emphasised that their support for any such proposal is contingent upon additional and sufficient resources being provided to the Family Court to undertake an expanded jurisdiction.

The Family Law Practitioners Association suggested that cases eligible for transfer from the Magistrates Court to the Family Court could be limited to cases in Perth where the respondent has lodged an objection to a violence restraining order and where the parties are already involved in proceedings in the Family Court. It argued that there should not be any additional infrastructure requirements because, under its suggestion, the Family Court would not receive any 'new' cases because the same parties are already involved in a parenting order application before the court. However, if cases take longer to be resolved and use more court time, it is inevitable that the overall workload of the court will increase.

The Commission notes that there were different views expressed during consultations in relation to the ambit of any expanded jurisdiction. Some stakeholders considered that as soon as an interim violence restraining order is made in the Magistrates Court the matter should be transferred to the Family Court. Others agreed that only contested applications should be transferred. Clearly the resourcing and infrastructure implications of any expansion will vary depending on the range of cases selected for eligibility. In its submission, the Family Court indicated that the Court would cooperate with any costing evaluation that may need to be undertaken to progress the idea of an expanded jurisdiction. However, it was also stated that the Chief Judge of the Family Court 'strongly endorses' the views expressed in the Discussion Paper in regard to the practical and financial impediments to any extension of the court's jurisdiction'.²⁴

The Commission maintains its view that an expansion of the jurisdiction of the Family Court has merit but notes that the overall benefits to be obtained in terms of reduced duplication and re-traumatisation for victims of family and domestic violence will be

diluted by the smaller the cohort of cases eligible for transfer. Given the strong support received from the Family Law Practitioners Association and Legal Aid, the Commission recommends that the Western Australia government further consider this option by undertaking a comprehensive analysis of relevant data (to assess the number of potential cases that might be eligible for transfer depending on the different options for eligibility) and a full cost analysis to determine if expanding the jurisdiction of the Family Court will achieve tangible benefits in practice.

RECOMMENDATION 62

Evaluation of expanding the jurisdiction of the Family Court to deal with family and domestic violence protection orders

That the Western Australian government undertake a comprehensive evaluation of the option of expanding the jurisdiction of the Family Court to deal with family and domestic violence protection cases where the parties are also involved in Family Court parenting order proceedings. Further, this evaluation should consider the different types of cases that may be eligible for transfer from the Magistrates Court to the Family Court, and analyse the economic cost and benefits of each option as well as consideration of other benefits to the parties and other stakeholders.

Family Court to make violence restraining orders during its proceedings under s 63 of the *Restraining Orders Act 1997* (WA) should be expanded to remove the requirement that the person who would be bound by the order must be present. Examples were referred to including a case where the person who would be bound was not present but his lawyer indicated that he consented to the making of a violence restraining order but because of the limitations under s 63 an order could not be made. In subsequent consultation with the Principal Registrar of the Family Court it was stated that enabling the Family Court to make ex parte violence restraining orders would impose a considerable burden on resources: Principal Registrar David Monaghan, email consultation (31 March 2014).

24. Family Court of Western Australia, Submission No. 25 (27 February 2014) 3.

Victim rights

The Commission's Discussion Paper provides a brief overview of government agencies that provide support for victims in Western Australia including the Commissioner for Victims of Crime.¹ The Commission's consultations and research raised several issues concerning the rights of victims and these are examined below.

VICTIMS OF CRIME ACT

The *Victims of Crime Act 1994* (WA) provides for guidelines about how victims should be treated.² Section 3 of the Act provides that public officers and bodies³ 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.

As the Commission observed in its Discussion Paper, this provision does not create a legally enforceable right or entitlement.⁴ It was also noted that some other Australian jurisdictions provide for a complaints mechanism and reporting process, and this arguably imposes stronger requirements on government agencies with respect to their dealings with victims of crime.⁵ Based on this analysis, the Commission sought 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.⁶

Most submissions agreed that there should be a complaints mechanism for victims of crime.⁷ In support of its view, Relationships Australia stated that it often hears 'from women their experience of negative responses from police and magistrates in relation to the legal system'.⁸ The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network supported a staged process whereby a complaint is first lodged with the relevant agency and, if unresolved, the complaint is then dealt with by Victim Support Services or the Department of the Attorney General.⁹ However, the Commission notes that there could be instances where Victim Support Services is the agency that is the subject of the complaint. The Disability Services Commission suggested that 'an appropriate agency could be engaged to provide support to individuals wishing to lodge a complaint'.¹⁰

The Western Australia Police opposed the introduction of a new complaints mechanism noting that there are existing bodies to deal with complaints such as the Ombudsman, the Corruption and Crime Commission and the Legal Practice Board.¹¹ Similarly, Legal Aid stated that there are existing mechanisms for complaints against police and government agencies but highlighted that what 'is lacking is a process for dealing with complaints against the judiciary that are not capable of being adequately addressed by way

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 147–8.
2. The guidelines are contained in the *Victims of Crime Act 1994* (WA) sch 1.
3. Public officers and bodies include Ministers of the Crown, judicial officers, officers of courts, Director of Public Prosecutions, Commissioner of Police, members of the Western Australia Police, Prisoners Review Board, Mentally Impaired Accused Review Board, 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.
4. LRCWA Discussion Paper, 148.
5. See for example *Victims' Charter Act 2006* (Vic) ss 18, 20, 21; *Victims Rights and Support Act 2013* (NSW) ss 10, 12.
6. LRCWA Discussion Paper, Question 27(2).

7. Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).
8. Relationships Australia, Submission No. 29 (28 February 2014) 19.
9. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 78.
10. Disability Services Commission, Submission No. 11 (31 January 2014) 9.
11. Western Australia Police, Submission No. 26 (27 February 2014) 11.

of appeals'.¹² It indicated its support for a Judicial Commission, as previously recommended by the Commission.

The Commissioner for Children and Young People also observed that there are existing complaints mechanisms for all government agencies; however, it was emphasised that it is 'important for victims of crime to be made aware of and understand the avenues for lodging complaints which are available and appropriate to their concerns'.¹³ It was further explained that the Commissioner for Children and Young People has issued guidelines for making complaint systems accessible and responsive for children and young people. Under s 19 of the *Commissioner for Children and Young People Act 2006* (WA), one of the Commissioner's functions is to 'monitor the trends in complaints made by children and young people to government agencies'; however, the Commissioner does not have the authority to investigate individual complaints. Its website directs children and young people to relevant agencies such as the Ombudsman, the Health and Disability Services Complaints Office, and the Equal Opportunity Commission.¹⁴

The Commission notes that the Victims of Crime website provides a limited degree of information in relation to making a complaint against police where police have decided not to lay a charge. It refers the aggrieved person to internal police processes including the Police Complaints Administration Centre.¹⁵ In addition, the website states that if victims believe they have not been treated in accordance with the guidelines under the *Victims of Crime Act* they have the right to complain to the relevant government agency and the website provides contact details for the Ombudsman.¹⁶

Having reviewed the submissions received, the Commission has concluded that the establishment of a separate complaints mechanism for victims of crime is unwarranted because it would result in an unnecessary duplication of existing complaints procedures. However, the Commission is of the view that functions of the Commissioner for Victims

of Crime could usefully include assisting victims of crime in relation to lodging complaints and ensuring that complaints are directed to the appropriate body as well as monitoring trends in complaints. This is particularly relevant for victims of family and domestic violence who are especially vulnerable as a result of cultural or language barriers, disability or age. The Commission recommends that the Department of the Attorney General consider expanding the role of the Commissioner for Victims of Crime.

RECOMMENDATION 63

Assistance for victims in relation to complaints

That the Department of the Attorney General consider expanding the functions of the Commissioner for Victims of Crime to provide assistance to victims wishing to lodge a complaint against a government agency and to monitor the trends in complaints made against government agencies with a view to making recommendations for improvement in the way in which government agencies respond to and deal with victims of crime.

Definition of a victim of crime

The provisions of the *Victims of Crime Act* apply to victims as defined under s 2 of that Act, namely:

- (a) A person who has suffered injury, loss or damage as a direct result of an offence,¹⁷ 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.

The Commission observed in its Discussion Paper that there have been calls for this definition to be expanded. The *Report on the 2011 Review of the Victims of Crime Act 1994*¹⁸ recommended that consideration should be given to expanding the definition of a victim under the *Victims of Crime Act* to cover parents and guardians of children and incapable persons who are direct victims of crimes, and to accommodate Aboriginal cultural relationships. 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

12. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 66.

13. Commissioner for Children and Young People, Submission No. 22 (21 February 2014) 21. This submission referred to the Public Sector Commissioner's Circular 2009-27, *Complaints Management*, which requires all agencies to have in place a complaints management system and where complaints are unresolved to refer complainants to the appropriate external agency.

14. See <<http://www.cyp.wa.gov.au/content/Complaints-.aspx>>.

15. See <http://www.victimsofcrime.wa.gov.au/lif_police_don_t_lay_charges.aspx>.

16. See <http://www.victimsofcrime.wa.gov.au/v/victims_rights.aspx?uid=0961-2851-7126-0137>.

17. An offence includes an alleged offence: *Victims of Crime Act 1994* (WA) s 2.

18. Department of the Attorney General, *Report on the 2011 Review of the Victims of Crime Act 1994* (November 2013).

crime, be expanded to cover cases where a person has been incapacitated as a result of a crime.¹⁹

During consultations for this reference it was also 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 Commission proposed that the definition of a victim should be expanded but sought submissions about the categories of persons who should be included in the definition.²⁰ In this context it was noted 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.

All submissions received in response to the Commission's proposal to expand the definition were supportive.²¹ The Department of the Attorney General advised the Commission that 'work is currently underway' in relation to this matter.²² In relation to the first limb of the definition of a victim (a person who has suffered injury, loss or damage as a direct result of an offence), a number of submissions stated that this should be expanded to include a parent or guardian of a child victim.²³ The Department for

Child Protection and Family Support submitted that the definition of a victim should include a parent, guardian, carer of a child victim or equivalent person under Aboriginal customary law.²⁴ Other submissions advocated for the inclusion of children who witness family and domestic violence²⁵ with some suggesting that any witness to an offence of violence should be covered by the definition.²⁶

The joint submission from the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network emphasised two important categories of persons harmed by family and domestic violence that should be included within the scope of the definition: children who are exposed to family and domestic violence, and parents and guardians (including persons who equate to these relationships) of children who are the primary victim of an offence (other than where that person is the offender).²⁷ This submission acknowledged that expanding the application of the *Victims of Crime Act* to secondary victims would require an increase in resources.

With respect to the second limb of the definition (any immediate family of the deceased), a number of submissions supported an expanded interpretation of 'immediate family' to cover Aboriginal kinship relationships and other relationships that are equivalent to immediate family members'.²⁸ The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network suggested that, rather than including an inflexible list of persons for this purpose, guidelines should be developed to assist in interpretation of who falls within the meaning of immediate family. Three submissions argued that the recognition of

19. Ibid.

20. LRCWA Discussion Paper, Proposal 46 and Question 27.1.

21. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

22. Department of the Attorney General, consultation (18 March 2014).

23. Patricia Giles Centre, Submission No. 5 (24 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission

No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

24. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014) 8.

25. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

26. Western Australia Police, Submission No. 26 (27 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

27. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 75.

28. Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

secondary victims where an offence results in death should be extended to cases where an offence results in incapacitation.²⁹

The Commission is wary of recommending an expanded definition that is over inclusive. For example, in the absence of additional resources, the inclusion of a parent or guardian of a victim of *any* crime who is under the age of 18 years may impact significantly on the available resources for victims who are currently covered by the provisions of the Act. The same observation applies to including a witness of *any* crime. In the context of this reference, the Commission is of the view that the definition should cover children who are exposed to a family and domestic violence related offence and parents or guardians (in a broad sense) of children who are victims of family and domestic violence related offences. It also agrees with submissions that the meaning of 'immediate family' should be broadly interpreted to capture significant relationships under Aboriginal customary law and that the second limb of the definition should be extended to a situation where a victim of crime has been permanently incapacitated. Considering that the Department of the Attorney General is currently in the process of reviewing the definition of a victim, the Commission recommends that consideration be given to including these categories within any proposed amendments.

RECOMMENDATION 64

Definition of a victim of crime

1. That the Department of the Attorney General consider expanding the definition of a victim of crime under the *Victims of Crime Act 1994* (WA) to include the following categories:
 - (a) A parent, guardian or carer (including equivalent relationships under Aboriginal customary law) of a child (a person under the age of 18 years) who is a victim of a family and domestic violence related offence;
 - (b) A child who has been exposed to a family and domestic violence related offence committed against a person with whom that child is in a family and domestic relationship; or

29. Relationships Australia, Submission No. 29 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014).

(c) Where an offence results in a permanent incapacitation, any member of the immediate family of the deceased.

2. That the Department of the Attorney General in consultation with other relevant agencies develop guidelines to assist agencies in the interpretation of the meaning of the term 'immediate family' under s 2 of the *Victims of Crime Act 1994* (WA) to ensure that significant relationships under Aboriginal customary law are recognised.

DISCLOSURE OF VICTIM IMPACT STATEMENTS

In its Discussion Paper, the Commission noted a potential issue in relation to the disclosure of victim impact statements. One non-government victim support agency told the Commission that it had been 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.

The Commission reviewed current law and practices concerning the physical security of victim impact statements and formed the view that the existing provisions and practices in relation to pre-sentence reports and mediation reports (which require copies of these reports to be returned to relevant court staff) should be replicated for victim impact statements. The Commission proposed that courts update or develop their practice directions to ensure that all copies of written victim impact statements are returned to the court immediately after sentencing proceedings have concluded and that any electronic copies are deleted after the sentencing hearing.³⁰ In making this proposal the Commission acknowledged that an offender is highly likely to be informed of the contents of a victim impact statement during the sentencing process; however, if an offender retains a copy of such a statement it may be used in the future to perpetrate further family and domestic violence.

Most submissions received on this topic supported the Commission's proposal.³¹ The Chief Judge of the

30. LRCWA Discussion Paper, Proposal 47.

31. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Office of the Director of Public Prosecutions, Submission No. 16 (4 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for

District Court noted that there does not appear to have been a problem in regard to the security of victim impact statements but nevertheless agreed that there is 'merit in the proposal that there be consultation and review of the Court's practice in this area'.³² In this regard, the Chief Judge recently advised the Commission that the 'District Court has amended its practice with respect to victim impact statements to increase the confidentiality of those statements'.³³ The relevant practice direction now provides, among other things, that at the conclusion of the sentencing hearing defence counsel is to deliver the hard copy of the victim impact statement to the court and delete any electronic copies of the statement.³⁴

The Chief Justice of the Supreme Court explained that there 'is capacity for victim impact statements to be treated in the same way as pre-sentence reports and subject to the same regime of confidentiality, and this occurs when a judicial officer believes such treatment is warranted'.³⁵ It was also stated that if there is to be a requirement to return the victim impact statements, it should be set out in legislation. Additionally, the Chief Justice posed two further issues in relation to the Commission's proposal. First, he mentioned that victim impact statements may be given orally. The Commission understands that oral victim impact statements are only allowed in exceptional circumstances.³⁶ Secondly, he queried the rationale for requiring the prosecution to return victim impact statements when it is in fact the Director of Public Prosecutions that provides the statements to higher courts. The Commission notes that the Director of Public Prosecutions supported the Commission's proposal. Although the prosecution may facilitate the provision of a victim impact statement to the court, the Commission was told by the Manager of Victim Support and Child Witness Services that a victim impact statement is

considered the victim's statement (and they usually retain a copy for themselves).

The Commission's concern is to ensure that copies of victim impact statements do not inadvertently find their way to an offender. It is appreciated that the offender may hear or read what is contained in a victim impact statement but this is different from having a copy for an indefinite period of time and potentially being able to use that statement to cause further harm. Having said that, it may be appropriate for different arrangements concerning the security of victim impact statements to be made in relation to different courts and accordingly the Commission has revised its recommendation.

RECOMMENDATION 65

Victim Impact Statements

That the Supreme Court, District Court, Magistrates Court and Children's Court of Western Australia review their practices in relation to the security of victim impact statements and consider updating or developing practice directions to ensure that, absent directions to the contrary, the prosecution and defence counsel's copies of written victim impact statements are returned to the judge's associate (or judicial support officer) immediately after the sentencing proceedings are concluded and that any electronic copies that have been provided to the prosecution or defence are deleted at the completion of the sentencing hearing.

VICTIM NOTIFICATION REGISTER

The *Victims of Crime Act* recognises that there should be a mechanism to enable the views of a victim to be taken into account when a decision is being made about the release of an offender from custody and that victims should be informed of the impending release of an offender.³⁷ To facilitate information to victims about an offender's release from custody, the Department of Corrective Services operates the Victim Notification Register (VNR). In its Discussion Paper, the Commission observed that there is a gap in terms of victim safety in relation to the current eligibility for inclusion on the VNR. A person who has suffered family and domestic violence at the hands of a prisoner, who is about to be released from custody for an unrelated non-family and domestic offence, does not have any right to be notified of

Child Protection and Family Support, Submission No. 20 (14 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Chief Judge of the District Court of Western Australia, Submission No. 36 (11 March 2014); Magistrate Pamela Hogan, Submission No. 38 (21 March 2014).

32. Chief Judge of the District Court of Western Australia, Submission No. 36 (11 March 2014) 2.

33. Chief Judge of the District Court of Western Australia, letter (29 May 2014).

34. District Court of Western Australia, Practice Direction CRIM 3 of 2008 [6.9].

35. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 7.

36. Harvey Hatch, Manager, Victim Support and Child Witness Service, Department of the Attorney General, email consultation (28 March 2014).

37. *Victims of Crime Act 1994* (WA) sch 1.

the offender's release. The Commissioner for Victims of Crime suggested to the Commission that the Victorian system is preferable because it properly accommodates victims of family and domestic violence. On that basis, the Commission proposed that the Department of Corrective services expand its eligibility criteria for the VNR 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 protection order against the prisoner.³⁸

All submissions responding to this proposal were supportive.³⁹ The Department of Corrective Services stated that it agreed with the proposal in principle and highlighted that the release of a family and domestic violence offender from prison 'may be a dangerous time for victims'.⁴⁰ However, it was noted that the proposal will have significant resource implications for the Department and that it would be unable to undertake this task without access to data for family and domestic violence offenders including access to family and domestic violence restraining order information.

In Chapter Four, the Commission has recommended that the Department of the Attorney General liaise with the Department of Corrective Services in order to consider the feasibility of enabling the Department of Corrective Services to have access to the relevant database of all family and domestic violence protection orders.⁴¹ This recommendation is designed to facilitate more effective supervision and monitoring of offenders by the Department of Corrective Services by enabling the officers of the Department to access information about current family and domestic violence protection orders.

In relation to the proposal to expand the eligibility criteria for registration on the VNR to include a person who has a current family and domestic violence protection order against a prisoner/offender, the Department may need access to information about the protection order for the purpose of verifying

the existence of the protection order. Presently, a person who applies to be included on the VNR must consent to the Department providing information to the Western Australia Police for the purpose of verifying the information included in the application form. Clearly, access to a central database of family and domestic violence protection orders would enable prompt verification of an applicant's status as a person protected by a family and domestic violence protection order made against the prisoner. Nonetheless, in the absence of access to the database, the application form could be revised to enable the applicant to provide consent for the Department of Corrective Services to verify the existence of the protection order with the Department of the Attorney General. The Commission is of the view that the most appropriate way to achieve this should be determined by both departments in consultation with one another.

RECOMMENDATION 66

Eligibility for inclusion on the Victims Notification Register

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 protection order against the prisoner.

38. LRCWA, Discussion Paper, Proposal 48.

39. Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Department of Corrective Services, Submission No. 23 (25 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

40. Department of Corrective Services, Submission No. 23 (25 February 2014) 8.

41. Chapter Four, Recommendation 54.2.

Criminal injuries compensation

In its Discussion Paper, the Commission provided a brief overview of the Western Australian criminal injuries compensation scheme under the *Criminal Injuries Compensation Act 2003* (WA) and examined issues raised in consultations concerning the application of the scheme in cases of family and domestic violence.¹

AWARENESS OF RIGHT TO CLAIM COMPENSATION

The Commission's consultations and research indicated that there is a need for greater awareness among victims of family and domestic violence of the right to claim compensation, primarily to ensure that victims are not prejudiced by lodging their claim out of time. One suggestion was for an information pack to be provided to victims at the time they make their statement to police.² The Commission sought submissions about whether police should provide victims of crime with an information pack about criminal injuries compensation at the time they make their statement.³

A number of submissions agreed that the provision of an information pack by police at the time a statement is taken would be useful.⁴ Relationships Australia confirmed that victims are often not aware of the option of applying for criminal injuries compensation.⁵ The Geraldton Resource Centre stated that it sees 'many clients who have only learned about their right to claim compensation after the time limit to

apply has expired'.⁶ Aboriginal Family Law Services stated that an information pack should ideally be provided by an officer or other support workers from the interagency Family Violence Response Teams.⁷

However, other submissions cautioned against this approach noting that it may prejudice any criminal proceedings.⁸ The Western Australia Police indicated that officers attending a family and domestic violence incident 'must concentrate on response, intervention and investigation and should not be seen as having bias towards any party'.⁹ The Chief Assessor explained that a person who has applied for compensation 'before a trial commences may be subjected to additional cross examination to the effect that the allegation is untrue and is made only to establish access to compensation'. The usual practice is for the Office of Criminal Injuries Compensation to return an application that is lodged before the criminal proceedings are completed (unless it is a case where an interim payment is sought). This submission further advised that, on occasions, the office has been subpoenaed and required to produce the application form and associated documents to a court.¹⁰ On balance, the Commission has concluded that it would not be appropriate for a police officer to provide an information pack to victims at the time of investigating a family and domestic violence offence. Instead, the Commission considers that awareness of the right to claim compensation can be increased by improving the accessibility of publicly available information and also notes that agencies providing support to victims of family and domestic violence are in a position to provide relevant information and referrals to victims.

In its Discussion Paper, the Commission proposed that the websites of the Office of Criminal Injuries Compensation and Victims of Crime be augmented

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) ('LRCWA Discussion Paper') 152–3.
2. Pilbara Community Legal Service Inc, Submission No. (19 August 2013).
3. LRCWA Discussion Paper, Question 28.
4. Patricia Giles Centre, Submission No. 5 (24 January 2014); Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Anglicare, Submission No. 28 (28 February 2014); Relationships Australia, Submission No. 29 (28 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).
5. Relationships Australia, Submission No. 29 (28 February 2014) 19.

6. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014) 49.
7. Aboriginal Family Law Services, Submission No. 37 (12 March 2014) 12.
8. Maggie Woodhead, Submission No. 4 (17 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014); Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014).
9. Western Australia Police, Submission No. 26 (27 February 2014) 11.
10. Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014) 1.

with more detailed information about the requirements and processes for applications for criminal injuries compensation to assist unrepresented applicants.¹¹ All submissions responding to this proposal agreed.¹² Three of these submissions emphasised that the websites should include information for children's rights to compensation and that such information should be in child accessible formats.¹³ Generally, the Disability Services Commission contended that the 'contents of any approved form or information given to a person with disability must be explained to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand'.¹⁴

During consultation, the Department of the Attorney General advised that 'work is currently underway' in relation to this proposal.¹⁵ Given that advice, coupled with the support and views received from respondents, the Commission makes a recommendation in the similar terms to its original proposal with additions concerning the accessibility of information for particular groups.

RECOMMENDATION 67

Information in relation to criminal injuries compensation

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

11. LRCWA Discussion Paper, Proposal 49.
12. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).
13. Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014).
14. Disability Services Commission, Submission No. 11 (31 January 2014) 6.
15. Department of the Attorney General, consultation (18 March 2014).

applications for criminal injuries compensation to assist unrepresented applicants and that this information be provided in accessible formats for persons from culturally and linguistically diverse communities, people with disability and children.

PUBLICATION OF DATA

The Commission observed that there are a number of criticisms of the criminal injuries compensation scheme as it applies to victims of family and domestic violence. It noted that an obvious problem with testing such claims is that there are insufficient publicly available data to determine whether the particular provisions of the legislation that are claimed to be barriers to compensation for family and domestic violence victims in fact operate or are applied in that way. It was noted that such data is currently collected by the Office of Criminal Injuries Compensation; however, it is not included in the annual reports published by the office. The Commission proposed that the Office of Criminal Injuries Compensation publish in its annual report data about awards and refusals of compensation claims in cases of family and domestic violence.¹⁶ The Commission received seven submissions all agreeing with this proposal.¹⁷ The Chief Assessor advised in her submission that 'data which identifies the number and percentage of the refusals which arose in cases involving' a family and domestic relationship will be included in the annual report from 2013–2014.¹⁸ Accordingly, a recommendation in this regard is appropriate.

RECOMMENDATION 68

Publication of Criminal Injuries Compensation data

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.

16. LRCWA Discussion Paper, Proposal 50.
17. Patricia Giles Centre, Submission No. 5 (24 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Peel Community Legal Service, Submission No. 30 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014); Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014).
18. Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014) 2.

OTHER ISSUES

A number of other issues related to the criminal injuries compensation scheme were mentioned to the Commission during consultations and were considered by it in the Discussion Paper. These issues primarily related to the impact of certain provisions under the *Criminal Injuries Compensation Act* to victims of family and domestic violence (eg, s 9 (time limitation on claims¹⁹); s 27 (reasons for decision); s 36 (relationship clause²⁰); s 38 (reporting offence and assisting investigation); and s 41 (contributory conduct)).²¹ In their submission, the Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network reiterated concerns in relation to these provisions and advocated for reforms.²² In relation to the 'relationship clause' they argued that, given that this provision is rarely used to refuse a claim and because comparable provisions in most other Australian jurisdictions have been abolished, consideration should be given to the repeal of s 36 of the Act. Extensive comments were provided in relation to s 41 which provides that an award may be refused or reduced on the basis of behaviour of the victim that contributed directly or indirectly to the victim's injury or death. In particular, a number of cases were referred to where the award was reduced (rather than refused) as a result of contributory conduct. Submissions were also made in relation to the other provisions noted above. The Peel Community Legal Service argued for a broader review of the criminal injuries compensation scheme to 'remove other barriers to victims of domestic violence accessing the Criminal Injuries Scheme to

include a relaxation of reporting requirements and time limitations where appropriate'.²³

The Commission did not make proposals for legislative reform in its Discussion Paper and therefore it has not received a wide range of submissions on this area or in relation to specific legislative amendments. However, on the basis of the material provided in the two submissions referred to above, the Commission has concluded that a broader review of the criminal injuries compensation scheme in Western Australia is warranted.

RECOMMENDATION 69

Review of the criminal injuries compensation scheme in Western Australia

That the Western Australia government undertake a full review of how the criminal injuries compensation scheme operates in practice in relation to victims of family and domestic violence related offences.

19. The Chief Assessor referred the Commission to the recent case of *Jackamarra* [2014] WADC 9 where it is said a stricter view was taken in relation to the granting of extensions of time. The submission notes that if this case is followed it will result in a 'tightening of the conditions under which an [extension of time] may be granted in some cases'. Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014) 1.
20. Section 36 provides that if there is a relationship between the offender and the 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 Chief Assessor advised that the Commission's statement in its Discussion Paper that 'applicants may effectively reapply if they subsequently leave the relationship' is not correct. She stated that an 'applicant may reactivate a closed application if and when circumstances change, but this depends on the outcome and any order made by the assessor': Helen Porter, Chief Assessor Criminal Injuries Compensation, Submission No. 39 (27 March 2014) 1.
21. For further discussion, see LRCWA Discussion Paper, 153–5.
22. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 79. This submission was endorsed by Women's Law Centre, Submission No. 31 (28 February 2014).

23. Peel Community Legal Service, Submission No. 30 (28 February 2014) 11–12.

Other matters

TRAINING

The Commission explained in its Discussion Paper (and earlier in this Report) that there is considerable concern among people working in the family and domestic violence sector that some judicial officers, lawyers and police do not properly understand the nature and dynamics of family and domestic violence and that this impacts on decision-making.¹ In addition, this lack of understanding may lead to inappropriate comments being made to victims of family and domestic violence and the negative experience may in turn discourage victims from seeking assistance from the legal system in the future. As noted earlier, the restraining orders system may also be subject to misuse and is sometimes used for collateral reasons such as obtaining tactical advantage in family law proceedings.² Increased training of judicial officers and lawyers about the dynamics of family and domestic violence may assist in achieving fair and just outcomes for all parties. In Chapter Three of this Report the Commission has made a recommendation in relation to training for police. This section deals with training for judicial officers and lawyers.

Judicial training

The Commission proposed in its Discussion Paper that the heads of jurisdiction in each Western Australian court ensure that regular training is delivered by a range of agencies with expert knowledge of family and domestic violence for judicial officers who deal with matters involving family and domestic violence. The proposal noted that specific issues concerning Aboriginal communities, multicultural communities

and people with disability should be included in the training programs and suggested that judicial officers working in specialist family violence courts should be actively involved in the development of the training programs.³

A number of submissions supported the proposal in full.⁴ Other submissions agreed with the proposal but made suggestions about the content of the training or about how such training should be delivered. Four submissions argued that judicial training should include training about the impact of family and domestic violence on children and how family and domestic violence may impact on a victim's capacity to parent.⁵ Anglicare highlighted that judicial officers need specific training in relation to the 'dynamics' of coercion because it appears that some judicial officers criticise victims who repeatedly cancel violence restraining orders.⁶ The victim representatives from the Victims of Crime Reference Group submitted that the most important issue in the Commission's reference is the need to ensure that all decision-making is 'done by magistrates and judges who deeply understand the characteristics of' family and domestic violence, and in order to achieve this they argued that the proposal should refer to 'regular competency based training' instead of 'regular training'.⁷

The Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network stated that in their experience some magistrates are 'uneducated about the social science and the evidence base that understands

1. Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (December 2013) 30–2 ('LRCWA Discussion Paper') and see Chapter One: Lack of Awareness and Understanding of Family and Domestic Violence
2. See Chapter One, Provide fair and just legal responses in family and domestic violence. See also Parkinson P et al, 'Post-Separation Conflict and the Use of Family Restraining Orders' (2011) 33 *Sydney Law Review* 1, 32–3. See also P Parkinson et al, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *Australian Journal of Family Law* 313, 315; Hickey J & Cumines S, 'Apprehended Violence Orders: A survey of magistrates' (Sydney: Judicial Commission of New South Wales, 1999) 37. One regional magistrate expressed the view that some applicants may file an application for a violence restraining order as an alternative to seeking Family Court orders or to obtain outcomes in Family Court proceedings: Magistrate Dianne Scadden, email consultation (21 May 2014).

3. LRCWA Discussion Paper, Proposal 51.
4. Patricia Giles Centre, Submission No. 5 (24 January 2014); Martin Chape JP, Submission No. 10 (29 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014);
5. Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014)
6. Anglicare, Submission No. 28 (28 February 2014) 31.
7. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 1.

risks associated with violence and abuse in families' and that courts 'continue to be a context of re-traumatisation and re-victimisation for women and their children'. This submission advocated for judicial training to be legislatively prescribed and for minimum selection criteria for specialist family and domestic violence magistrates. They also suggested that a judicial bench book on family and domestic violence would be beneficial.⁸ They agreed with the Commission's suggestion that judicial officers in specialist family violence courts should be involved in the development of training programs, but also argued that the development of judicial training programs should be supported by the establishment of a 'consultative stakeholder and steering committee' comprised of non-government and government representatives.⁹

Legal Aid advised in its submission that research on successful judicial education 'indicates that this is most effective where the training is contextualised and driven and led by the judiciary themselves' and suggested involving judicial officers from other jurisdictions with expertise in family and domestic violence. It also argued that the selection criteria for all magistrates should include current knowledge of family and domestic violence theory and practice because family and domestic violence is a major issue across the magistrates' jurisdiction as a whole.¹⁰

The Chief Justice of the Supreme Court indicated his strong support for the Commission's proposal but also argued that such training should be extended to court staff including associates, judicial support officers and administrative staff because these staff regularly have contact with victims of family and domestic violence.¹¹ In Chapter Three, the Commission has recommended that the Western Australian government ensure that adequate training in relation to family and domestic violence is provided to court security staff (including staff employed by private contractors).¹² This recommendation is designed to ensure that court security staff are equipped to deal with situations where persons bound by and persons protected by violence restraining orders are required to attend court at the same time. The Commission agrees with the suggestion of the Chief Justice that training should be provided to court staff more

broadly and has included this in its recommendation below.¹³

The Chief Justice also emphasised that the heads of jurisdiction in Western Australia have 'no capacity to incur expenditure on any topic, including the topic of judicial education. No court has a budget for judicial education, and at present, any judicial education must be resourced through other budgetary sources, such as the travel budget'.¹⁴ Therefore, it was submitted that the Commission's proposal should be directed to the executive government. Nevertheless, the Chief Justice also stated that the 'independence of the judiciary, and the effectiveness of judicial training requires that the development of any such programmes be under the direct control of the judiciary' and, therefore, any recommendation should be directed to the government to provide the necessary funds to enable the judiciary to develop and deliver appropriate training programs. It was further contended that the reference in the proposal to the delivery of training by a range of agencies should be removed because the delivery of judicial training should be under the control of the judiciary. However, it was explained that this would not mean that specialists from other fields would not be utilised and the submission notes that judicial education programs on family and domestic violence in other jurisdictions rely significantly on professionals from other fields (such as medicine and social work). Likewise, the Chief Justice suggested that members of the judiciary with specialist knowledge and experience with family and domestic violence would be utilised in practice but that the recommendation should not cover this level of detail, instead leaving the 'precise mechanism for program delivery and development to the judiciary'.¹⁵

The Chief Judge of the District Court also noted that the ability for courts to deliver appropriate professional training is limited. The Commission's observations in this regard in its report on *Complaints against the Judiciary* were referred to. In that report, the Commission observed that presently 'courts are left to fund education of judges from their own budgets with little specific assistance from general revenue. Available programs are necessarily modest and rely on assistance from outside bodies on an ad hoc basis'.¹⁶ It was further stated that having 'a structured and properly resourced education programme for judicial officers in this state would

8. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 88.

9. Ibid 89.

10. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 68.

11. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 8.

12. Recommendation 39.2.

13. Chapter Three, Breach of violence restraining orders and police orders.

14. Chief Justice of the Supreme Court of Western Australia, Submission No. 24 (27 February 2014) 8.

15. Ibid 9.

16. LRCWA, *Complaints against Judiciary*, Final Report, Project No. 102 (August 2013) 96.

also assist heads of jurisdiction in the management of the courts' and put forward that its recommended judicial commission should include within its functions responsibility for education programmes for judicial officers.¹⁷ The Chief Judge argued that if there is a 'properly funded and organised judicial education program then it would be easier for judicial officers to receive appropriate professional education'.¹⁸

The Commission maintains its view that a judicial commission should be established in Western Australia and that one function of such a commission should be judicial education. However, in the absence of this, it is imperative that Western Australian courts are provided with sufficient resources to enable effective and ongoing training for judicial officers in relation to family and domestic violence. The Commission has taken into account the views of the Chief Justice and notes that Legal Aid's submission supports the contention that the most effective judicial education programs are those which are led by the judiciary themselves. Therefore, the Commission is not prescriptive in its recommendation but strongly suggests that any education programs should ensure that special issues in relation to family and domestic violence in Aboriginal communities, multicultural communities, persons with disability and children are included, and that the expertise of outside agencies and individuals with specialist knowledge is utilised.

The Commission also agrees with the suggestion from Legal Aid that the selection criteria for magistrates should include knowledge of the nature and dynamics of family and domestic violence and experience with legal issues concerning family and domestic violence. It considers that this knowledge and experience should be a desirable but not essential characteristic of appointees, and makes a recommendation to this effect. This does not mean that the absence of such knowledge or experience is a bar to appointment but merely that such knowledge and experience will be viewed favourably by selectors.

RECOMMENDATION 70

Judicial education programs

That the Western Australian government provide sufficient resources to enable the heads of jurisdiction in each Western Australian court to provide regular judicial education programs in relation to the nature and dynamics of family and domestic violence.

17. Ibid, Recommendation 18.

18. Chief Judge of the District Court of Western Australia, Submission No. 36 (11 March 2014) 2.

RECOMMENDATION 71

Training for court staff

That the Department of the Attorney General develop and provide training programs in relation to family and domestic violence for all court staff including associates, judicial support officers, administrative staff and court security staff.

RECOMMENDATION 72

Selection criteria for magistrates

That the Western Australian government ensure that the selection criteria for the appointment as a magistrate include as a desirable, but not essential, characteristic knowledge of the nature and dynamics of family and domestic violence and experience with legal issues concerning family and domestic violence

Training for lawyers

In its Discussion Paper, the Commission made a similar proposal for training for lawyers and directed this proposal to the Law Society of Western Australia.¹⁹ Again submissions were supportive²⁰ with some respondents suggesting that training should also include specific issues related to children.²¹ Legal Aid suggested that consideration be given to whether family and domestic violence

19. Ibid, Proposal 52.

20. Maggie Woodhead, Submission No. 4 (17 January 2014); Patricia Giles Centre, Submission No. 5 (24 January 2014); Disability Services Commission, Submission No. 11 (31 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

21. Maggie Woodhead, Submission No. 4 (17 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service, Submission No. 17(b) (5 February 2014); Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH, Submission No. 17(c) (5 February 2014); Commissioner for Children and Young People, Submission No. 22 (21 February 2014).

training should be a mandatory requirement for legal practitioners who practise in particular areas such as family law and child protection.²² This sentiment was echoed in the submission received from the victim representatives' on the Victims of Crime Reference Group who stated that legal practitioners who work in family and criminal law jurisdictions should be required to undertake compulsory Continuing Professional Development (CPD) programs on family and domestic violence.²³

The Law Society explained that it currently provides a large range of CPD programs and 'actively considers which topics are in demand'. It stated that it will refer the Commission's proposal to its Education Committee.²⁴ As emphasised by the Law Society, the Legal Practice Board is the body responsible for general oversight of CPD in Western Australia. Pursuant to the *Legal Profession Rules 2009* (WA), legal practitioners are required to accrue 10 CPD points in a 12-month period by participating in approved activities in three competency areas (legal skills and practice, ethics and professional responsibility and substantive law). The Legal Practice Board has responsibility for approving providers of CPD and approving specific activities provided by non-approved providers.²⁵ However, the board does not dictate the content of CPD programs delivered by approved providers.

The Law Society is one of numerous approved providers in Western Australia. In 2012–2013 there were 106 approved providers consisting of law firms, educational institutions, professional bodies, community organisations and commercial providers.²⁶ In 2012–2013, the Law Society had 3,406 members. In the same period the Law Society held 58 CPD learning events with 2,566 persons registered for these events.²⁷ The Commission notes that the number of practising certificates issued by the Legal Practice Board in Western Australia in 2012–2013 was 5,321.²⁸ Accordingly, the Law Society's CPD programs have the potential to reach a significant proportion of legal practitioners in this state. It was for this reason that the Commission directed its proposal to the Law Society. Nevertheless, the

22. Legal Aid Western Australia, Submission No. 35 (7 March 2014) 68.
23. Victims of Crime Representatives on the Victims of Crime Reference Group, Submission No. 42 (27 March 2014) 1.
24. Law Society of Western Australia, Submission No. 27 (25 February 2014) 2.
25. See <<http://practitioner.lpbwa.org.au/Continuing-Professional-Development>>.
26. Legal Practice Board of Western Australia, *Annual Report 2012–2013* (2013) 49.
27. Law Society of Western Australia, *Annual Report 2012–2013* (2013) 3.
28. Legal Practice Board of Western Australia, *Annual Report 2012–2013* (2013) 16.

Commission acknowledges it would be appropriate for other approved providers to offer family and domestic violence CPD programs (eg, Aboriginal Legal Service of Western Australia, Family Law Practitioners Association of Western Australia, Legal Aid Western Australia and various tertiary institutions). Therefore, the Commission has widened its proposal to include other relevant CPD providers. The Commission does not agree that it is appropriate to recommend that certain legal practitioners be required to undertake family and domestic violence CPD because the particular content of CPD is not presently mandated for any particular group of lawyers.

RECOMMENDATION 73

Continuing Professional Development for legal practitioners

That the Law Society of Western Australia and other relevant approved CPD providers are encouraged to ensure that CPD programs are available in relation to the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities, people with disability and children and that, wherever possible, these programs be developed and delivered by individuals and agencies with expertise in family and domestic violence.

CLARE'S LAW (UK)

In its Discussion Paper, the Commission referred to the United Kingdom Domestic Violence Disclosure Scheme (known as Clare's Law) which enables the limited disclosure of information by police about a person's history of family and domestic violence.²⁹ This scheme commenced as a pilot in July 2012 and was subject to a process evaluation in 2013. 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 makes 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'.³⁰ On 26 November 2013, the Home

29. LRCWA Discussion Paper, 158–9.
30. United Kingdom Home Office, *Domestic Violence Disclosure Scheme (DVDC) Pilot Assessment* (2013) 2.

Office announced that the disclosure scheme would be rolled out nationally from March 2014.³¹

After noting calls for a similar scheme in Western Australia, the Commission observed that any potential benefits of a public disclosure scheme need to be balanced against the potential detriments. 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 in cases where there is no information to disclose. 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. 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.

Also, 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. 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 family and domestic violence.

In the absence of further evidence about whether public disclosure schemes provide enhanced safety to victims of family and domestic violence, the Commission expressed reservations about the establishment of a public disclosure scheme in Western Australia. Nevertheless, the Commission sought 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.³²

A reasonable number of submissions supported a public disclosure scheme;³³ however, there was

31. 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.

32. LRCWA Discussion Paper, Question 29.

33. Maggie Woodhead, Submission No. 4 (17 January 2014); Path of Hope, Submission No. 14 (31 January 2014); Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health

also notable opposition.³⁴ The submission from the Western Australia Police indicated strong resistance to any public disclosure scheme and referred to a number of potential disadvantages including that such a scheme may provide a false sense of security for applicants; that problems may occur if information is disclosed to a third party; that an applicant may be at risk if the perpetrator is confronted; that victims in remote communities are likely to be unwilling or unable to engage in the scheme; and that the mere existence of a family and domestic violence related conviction may be misleading (for the reasons outlined by the Commission above).³⁵ The Aboriginal Social Workers Association cautioned against the introduction of such a scheme in suggesting that it may redirect resources away from current family and domestic violence cases.³⁶

Even those who indicated support for a public disclosure scheme acknowledged the potential pitfalls. Anglicare stated that perpetrators have the capacity to change thereby recognising that disclosure may be misleading in terms of current risk and, therefore, suggested that any disclosure should be limited to high risk cases.³⁷ The joint submission from the Women's Council on Domestic and Family Violence Services and the Domestic Legal Workers Network referred to the problems identified by the Commission in its Discussion Paper and also noted that a disclosure scheme may lead to 'victim blaming' if an applicant does not leave a relationship after being informed of the past family and domestic violence convictions.³⁸ Nevertheless, this submission supported the introduction of a scheme modelled on the United Kingdom program as well as appropriate education strategies for applicants at the time disclosure is made. Some submissions expressed the view that further consideration of the merits of a public disclosure scheme is required.³⁹ Legal

Service, Submission No. 17(b) (5 February 2014); Department for Child Protection and Family Support, Submission No. 20 (14 February 2014); Anglicare, Submission No. 28 (28 February 2014); Women's Law Centre, Submission No. 31 (28 February 2014); Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014); Aboriginal Family Law Services, Submission No. 37 (12 March 2014).

34. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014); Youth Legal Service, Submission No. 18 (12 February 2014); Western Australia Police, Submission No. 26 (27 February 2014).

35. Western Australia Police, Submission No. 26 (27 February 2014) 11.

36. Aboriginal Social Workers Association of Western Australia, Submission No. 13 (31 January 2014).

37. Anglicare, Submission No. 28 (28 February 2014) 40.

38. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network, Submission No. 34 (28 February 2014) 91.

39. Geraldton Resource Centre Inc, Submission No. 32 (28 February 2014); Legal Aid Western Australia, Submission No. 35 (7 March 2014).

Aid stated that there are 'significant risks' of such a scheme and 'serious implications in terms of civil liberties'. It submitted that further detailed research, consultation and analysis are required before any public disclosure scheme should be considered.

Given the significant unease about the introduction of a public disclosure scheme for family and domestic violence and the Commission's view that such a scheme is fraught with potential difficulties, it has not made a recommendation in this regard. The Commission notes that the United Kingdom scheme has only been rolled out nationally since March 2014 and suggests that the Western Australian government continue to monitor and review the effectiveness of the United Kingdom scheme in terms of reducing family and domestic violence and improving safety for victims (and potential victims) to ensure that any future proposal for a scheme in Western Australia is evidence-based.

Appendices

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Appendix A:

List of recommendations

SEPARATE FAMILY AND DOMESTIC VIOLENCE LEGISLATION

RECOMMENDATION 1

[PAGE 27]

The Family and Domestic Violence Protection Order Act

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) the objects of the Act;
 - (b) recognition of key features of family and domestic violence;
 - (c) principles;
 - (d) the grounds for making a family and domestic violence protection order;
 - (e) the definition of 'family and domestic violence' and 'a family and domestic relationship';
 - (f) all court processes dealing with applications for and hearings of family and domestic violence protection orders including applications for variation or cancellation of such orders;
 - (g) police powers of investigation and responsibilities in relation to family and domestic violence;
 - (h) police orders;
 - (i) provisions dealing with the making of family and domestic violence protection orders during other proceedings;
 - (j) provisions dealing with the provision of information to courts in relation to applications for and hearings of family and domestic violence protection orders; and
 - (k) that the legislation be reviewed after a period of five years has elapsed since its introduction.
2. That the provisions of the *Criminal Code* (WA), that refer to the definition of a family and domestic relationship for the purpose 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.
3. That, as part of the process of drafting the Family and Domestic Violence Protection Order Bill, consideration be given to all of the current provisions of the *Restraining Orders Act 1997* (WA) to ensure that the new legislation contains all necessary procedural and process provisions.
4. That consequential amendments be made to the *Restraining Orders Act 1997* (WA) to ensure that the current provisions under that legislation that exclusively concern family and domestic violence matters are repealed.

RECOMMENDATION 2

[PAGE 30]

Objects clause for the new Family and Domestic Violence Protection Order Act

That the new Family and Domestic Violence Protection Order Act include an objects clause which provides that the objects of the legislation are:

- (a) to maximise safety for children and adults who have experienced or are at risk of family and domestic violence;
- (b) to prevent and reduce the incidence and consequences of family and domestic violence to the greatest extent possible;
- (c) to prevent and reduce the exposure of children to family and domestic violence to the greatest extent possible; and
- (d) to promote the accountability of perpetrators of family and domestic violence for their actions.

Legislative recognition of the key features of and statements about family and domestic violence

That the new Family and Domestic Violence Protection Order Act contain a provision that states that in enacting the Act, Parliament recognises that:

- (a) family and domestic violence is a violation of human rights and unacceptable in any community or culture;
- (b) 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;
- (c) family and domestic violence extends beyond physical and sexual abuse and may involve a range of intimidating, coercive and controlling behaviours that adversely affect a person's safety or wellbeing or cause a person to reasonably apprehend that his or her safety or wellbeing (or the safety or wellbeing of another person) will be adversely affected;
- (d) family and domestic violence often involves an overt or subtle exploitation of a power imbalance and commonly involves an ongoing pattern of coercive or controlling behaviour;
- (e) family and domestic violence may escalate in frequency and severity both during and after separation;
- (f) family and domestic violence is underreported and there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;
- (g) not all victims of family and domestic violence wish to end their relationships – some simply want the violence to stop;
- (h) children who are exposed to the effects of family and domestic violence are particularly vulnerable and exposure to family and domestic violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing; and
- (i) particular vulnerable groups may experience and understand family and domestic violence differently from other groups, may have different needs 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; people from rural, regional and remote locations; and people with disability.

RECOMMENDATION 4**Principles**

That the new Family and Domestic Violence Protection Order Act include a provision stating that in performing a function under this Act, a person, court or body is to have regard to the following principles:

- (a) ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) that the best interests of children is a primary consideration;
- (d) that perpetrators are solely responsible for their use of violence and its impact on others and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) that the special and different needs of perpetrators who are children should be taken into account;
- (f) 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
- (g) that in order to encourage victims to report family and domestic violence and seek help, the justice system should treat victims with respect and endeavour to reduce the degree to which victims are subjected to re-victimisation or re-traumatisation.

Definition of family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide:

1. That **family and domestic violence** means any of the following conduct committed by a person (the first person) towards another person (the second person) with whom he or she is in a family and domestic relationship:
 - (a) physical or sexual abuse;
 - (b) damaging the second person's property, including injuring or causing the death of an animal;
 - (c) pursuing the second person or another person, or causing the second person or another person to be pursued —
 - (i) with intent to intimidate the second person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the second person;
 - (d) behaving in a manner that:
 - (i) intimidates, coerces or controls the second person or is likely to intimidate, coerce or control a person in the second person's circumstances; and
 - (ii) adversely affects the safety or wellbeing of the second person or is likely to cause a person in the second person's circumstances to reasonably apprehend that his or her safety or wellbeing, or the safety or wellbeing of another person, will be adversely affected;
 - (e) if the second person is a child, committing family and domestic violence against another person to which the child is exposed; or
 - (f) threatening to engage in any behaviour that is included in (a) to (e) above, or causing a third person to engage in behaviour that is included in (a) to (e) above.
2. That for the purposes of 1(a) above:
 - (a) **physical abuse** means assaulting a person; causing any bodily harm or injury to a person; depriving a person of his or her liberty; and kidnapping a person; and
 - (b) **sexual abuse** means sexually penetrating a person without his or her consent; indecently assaulting a person; indecently dealing with a person; committing a sexual offence against a child; and sexual coercion.
3. That for the purposes of 1(b) above, **damaging** means conduct that constitutes an offence under ss 444 or 445 of the *Criminal Code* (WA).
4. That for the purposes of 1(b) above, **property of the second person** includes the property of the second person, the property of another person that is situated in premises in which the second person lives or works, and property of another person that is being used by the second person.
5. That for the purpose of 1(c) and (d) above, **intimidate** and **pursue** have the same meaning as in s 338D of the *Criminal Code* (WA)
6. That for the purpose of 1(e) above, a child is **exposed** to domestic and family violence if the child sees or hears or is otherwise exposed to any of the effects of that behaviour.

Definition of a family and domestic relationship

That the new Family and Domestic Violence Protection Order Act define **a family and domestic relationship** as 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 –
 - (i) who ordinarily resides, or resided, with the other person; or
 - (ii) who 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; or
- (g) where one of those persons is the former spouse or former de facto partner of the other person’s current spouse or current de facto partner.

POLICE RESPONSE TO FAMILY AND DOMESTIC VIOLENCE

Recording of reported family and domestic violence

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) The Western Australia Police must formally record every incident of family and domestic violence that is reported to the Western Australia Police by any person who alleges that he or she has been subject to family and domestic violence.
 - (b) That the person who reports the incident of family and domestic violence must be provided with a report number for subsequent verification at the time of making the report.
2. That the Western Australia Police collect and maintain accessible data in relation to the number of recorded reports of an incident of family and domestic violence as per 1 above.

Improved Western Australia Police policy in relation to the investigation of and response to family and domestic violence

That the Western Australia Police update and expand their policy on family and domestic violence (including the addition of relevant information concerning vulnerable groups) and ensure that this policy is publicly available on the police website.

Enhancing understanding about the content and context of breaches of protection orders

That where an accused is charged with breaching a family and domestic violence protection order or police order by communicating with the person protected by the order (including by electronic communication, by telephone, in writing or in person), the Western Australia Police ensure that sufficient information to demonstrate the content and context of that communication is included in the police brief for prosecution as early as possible.

RECOMMENDATION 10

[PAGES 70–71]

Police powers of entry in relation to family and domestic violence

1. That s 62D(3) of the *Restraining Orders Act 1997* (WA) be amended to provide that a police officer making an 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 in the premises; and
 - (ii) a person has committed, or is committing, an act of family and domestic violence against another person.
2. That the Western Australia Police review its use of s 62B of the *Restraining Orders Act 1997* (WA) including consideration of the proportion of entries that are made with a senior officer's approval, the proportion of entries that are made without a senior officer's approval (and the reasons for proceeding without such approval), and the extent to which s 63B of the *Restraining Orders Act 1997* (WA) is utilised for the purpose of investigating family and domestic violence.
3. That sections 62A–62D (as amended or reformed) be removed from the *Restraining Orders Act 1997* (WA) and be included in the new Family and Domestic Violence Protection Order Act.

RECOMMENDATION 11

[PAGE 73]

Police training

1. That the Western Australia Police ensure that it provides comprehensive and ongoing family and domestic violence training to all police officers (including police recruits, frontline police officers, police officers working in management and administrative roles, and police prosecutors).
2. That the training include contemporary understandings of the nature and dynamics of family and domestic violence; and specific issues in relation to family and domestic violence for Aboriginal communities, multicultural communities, persons with disability, children who are exposed to family and domestic violence and children who are perpetrators of family and domestic violence.
3. That the training be delivered by members of the Western Australia Police with expertise in family and domestic violence as well as experts from government and non-government agencies.
4. That the Western Australia Police establish a multi-agency stakeholder committee (comprised of relevant experts from government and non-government agencies) to regularly review the content of the training and to monitor its effectiveness.

FAMILY AND DOMESTIC VIOLENCE PROTECTION ORDERS

RECOMMENDATION 12

[PAGE 77]

Grounds for making a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that a court may make a family and domestic violence protection order if it is satisfied that –

- (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

unless the court is satisfied that there are special circumstances which make it inappropriate for a family and domestic violence protection order to be made.

Relevant factors for consideration when determining whether to make a family and domestic violence protection order and the terms of a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a family and domestic violence protection order and when considering the terms of a family and domestic violence protection order, the court is to have regard to:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) 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;
- (h) hardship that may be caused to the respondent if the order is made;
- (i) the accommodation needs of the person seeking to be protected and the respondent;
- (j) the circumstances of the relationship between the parties, including whether the parties intend to remain living together or remain in contact and the wishes of the person seeking to be protected in this regard;
- (k) any family orders;
- (l) other current legal proceedings involving the respondent or the person seeking to be protected;
- (m) any criminal record of the respondent and the person seeking to be protected;
- (n) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and
- (o) any other matter the court considers relevant.

RECOMMENDATION 14**Grounds for making a family and domestic violence protection for the benefit of a child who has been exposed to family and domestic violence**

That the new Family and Domestic Violence Protection Order Act provide that, in addition to the grounds for making a family and domestic violence protection order (as set out in Recommendation 12 above), a family and domestic violence protection order may also be made for the benefit of a child if the court is satisfied that a person with whom the child is in a family and domestic relationship has reasonable grounds for apprehending that the child will be exposed to family and domestic violence committed by the respondent, unless the court is satisfied that there are special circumstances which make it inappropriate for the family and domestic violence protection order to be made for the benefit of the child.

RECOMMENDATION 15

[PAGE 82]

Review of the circumstances of making interim and final family and domestic violence protection orders

That the Department of the Attorney General conduct a review of the circumstances of making interim and final family and domestic violence protection orders including consideration of:

- (a) the number of interim family and domestic violence protection orders made in comparison to the number of final family and domestic violence protection orders made in a 12-month period;
- (b) the reasons why a final family and domestic violence protection order was not made after an interim family and domestic violence protection order had already been made; and
- (c) the circumstances of and reasons for applications for final orders being made without an application for an interim order first being made.

RECOMMENDATION 16

[PAGE 84]

Relevant factors for consideration when determining whether to make a police order and the terms of a police order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a police order and when considering the terms of a police order, a police officer is to have regard to the following:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring that the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) hardship that may be caused if the order is made;
- (h) the accommodation needs of the persons involved;
- (i) any similar behaviour by any person involved, whether in relation to the same person or otherwise; and
- (j) any other matter the police officer considers relevant.

RECOMMENDATION 17

[PAGE 87]

Explanation of police orders

1. That the new Family and Domestic Violence Protection Order Act provide that, if a person to whom an explanation is to be given by a police officer in relation to a police order does not readily understand English, the officer should, as far as practicable, arrange for a trained interpreter to provide the explanation. If it is not practicable for the officer to arrange for a trained interpreter to provide the explanation the officer should, as far as practicable, cause a person above the age of 18 years to give the explanation to the person in a way that the person is likely to understand.
2. That the new Family and Domestic Violence Protection Order Act provide that if a police officer is required to give a person an explanation in relation to a police order and the police officer is not satisfied that the person understood the explanation because of age, disability or other factors, the officer is, as far as practicable, to arrange for an appropriate support person who is over the age of 18 years to provide the explanation.
3. That the Western Australia Police liaise with the Disability Services Commission and other relevant agencies with a view to establishing a panel of support persons who may be able to assist in providing explanations of police orders.

RECOMMENDATION 18

[PAGE 88]

Service of police orders

That the new Family and Domestic Violence Protection Order Act 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.

RECOMMENDATION 19

[PAGE 89]

Applications for family and domestic violence protection orders by children

That the new Family and Domestic Violence Protection Order Act expressly provide that a child is permitted to apply for a family and domestic violence protection order in his or her own right.

RECOMMENDATION 20

[PAGE 91]

Sufficient funding to the Western Australia Police to enable police officers to make applications for family and domestic violence protection orders

That the Western Australian government provide sufficient resources to the Western Australia Police to ensure that police officers are able to actively and regularly make applications for family and domestic violence protection orders on behalf of a person seeking to be protected.

RECOMMENDATION 21

[PAGES 92–93]

Extending orders for the benefit of other persons

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) When making a family and domestic violence protection 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 prescribe form.
 - (b) The court may only extend a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order if it is satisfied of the applicable grounds for making a family and domestic violence in relation to that named person.

- (c) If a court extends a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order, the court is to ensure that the order clearly stipulates which conditions are applicable to the person protected and which conditions are applicable to the named person.
2. That the Department of the Attorney General ensure that accurate data is collected and maintained in relation to the number and categories of people who are protected by a family and domestic violence protection order by virtue of being a named person under 1 above.

RECOMMENDATION 22

[PAGE 94]

Service of family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) A family and domestic violence protection order is to be served personally on the person bound by the order as soon as possible.
- (b) If a family and domestic violence protection order has not been served on the person bound within 72 hours, the Western Australia Police are to apply to a registrar of the court within 24 hours for oral service to be authorised and the registrar may authorise oral service if satisfied that reasonable efforts have been made to serve the order personally.

RECOMMENDATION 23

[PAGE 95]

Notification of service to person protected by the order

1. That the new Family and Domestic Violence Protection Order Act provide that the Western Australia Police are required to make reasonable efforts to notify the person protected by a family and domestic violence protection order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the family and domestic violence protection order has been served on the person bound.
2. That forms for an application for a family and domestic violence protection order include a separate document to be completed by the applicant (if he or she wishes) indicating the applicant's preferred contact details for the purpose of being notified that the person bound by a family and domestic violence protection order has been served.

RECOMMENDATION 24

[PAGE 96]

Revised forms

1. That the Department of the Attorney General amend and update the application form and form of affidavit for family and domestic violence protection orders to incorporate a broader range of questions or headings based upon the recommended new definition of family and domestic violence and to enable the applicant to clearly specify the conditions sought under the family and domestic violence protection order.
2. That, for the purpose of 1 above, the Department of the Attorney General establish a committee of relevant stakeholders to assist in the development of the new forms.
3. After the updated forms have been developed the Department of the Attorney General, in conjunction with the committee established under 2 above, consider whether these updated forms should be prescribed forms under the applicable regulations or whether they should be used on a pilot basis and then subsequently reviewed.

RECOMMENDATION 25

[PAGE 98]

Mention hearings for family and domestic violence protection orders

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) Upon the registrar receiving the endorsed copy of an interim family and domestic violence protection order indicating that the respondent objects to the final family and domestic violence protection order, the registrar is to promptly fix a mention date that is 14 days after receipt of the objection or as soon as possible thereafter.
 - (b) That notice of the mention hearing date must be given to the parties at least two days prior to the hearing if the notice is given personally or at least five days prior to the hearing if the notice is given by post.
2. That the forms provided to the parties indicate that if the respondent objects a mention date will be set 14 days after the registrar receives notice of the objection or as soon as possible thereafter.

RECOMMENDATION 26

[PAGE 98]

Update forms and information sheets for applicants and respondents

That the Department of the Attorney General in conjunction with the committee (as established under Recommendation 24.2 above) revise and update the information sheets and forms provided for applicants and respondents to family and domestic violence protection orders to ensure that there is adequate information available in relation to the contents and consequences of family and domestic violence protection and the rights of the parties in relation thereto, and to ensure that there is accessible information for parties from culturally and linguistically diverse communities, people with disability and children.

RECOMMENDATION 27

[PAGE 99]

Priority and specified listing times for family and domestic violence protection order hearings

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) ex parte interim family and domestic violence protection order hearings should be heard, as far as is practicable and just, as a matter of priority and wherever possible on the same day as the application is made; and
- (b) wherever possible, parties to family and domestic violence protection order hearings should be given a specified time for attendance.

RECOMMENDATION 28

[PAGE 100]

Basis of objection to final family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, if the respondent objects to the making of a final family and domestic violence protection order, the respondent is required to indicate in a form prescribed or approved by the court whether he or she objects to the making of the final order because he or she:

- (a) disputes that the grounds for making a family and domestic violence protection order can be established;
- (b) contends that there are special circumstances that make an order inappropriate, specifying the nature of the special circumstances; and/or
- (c) contends for any other reason that a final order in the same terms as the interim order should not be made, specifying the reason/s.

Information sessions and advice for respondents to family and domestic violence protection orders

That the Western Australian government investigate and consider options for providing information sessions and access to general legal advice to respondents to family and domestic violence protection order applications at all court locations across the state.

RECOMMENDATION 30

[PAGES 106–107]

Provision of information to the court in family and domestic violence protection order matters

1. That the Department of the Attorney General ensure that all Western Australian courts that have jurisdiction to determine a family and domestic violence protection order are able to access the relevant databases to check whether there are existing or past family and domestic violence protection orders (or violence restraining orders) or pending family and domestic violence protection order applications (or violence restraining order applications) between the parties to a family and domestic violence protection order application.
2. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access the records of any court with jurisdiction to make a family and domestic violence protection order for the purpose of determining if there are any existing family and domestic violence protection orders (or similar orders under the *Restraining Orders Act 1997* (WA)) between the person seeking to be protected and the respondent, and whether there is any existing application for a family and domestic violence protection made by either the person seeking to be protected or the respondent.
3. That the Department of the Attorney General develop an IT process that enables all courts that have jurisdiction to determine family and domestic violence protection order applications to access the records of the Family Court of Western Australia to determine if there are existing family orders or proceedings involving the parties to the application.
4. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access Family Court records in relation to the existence and contents of family orders and the existence of pending Family Court proceedings between the person seeking to be protected and the respondent.
5. That the Department of the Attorney General and the Western Australia Police investigate the feasibility of developing an IT system that enables a court determining an application for a family and domestic violence protection order to access the Western Australia Police criminal history of the respondent and the person seeking to be protected.
6. That the new Family and Domestic Violence Protection Act provide that any information obtained by a court determining an application for a family and domestic violence protection order pursuant to 1–5 above be disclosed to the applicant (in the case of an interim protection order hearing) and the parties (in the case of an opposed final protection order hearing) but also that the court need not comply with the requirement to disclose the information if disclosure would place a party (or a child of either party) at an increased risk of family and domestic violence or would otherwise be contrary to the public interest. Further, the legislation provide that if the court determines that disclosure would place a party at an increased risk of family and domestic violence the court is not entitled to rely on the information provided.
7. That the new Family and Domestic Violence Protection Act provide that a court determining a family and domestic violence protection order application may request from a government agency any of the following information:
 - (a) The criminal record for both the respondent and the person seeking to be protected.
 - (b) Existing and past family and domestic violence protection orders and violence restraining orders made against or in favour of the respondent 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 respondent and the person seeking to be protected.
 - (e) Whether the Department for Child Protection and Family Support has had previous involvement with the person seeking to be protected or the 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
8. That the new Family and Domestic Violence Protection Order Act provide that information provided in response to a request, as set out in 7(a), (b), (c), (d) and (f) above, may be provided to the court in the form of a certificate signed by an officer (of a level to be specified) of the relevant government agency and the certificate is prima facie evidence of the matters specified in it, without proof of the signature of the person purporting to have signed it or proof that the purported signatory was of an officer of the specified level.
9. That the new Family and Domestic Violence Protection Order Act provide that for the purposes of determining a family and domestic violence protection order application the strict rules of evidence do not apply.

RECOMMENDATION 31

[PAGE 108]

Duration of final family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) a final family and domestic violence protection order remains in force for the period specified in the order or, if no period is specified, for two years;
- (b) a final family and domestic violence protection order may be made for a period of more than two years if the court is satisfied that there are special reasons for doing so; and
- (c) a final family and domestic violence protection order made against a child is to have a duration of six months or less unless the order is made automatically upon conviction for a specified offence (as per Recommendation 57 below).

RECOMMENDATION 32

[PAGE 109]

Standard conditions not to commit family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide that every family and domestic violence protection order include the following condition: that the person bound by the order is not to commit family and domestic violence against a person protected by the order.

RECOMMENDATION 33

[PAGE 109]

Review of family and domestic violence protection orders and the *Residential Tenancies Act 1987* (WA)

That the Department of Commerce undertake a review of the interaction of the *Residential Tenancies Act 1987* (WA) and family and domestic violence protection orders to consider whether any reforms are necessary or appropriate to accommodate the circumstances of tenants who may be subject to or protected by a family and domestic violence protection order.

Application to vary or cancel a family and domestic violence protection order by person protected by the order

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) A person protected by a family and domestic violence protection order may apply for a variation or cancellation of the order and may request that the application be heard *ex parte*.
- (b) Before making an order that varies or cancels a family and domestic violence protection order, the court must ensure that the person protected by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).
- (c) That a court may refuse to vary or cancel the family and domestic violence protection order, may vary the order in a way that differs from the variation sought or may vary the order instead of cancelling it, if the court is satisfied that it is necessary to do so to ensure the safety of a person protected by the order.
- (d) That a court must give a person bound by a family and domestic violence order a reasonable opportunity to be heard before varying an order if the order as proposed to be varied would be more restrictive on the person bound.
- (e) When determining whether to vary or cancel an order upon an application by a person protected by the order the court is to have regard to:
 - (i) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (ii) any current contact between the person protected and the person bound by the order;
 - (iii) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent;
 - (iv) the safety of the protected person and any other person who is protected by the order; and
 - (v) if the order is proposed to be varied and the order, as varied, would be more restrictive on the person bound, the matters referred to in Recommendation 13 above.

RECOMMENDATION 35**Application to vary a family and domestic violence protection order by person bound by the order**

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) The person bound by an interim family and domestic violence protection order may apply to vary the order on the mention hearing date that is listed 14 days after the registrar receives the endorsement copy of the family and domestic violence protection order (or as soon as possible thereafter), indicating that the respondent objects to a final order being made (as recommended by Recommendation 25).
- (b) On the mention hearing date, the court may vary the interim order if the variation sought is consented to by the person protected by the order so long as the person protected by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).
- (c) On the mention hearing date, the court may refuse to vary the family and domestic violence protection order or may vary the order in a way that differs from the variation sought, if the court is satisfied that it is necessary to do so to ensure the safety of person protected by the order (or any other person protected by the order).
- (d) In determining under (b) above whether to vary the family and domestic violence protection order, the court is to have regard to:

- (i) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (ii) any current contact between the person protected and the person bound by the order;
 - (iii) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent; and
 - (iv) the safety of the protected person and any other person who is protected by the order.
- (e) On the mention hearing date, the court may determine whether to grant leave for the person bound by the order to continue with the application to vary the order and leave is to be granted if the court is satisfied that there is evidence to support a claim that the restraints imposed by the order are causing the person bound by the order serious and unnecessary hardship and that it is appropriate that the application is heard as a matter of urgency.
- (f) If leave is granted to the person bound by the order, the court may deal with the application to vary the interim order on this date if the person protected by the order consents to the court dealing with the application on this date. If leave is granted, the court is to have regard to the matters set out in Recommendation 13 above when determining whether to vary the order.

RECOMMENDATION 36

[PAGE 113]

Variation or cancellation of a family and domestic violence protection order on the courts own motion or on an application by either party to the proceedings

1. That the new Family and Domestic Violence Protection Order Act provide that a court exercising criminal jurisdiction may vary or cancel a family and domestic violence protection order on its own motion or upon an application by either party to the proceedings without an application for a variation or cancellation being lodged by the person protected by the order or the person bound by the order, provided that both the person protected by the order and the person bound by the order have been provided with an opportunity to be heard.
2. That the new Family and Domestic Violence Protection Order Act provide that when determining whether to vary or cancel a family and domestic violence protection order, the court is required have regard to the matters specified in Recommendations 13 and 35(d) above.

RECOMMENDATION 37

[PAGE 117]

Penalty for repeated breach of family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act include a provision modelled on s 61A of the *Restraining Orders Act 1997* (WA) with the only substantive change being that the relevant offences for which the presumptive sentence of detention or imprisonment applies includes the offence of aggravated stalking where the circumstances of aggravation are that the conduct of the offender in committing the offence constituted a breach of a family and domestic violence protection order or a police order.

RECOMMENDATION 38

[PAGE 118]

Mitigation in sentencing for breaches of family and domestic violence protection orders and police orders

That s 61B(2) of the *Restraining Orders Act 1997* (WA) be repealed and the new Family and Domestic Violence Protection Order Act provide that circumstances where the person protected by a family and domestic violence protection order or police order has actively invited or encouraged the person bound to breach the order may 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).

RECOMMENDATION 39

[PAGE 120]

Defence for breaching a family and domestic violence protection order

1. That the new Family and Domestic Violence Protection Order Act provide that contact or communication that occurs between a person bound by an order and the person protected by an order that is necessary to comply with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a family and domestic violence protection so long as the person bound by the order does not engage in any conduct that constitutes family and domestic violence.
2. That the Western Australia government ensure that adequate training in relation to family and domestic violence is provided to court security staff (including staff employed by private contractors).

RECOMMENDATION 40

[PAGE 123]

Family and Domestic Violence Protection Undertakings

That the new Family and Domestic Violence Protection Act provide for the making of family and domestic violence protection undertakings that have the following characteristics:

- (a) A family and domestic violence protection undertaking is to take effect upon making of an order of the court and is to be specifically registered.
- (b) The court approving the family and domestic violence protection undertaking is to provide a copy of the undertaking to the Western Australia Police.
- (c) Failure to comply with the conditions of the family and domestic violence protection undertaking 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 in the appropriate circumstances) and non-compliance can attract specified civil enforcement sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
- (d) A court is to be satisfied that a person has failed to comply with the conditions of the family and domestic violence protection undertaking on the balance of probabilities.
- (e) A finding that a person has failed to comply with the conditions of a family and domestic violence protection undertaking is sufficient evidence to satisfy a court that the grounds for a family and domestic violence protection order have been established, unless there are exceptional circumstances to decide otherwise.
- (f) A family and domestic violence protection undertaking can only be approved by a court if the applicant for a family and domestic violence protection order and the respondent have been provided with the opportunity to obtain independent legal advice.
- (g) A family and domestic violence protection undertaking may include any requirements to be complied with by the respondent that a court could impose if it made a family and domestic violence protection order.

RECOMMENDATION 41

[PAGE 124]

Data collection

That if the recommendations in this Report are implemented, the Department of the Attorney General consider appropriate and reliable ways to ensure that full and accurate data is recorded in an accessible format in regards to family and domestic violence protection orders including (but not limited to) the number of applications made for interim and final orders and the number of such orders made; the circumstances to explain why interim orders are not converted into final orders; the number of family and domestic violence protection undertakings made; and the characteristics (eg, age, gender, ethnicity and disability) of applicants and respondents to family and domestic violence protection order applications.

RECOMMENDATION 42

[PAGE 130]

Aggravating circumstances for family and domestic violence related offences

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 ss 338A–C, and assault causing death under s 281, if the offence is committed in circumstances of aggravation as defined under s 221.
3. That on the basis of the addition of circumstances of aggravation to additional offences as recommended in 2 above, 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*.
4. That s 63B of the *Restraining Orders Act 1997* (WA) (as amended by this recommendation) be transferred from the *Restraining Orders Act 1997* (WA) and inserted into the *Sentencing Act 1995* (WA).

RECOMMENDATION 43

[PAGE 131]

Recording of circumstances of aggravation

That the Western Australia Police develop an appropriate system to ensure that the existence of a family and domestic relationship between the offender and the victim for an offence committed in circumstances of aggravation is recorded in every case on the Statement of Material Facts, the Prosecution Notice and the offender's Criminal Record.

RECOMMENDATION 44

[PAGE 132]

Assault causing death

That s 281 of the *Criminal Code* (WA) be amended to provide that if the offence of assault causing death is committed in circumstances of aggravation the maximum penalty for the offence is 20 years' imprisonment.

RECOMMENDATION 45

[PAGE 133]

Review of cyberstalking and other forms of threatening or abusive behaviour committed via electronic means

That the Western Australian government undertake a review of the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of threatening or abusive behaviour that are undertaken by electronic means.

RECOMMENDATION 46

[PAGE 135]

Concurrent protective bail conditions and family and domestic violence protection orders

That, if Recommendation 57 below is not implemented, 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 family and domestic violence protection order, or protective bail conditions, or both.

RECOMMENDATION 47

[PAGE 135]

Consistency between protective bail conditions and family and domestic violence protection orders

That the *Bail Act 1982* (WA) be amended to provide that before setting or amending protective bail conditions for an offence where the accused and the victim are in a family and domestic relationship (as defined under the new Family and Domestic Violence Protection Order Act), the judicial officer or authorised officer must consider whether there is an existing interim or final family and domestic violence protection order (where the accused is the person bound by the order and the victim is the person protected by the order). If so, the judicial officer or authorised officer is to ensure that the conditions of bail and the conditions of the family and domestic violence protection order are compatible unless to do so would pose a risk to the safety of the victim or would pose a risk to the safety of a child who is also protected by the family and domestic violence protection order.

RECOMMENDATION 48

[PAGE 136]

Repeal of s 16A(3) of the *Bail Act 1982* (WA)

That s 16A(3) of the *Bail Act 1982* (WA) be repealed.

RECOMMENDATION 49

[PAGE 137]

Funding for bail risk assessment reports

1. That funding be provided to the Family Violence Service (and other relevant agencies) to enable bail risk assessment reports to be prepared for the purpose of considering bail conditions for all family and domestic violence related 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).
2. That the use and effectiveness of bail risk assessment reports be monitored on an ongoing basis.

RECOMMENDATION 50

[PAGE 138]

Deferral of bail to consider conditions to protect a victim of family and domestic violence

That section 9 of the *Bail Act 1982* (WA) be amended to provide that a judicial officer or authorised officer may defer consideration of a case for bail for a period not exceeding 30 days if he or she thinks it is necessary to obtain more information for the purpose of ascertaining what, if any, conditions should be imposed to protect a victim of a family and domestic violence related offence.

RECOMMENDATION 51

[PAGE 139]

National criminal records

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every offence includes the accused's national criminal record as soon as is practicable after the person is charged.

RECOMMENDATION 52

[PAGE 141]

Review of programs for perpetrators of family and domestic violence

That the Department of the Attorney General, the Department of Corrective Services and the Department for Child Protection and Family Support undertake a review of the availability and effectiveness of programs for perpetrators of family and domestic violence across Western Australia including but not limited to:

- (a) consideration of the availability and effectiveness of such programs for Aboriginal perpetrators, perpetrators with disability, perpetrators from culturally and linguistically diverse communities, perpetrators in remote areas and perpetrators who are children;
- (b) consideration of the effectiveness of programs delivered as part of the metropolitan Family Violence Courts and the Barndimalgu Aboriginal Family Violence Court; and
- (c) consideration of the availability and effectiveness of such programs delivered in prisons and detention centres and as part of a community-based sentencing disposition.

RECOMMENDATION 53

[PAGE 142]

Review of sentencing options under the *Sentencing Act 1995 (WA)*

That when responding to the review of the *Sentencing Act 1995 (WA)* the Western Australian government specifically consider whether the recommendations of that review provide adequate options for family and domestic violence offenders and whether any additional reforms are required to ensure that the available sentencing options are appropriate.

RECOMMENDATION 54

[PAGE 144]

Access to records of family and domestic violence protection orders

1. That the Department of the Attorney General develop an IT process that enables all family and domestic violence protection orders to be included in one database and accessible by the Prisoners Review Board.
2. That the Department of the Attorney General liaise with the Department of Corrective Services in order to consider the feasibility of enabling the Department of Corrective Services to have access to the relevant database of all family and domestic violence protection orders.

RECOMMENDATION 55

[PAGE 145]

GPS tracking for family and domestic violence offenders and persons bound by family and domestic violence protection orders

1. That the Department of Corrective Services conduct a review of the effectiveness of the current GPS tracking system for dangerous sex offenders (including consideration of the number of offenders subject to GPS tracking, the cost of GPS tracking per offender, practical issues such as the incidence of deliberate and accidental interference with the electronic devices, the circumstances in which alerts are received by the monitoring unit, the effectiveness and timeliness of the response to those alerts, and any other relevant matter).
2. That following that review the Department consider whether the system should be extended to family and domestic violence offenders and/or persons bound by family and domestic violence protection orders and, if so, provide a reasonable opportunity for members of the public and interested stakeholders to provide their views on any such proposal.

RECOMMENDATION 56

[PAGE 147]

Automatic lifetime violence restraining orders

1. 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)*.
2. That s 63A of the *Restraining Orders Act 1997 (WA)* be amended to provide that if the offender and the victim are in a family and domestic relationship the court is to make a family and domestic violence protection order instead of a violence restraining order.

Making of interim and final family and domestic violence protection orders during criminal proceedings

In addition to s 63A of the *Restraining Orders Act 1997* (WA) as amended by Recommendation 56 above, the new Family and Domestic Violence Protection Order Act provide that:

1. If a person is charged with a specified offence, the court must consider whether it is appropriate to make an interim family and domestic violence protection order against the accused and for the protection of the alleged victim until such time as the charge is determined.
 - (a) The court may make an interim family and domestic violence protection order under 1 above:
 - (i) if it is satisfied that there are grounds for making a family and domestic violence protection order (as set out under Recommendation 12 of this Report);
 - (ii) if it has considered the factors that are relevant (as set out under Recommendation 13 of this Report); and
 - (iii) the person who would be bound by the order and the person who would be protected by the order have been given a reasonable opportunity to be heard.
 - (b) The court is not to make an interim family and domestic violence protection order if the person who would be protected by the order objects to it being made.
2. If a person is convicted of a specified offence, the court is to make a final family and domestic violence protection order.
 - (a) If the offence is a violent personal offence as currently defined under s 63A (or as defined under Recommendation 56 above) the family and domestic violence protection order is to be imposed for life.
 - (b) In any other case, the court has discretion to determine the duration of the order; however, the court is required to ensure that the duration of the order is for a sufficient period in excess of the period of time that the offender will serve in custody under any sentence of imprisonment imposed for the offence.
 - (c) A court is not to make a final family and domestic violence protection order under (b) above unless the person who would be bound by the order and the person who would be protected by the order have been provided with a reasonable opportunity to be heard in relation to the making of the order.
 - (d) A court is not to make a final family and domestic violence protection order if the person who would be protected by the order objects to it being made.
 - (e) The court is not to make a final family and domestic violence protection order if it is satisfied that the order is unnecessary for the protection of the safety of the person who would be protected by the order.
3. A specified offence be defined as one of the following offences where the accused and the victim are in a family and domestic relationship as defined under the Act:
 - (a) the offences under the following sections of the *Criminal Code*:
 - (i) s 283 (attempt to kill)
 - (ii) s 292 (disabling in order to commit an indictable offence)
 - (iii) s 293 (stupefying in order to commit an indictable offence)
 - (iv) s 297 (grievous bodily harm)
 - (v) s 294 (acts intended to caused grievous bodily harm)
 - (vi) s 320 (sexual offences against children under 13 years)
 - (vii) s 321 (sexual offences against children of or over 13 years but under 16 years)
 - (viii) s 321A (persistent sexual conduct)
 - (ix) s 329 (sexual offences by relatives)

- (x) s 330 (sexual offences against incapable persons)
 - (xi) s 325 (sexual penetration without consent)
 - (xii) s 326 (aggravated sexual penetration without consent)
 - (xiii) s 327 (sexual coercion)
 - (xiv) s 328 (aggravated sexual coercion)
 - (xv) s 332 (kidnapping)
 - (xvi) s 333 (deprivation of liberty)
 - (xvii) ss 338A–C (threats)
 - (xviii) s 338E (stalking)
 - (xix) s 444 (criminal damage)
- (b) any other offence under Part V of the *Criminal Code* where the offender is sentenced to a term of immediate imprisonment.
4. A court exercising criminal jurisdiction may make a family and domestic violence protection order for any other offence if satisfied that the grounds for making the order are established and the person who would be bound by and the person who would be protected by the order have been provided with a reasonable opportunity to be heard. The court is not to make a family and domestic violence protection order under this provision if the person who would be protected by the order objects to it being made.

RECOMMENDATION 58

[PAGE 153]

Special witness provisions for family and domestic violence matters

That the *Evidence Act 1906* (WA) and the *Restraining Orders Regulations 1997* (WA) be amended to provide that victims of family and domestic violence related offences, applicants in contested family and domestic violence protection order proceedings and child witnesses in either proceedings be deemed to have special witness status unless the court is satisfied that the provision of special arrangements for the giving of evidence is unnecessary in the circumstances.

SPECIALIST FAMILY VIOLENCE COURTS

RECOMMENDATION 59

[PAGE 156]

Western Australia Police policy on listing family and domestic violence related offences

1. That the Western Australia Police Prosecution Policy 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 this policy be communicated within the Western Australia Police by an agency wide electronic broadcast and included in any family and domestic violence training programs.

RECOMMENDATION 60

[PAGE 157]

Deferral of sentencing

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.

INTERACTION OF VIOLENCE RESTRAINING ORDER PROCEEDINGS WITH THE FAMILY COURT

RECOMMENDATION 61

[PAGE 163]

Information sharing between the Magistrates Court, the Children's Court and the Family Court of Western Australia

1. That the Department of the Attorney General develop (or maintain) an IT process that enables the Family Court of Western Australia to access the records of the Magistrates Court and the Children's Court to determine if named parties are subject to family and domestic violence protection orders and 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.

RECOMMENDATION 62

[PAGE 165]

Evaluation of expanding the jurisdiction of the Family Court to deal with family and domestic violence protection orders

That the Western Australian government undertake a comprehensive evaluation of the option of expanding the jurisdiction of the Family Court to deal with family and domestic violence protection cases where the parties are also involved in Family Court parenting order proceedings. Further, this evaluation should consider the different types of cases that may be eligible for transfer from the Magistrates Court to the Family Court, and analyse the economic cost and benefits of each option as well as consideration of other benefits to the parties and other stakeholders.

VICTIM RIGHTS

RECOMMENDATION 63

[PAGE 167]

Assistance for victims in relation to complaints

That the Department of the Attorney General consider expanding the functions of the Commissioner for Victims of Crime to provide assistance to victims wishing to lodge a complaint against a government agency and to monitor the trends in complaints made against government agencies with a view to making recommendations for improvement in the way in which government agencies respond to and deal with victims of crime.

RECOMMENDATION 64

[PAGE 169]

Definition of a victim of crime

1. That the Department of the Attorney General consider expanding the definition of a victim of crime under the *Victims of Crime Act 1994* (WA) to include the following categories:
 - (a) A parent, guardian or carer (including equivalent relationships under Aboriginal customary law) of a child (a person under the age of 18 years) who is a victim of a family and domestic violence related offence;
 - (b) A child who has been exposed to a family and domestic violence related offence committed against a person with whom that child is in a family and domestic relationship; or
 - (c) Where an offence results in a permanent incapacitation, any member of the immediate family of the deceased.
2. That the Department of the Attorney General in consultation with other relevant agencies develop guidelines to assist agencies in the interpretation of the meaning of the term 'immediate family' under s 2 of the *Victims of Crime Act 1994* (WA) to ensure that significant relationships under Aboriginal customary law are recognised.

RECOMMENDATION 65

[PAGE 170]

Victim Impact Statements

That the Supreme Court, District Court, Magistrates Court and Children’s Court of Western Australia review their practices in relation to the security of victim impact statements and consider updating or developing practice directions to ensure that, absent directions to the contrary, the prosecution and defence counsel’s copies of written victim impact statements are returned to the judge’s associate (or judicial support officer) immediately after the sentencing proceedings are concluded and that any electronic copies that have been provided to the prosecution or defence are deleted at the completion of the sentencing hearing.

RECOMMENDATION 66

[PAGE 171]

Eligibility for inclusion on the Victims Notification Register

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 protection order against the prisoner.

CRIMINAL INJURIES COMPENSATION

RECOMMENDATION 67

[PAGE 173]

Information in relation to criminal injuries compensation

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 and that this information be provided in accessible formats for persons from culturally and linguistically diverse communities, people with disability and children.

RECOMMENDATION 68

[PAGE 173]

Publication of Criminal Injuries Compensation data

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.

RECOMMENDATION 69

[PAGE 174]

Review of the criminal injuries compensation scheme in Western Australia

That the Western Australia government undertake a full review of how the criminal injuries compensation scheme operates in practice in relation to victims of family and domestic violence related offences.

OTHER MATTERS

RECOMMENDATION 70

[PAGE 177]

Judicial education programs

That the Western Australian government provide sufficient resources to enable the heads of jurisdiction in each Western Australian court to provide regular judicial education programs in relation to the nature and dynamics of family and domestic violence.

RECOMMENDATION 71

[PAGE 177]

Training for court staff

That the Department of the Attorney General develop and provide training programs in relation to family and domestic violence for all court staff including associates, judicial support officers, administrative staff and court security staff.

RECOMMENDATION 72

[PAGE 177]

Selection criteria for magistrates

That the Western Australian government ensure that the selection criteria for the appointment as a magistrate include as a desirable, but not essential, characteristic knowledge of the nature and dynamics of family and domestic violence and experience with legal issues concerning family and domestic violence.

RECOMMENDATION 73

[PAGE 178]

Continuing Professional Development for legal practitioners

That the Law Society of Western Australia and other relevant approved CPD providers are encouraged to ensure that CPD programs are available in relation to the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities, people with disability and children and that, wherever possible, these programs be developed and delivered by individuals and agencies with expertise in family and domestic violence.

Appendix B: List of recommendations concerning the new Family and Domestic Violence Protection Order Act

RECOMMENDATION 1

[PAGE 27]

The Family and Domestic Violence Protection Order Act

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) the objects of the Act;
 - (b) recognition of key features of family and domestic violence;
 - (c) principles;
 - (d) the grounds for making a family and domestic violence protection order;
 - (e) the definition of 'family and domestic violence' and 'a family and domestic relationship';
 - (f) all court processes dealing with applications for and hearings of family and domestic violence protection orders including applications for variation or cancellation of such orders;
 - (g) police powers of investigation and responsibilities in relation to family and domestic violence;
 - (h) police orders;
 - (i) provisions dealing with the making of family and domestic violence protection orders during other proceedings;
 - (j) provisions dealing with the provision of information to courts in relation to applications for and hearings of family and domestic violence protection orders; and
 - (k) that the legislation be reviewed after a period of five years has elapsed since its introduction.
2. That the provisions of the *Criminal Code* (WA), that refer to the definition of a family and domestic relationship for the purpose 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.
3. That, as part of the process of drafting the Family and Domestic Violence Protection Order Bill, consideration be given to all of the current provisions of the *Restraining Orders Act 1997* (WA) to ensure that the new legislation contains all necessary procedural and process provisions.
4. That consequential amendments be made to the *Restraining Orders Act 1997* (WA) to ensure that the current provisions under that legislation that exclusively concern family and domestic violence matters are repealed.

RECOMMENDATION 2

[PAGE 30]

Objects clause for the new Family and Domestic Violence Protection Order Act

That the new Family and Domestic Violence Protection Order Act include an objects clause which provides that the objects of the legislation are:

- (a) to maximise safety for children and adults who have experienced or are at risk of family and domestic violence;
- (b) to prevent and reduce the incidence and consequences of family and domestic violence to the greatest extent possible;
- (c) to prevent and reduce the exposure of children to family and domestic violence to the greatest extent possible; and
- (d) to promote the accountability of perpetrators of family and domestic violence for their actions.

Legislative recognition of the key features of and statements about family and domestic violence

That the new Family and Domestic Violence Protection Order Act contain a provision that states that in enacting the Act, Parliament recognises that:

- (a) family and domestic violence is a violation of human rights and unacceptable in any community or culture;
- (b) 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;
- (c) family and domestic violence extends beyond physical and sexual abuse and may involve a range of intimidating, coercive and controlling behaviours that adversely affect a person's safety or wellbeing or cause a person to reasonably apprehend that his or her safety or wellbeing (or the safety or wellbeing of another person) will be adversely affected;
- (d) family and domestic violence often involves an overt or subtle exploitation of a power imbalance and commonly involves an ongoing pattern of coercive or controlling behaviour;
- (e) family and domestic violence may escalate in frequency and severity both during and after separation;
- (f) family and domestic violence is underreported and there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;
- (g) not all victims of family and domestic violence wish to end their relationships – some simply want the violence to stop;
- (h) children who are exposed to the effects of family and domestic violence are particularly vulnerable and exposure to family and domestic violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing; and
- (i) particular vulnerable groups may experience and understand family and domestic violence differently from other groups, may have different needs 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; people from rural, regional and remote locations; and people with disability.

Principles

That the new Family and Domestic Violence Protection Order Act include a provision stating that in performing a function under this Act, a person, court or body is to have regard to the following principles:

- (a) ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) that the best interests of children is a primary consideration;
- (d) that perpetrators are solely responsible for their use of violence and its impact on others and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) that the special and different needs of perpetrators who are children should be taken into account;
- (f) 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
- (g) that in order to encourage victims to report family and domestic violence and seek help, the justice system should treat victims with respect and endeavour to reduce the degree to which victims are subjected to re-victimisation or re-traumatisation.

Definition of family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide:

1. That **family and domestic violence** means any of the following conduct committed by a person (the first person) towards another person (the second person) with whom he or she is in a family and domestic relationship:
 - (a) physical or sexual abuse;
 - (b) damaging the second person's property, including injuring or causing the death of an animal;
 - (c) pursuing the second person or another person, or causing the second person or another person to be pursued —
 - (i) with intent to intimidate the second person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the second person;
 - (d) behaving in a manner that:
 - (i) intimidates, coerces or controls the second person or is likely to intimidate, coerce or control a person in the second person's circumstances; and
 - (ii) adversely affects the safety or wellbeing of the second person or is likely to cause a person in the second person's circumstances to reasonably apprehend that his or her safety or wellbeing, or the safety or wellbeing of another person, will be adversely affected;
 - (e) if the second person is a child, committing family and domestic violence against another person to which the child is exposed; or
 - (f) threatening to engage in any behaviour that is included in (a) to (e) above, or causing a third person to engage in behaviour that is included in (a) to (e) above.
2. That for the purposes of 1(a) above:
 - (a) **physical abuse** means assaulting a person; causing any bodily harm or injury to a person; depriving a person of his or her liberty; and kidnapping a person; and
 - (b) **sexual abuse** means sexually penetrating a person without his or her consent; indecently assaulting a person; indecently dealing with a person; committing a sexual offence against a child; and sexual coercion.
3. That for the purposes of 1(b) above, **damaging** means conduct that constitutes an offence under ss 444 or 445 of the *Criminal Code* (WA).
4. That for the purposes of 1(b) above, **property of the second person** includes the property of the second person, the property of another person that is situated in premises in which the second person lives or works, and property of another person that is being used by the second person.
5. That for the purpose of 1(c) and (d) above, **intimidate** and **pursue** have the same meaning as in s 338D of the *Criminal Code* (WA)
6. That for the purpose of 1(e) above, a child is **exposed** to domestic and family violence if the child sees or hears or is otherwise exposed to any of the effects of that behaviour.

RECOMMENDATION 6

[PAGE 53]

Definition of a family and domestic relationship

That the new Family and Domestic Violence Protection Order Act define a **family and domestic relationship** as 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 –
 - (i) who ordinarily resides, or resided, with the other person; or
 - (ii) who 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; or
- (g) where one of those persons is the former spouse or former de facto partner of the other person's current spouse or current de facto partner.

RECOMMENDATION 7

[PAGE 61]

Recording of reported family and domestic violence

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) The Western Australia Police must formally record every incident of family and domestic violence that is reported to the Western Australia Police by any person who alleges that he or she has been subject to family and domestic violence.
 - (b) That the person who reports the incident of family and domestic violence must be provided with a report number for subsequent verification at the time of making the report.

RECOMMENDATION 10

[PAGES 70–71]

Police powers of entry in relation to family and domestic violence

3. That sections 62A–62D (as amended or reformed) be removed from the *Restraining Orders Act 1997* (WA) and be included in the new Family and Domestic Violence Protection Order Act.

RECOMMENDATION 12

[PAGE 77]

Grounds for making a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that a court may make a family and domestic violence protection order if it is satisfied that –

- (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

unless the court is satisfied that there are special circumstances which make it inappropriate for a family and domestic violence protection order to be made.

Relevant factors for consideration when determining whether to make a family and domestic violence protection order and the terms of a family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a family and domestic violence protection order and when considering the terms of a family and domestic violence protection order, the court is to have regard to:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who have experienced or are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) 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;
- (h) hardship that may be caused to the respondent if the order is made;
- (i) the accommodation needs of the person seeking to be protected and the respondent;
- (j) the circumstances of the relationship between the parties, including whether the parties intend to remain living together or remain in contact and the wishes of the person seeking to be protected in this regard;
- (k) any family orders;
- (l) other current legal proceedings involving the respondent or the person seeking to be protected;
- (m) any criminal record of the respondent and the person seeking to be protected;
- (n) any previous similar behaviour of the respondent whether in relation to the person seeking to be protected or otherwise; and
- (o) any other matter the court considers relevant.

RECOMMENDATION 14**Grounds for making a family and domestic violence protection for the benefit of a child who has been exposed to family and domestic violence**

That the new Family and Domestic Violence Protection Order Act provide that, in addition to the grounds for making a family and domestic violence protection order (as set out in Recommendation 12 above), a family and domestic violence protection order may also be made for the benefit of a child if the court is satisfied that a person with whom the child is in a family and domestic relationship has reasonable grounds for apprehending that the child will be exposed to family and domestic violence committed by the respondent, unless the court is satisfied that there are special circumstances which make it inappropriate for the family and domestic violence protection order to be made for the benefit of the child.

RECOMMENDATION 16

[PAGE 84]

Relevant factors for consideration when determining whether to make a police order and the terms of a police order

That the new Family and Domestic Violence Protection Order Act provide that, when considering whether to make a police order and when considering the terms of a police order, a police officer is to have regard to the following:

- (a) the principle that ensuring that persons who have experienced family and domestic violence or are at risk of family and domestic violence (including children who are at risk of being exposed to family and domestic violence) are protected from family and domestic violence is a primary consideration;
- (b) the principle that ensuring that the prevention of behaviour that could reasonably be expected to cause a person to apprehend that the person will have committed against him or her family and domestic violence is a primary consideration;
- (c) the principle that the best interests of children is a primary consideration;
- (d) the principle that perpetrators are solely responsible for their use of violence and its impact on others, and they should be held accountable and encouraged and assisted to change their behaviour;
- (e) the principle that the special and different needs of perpetrators who are children should be taken into account;
- (f) the principle that where both persons in a relationship are committing acts of family and domestic violence, including for their self-protection, where possible the person who is most in need of protection should be identified;
- (g) hardship that may be caused if the order is made;
- (h) the accommodation needs of the persons involved;
- (i) any similar behaviour by any person involved, whether in relation to the same person or otherwise; and
- (j) any other matter the police officer considers relevant.

RECOMMENDATION 17

[PAGE 87]

Explanation of police orders

1. That the new Family and Domestic Violence Protection Order Act provide that, if a person to whom an explanation is to be given by a police officer in relation to a police order does not readily understand English, the officer should, as far as practicable, arrange for a trained interpreter to provide the explanation. If it is not practicable for the officer to arrange for a trained interpreter to provide the explanation the officer should, as far as practicable, cause a person above the age of 18 years to give the explanation to the person in a way that the person is likely to understand.
2. That the new Family and Domestic Violence Protection Order Act provide that if a police officer is required to give a person an explanation in relation to a police order and the police officer is not satisfied that the person understood the explanation because of age, disability or other factors, the officer is, as far as practicable, to arrange for an appropriate support person who is over the age of 18 years to provide the explanation.

RECOMMENDATION 18

[PAGE 88]

Service of police orders

That the new Family and Domestic Violence Protection Order Act 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.

RECOMMENDATION 19

[PAGE 89]

Applications for family and domestic violence protection orders by children

That the new Family and Domestic Violence Protection Order Act expressly provide that a child is permitted to apply for a family and domestic violence protection order in his or her own right.

RECOMMENDATION 21

[PAGES 92–93]

Extending orders for the benefit of other persons

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) When making a family and domestic violence protection 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 prescribe form.
 - (b) The court may only extend a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order if it is satisfied of the applicable grounds for making a family and domestic violence in relation to that named person.
 - (c) If a court extends a family and domestic violence protection order to operate for the benefit of a named person in addition to the person protected by the order, the court is to ensure that the order clearly stipulates which conditions are applicable to the person protected and which conditions are applicable to the named person.

RECOMMENDATION 22

[PAGE 94]

Service of family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) A family and domestic violence protection order is to be served personally on the person bound by the order as soon as possible.
- (b) If a family and domestic violence protection order has not been served on the person bound within 72 hours, the Western Australia Police are to apply to a registrar of the court within 24 hours for oral service to be authorised and the registrar may authorise oral service if satisfied that reasonable efforts have been made to serve the order personally.

RECOMMENDATION 23

[PAGE 95]

Notification of service to person protected by the order

1. That the new Family and Domestic Violence Protection Order Act provide that the Western Australia Police are required to make reasonable efforts to notify the person protected by a family and domestic violence protection order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the family and domestic violence protection order has been served on the person bound.

RECOMMENDATION 25

[PAGE 98]

Mention hearings for family and domestic violence protection orders

1. That the new Family and Domestic Violence Protection Order Act provide that:
 - (a) Upon the registrar receiving the endorsed copy of an interim family and domestic violence protection order indicating that the respondent objects to the final family and domestic violence protection order, the registrar is to promptly fix a mention date that is 14 days after receipt of the objection or as soon as possible thereafter.
 - (b) That notice of the mention hearing date must be given to the parties at least two days prior to the hearing if the notice is given personally or at least five days prior to the hearing if the notice is given by post.

RECOMMENDATION 27

[PAGE 99]

Priority and specified listing times for family and domestic violence protection order hearings

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) ex parte interim family and domestic violence protection order hearings should be heard, as far as is practicable and just, as a matter of priority and wherever possible on the same day as the application is made; and
- (b) wherever possible, parties to family and domestic violence protection order hearings should be given a specified time for attendance.

RECOMMENDATION 28

[PAGE 100]

Basis of objection to final family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act provide that, if the respondent objects to the making of a final family and domestic violence protection order, the respondent is required to indicate in a form prescribed or approved by the court whether he or she objects to the making of the final order because he or she:

- (a) disputes that the grounds for making a family and domestic violence protection order can be established;
- (b) contends that there are special circumstances that make an order inappropriate, specifying the nature of the special circumstances; and/or
- (c) contends for any other reason that a final order in the same terms as the interim order should not be made, specifying the reason/s.

RECOMMENDATION 30

[PAGE 106–107]

Provision of information to the court in family and domestic violence protection order matters

- 2. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access the records of any court with jurisdiction to make a family and domestic violence protection order for the purpose of determining if there are any existing family and domestic violence protection orders (or similar orders under the *Restraining Orders Act 1997* (WA)) between the person seeking to be protected and the respondent, and whether there is any existing application for a family and domestic violence protection made by either the person seeking to be protected or the respondent.
- 4. That the new Family and Domestic Violence Protection Order Act provide that, notwithstanding any other law, a court determining an application for a family and domestic violence protection order (interim and final) is entitled to access Family Court records in relation to the existence and contents of family orders and the existence of pending Family Court proceedings between the person seeking to be protected and the respondent.
- 6. That the new Family and Domestic Violence Protection Act provide that any information obtained by a court determining an application for a family and domestic violence protection order pursuant to 1–5 above be disclosed to the applicant (in the case of an interim protection order hearing) and the parties (in the case of an opposed final protection order hearing) but also that the court need not comply with the requirement to disclose the information if disclosure would place a party (or a child of either party) at an increased risk of family and domestic violence or would otherwise be contrary to the public interest. Further, the legislation provide that if the court determines that disclosure would place a party at an increased risk of family and domestic violence the court is not entitled to rely on the information provided.
- 7. That the new Family and Domestic Violence Protection Act provide that a court determining a family and domestic violence protection order application may request from a government agency any of the following information:

- (a) The criminal record for both the respondent and the person seeking to be protected.
 - (b) Existing and past family and domestic violence protection orders and violence restraining orders made against or in favour of the respondent 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 respondent and the person seeking to be protected.
 - (e) Whether the Department for Child Protection and Family Support has had previous involvement with the person seeking to be protected or the 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
8. That the new Family and Domestic Violence Protection Order Act provide that information provided in response to a request, as set out in 7(a), (b), (c), (d) and (f) above, may be provided to the court in the form of a certificate signed by an officer (of a level to be specified) of the relevant government agency and the certificate is prima facie evidence of the matters specified in it, without proof of the signature of the person purporting to have signed it or proof that the purported signatory was of an officer of the specified level.
9. That the new Family and Domestic Violence Protection Order Act provide that for the purposes of determining a family and domestic violence protection order application the strict rules of evidence do not apply.

RECOMMENDATION 31

[PAGE 108]

Duration of final family and domestic violence protection orders

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) a final family and domestic violence protection order remains in force for the period specified in the order or, if no period is specified, for two years;
- (b) a final family and domestic violence protection order may be made for a period of more than two years if the court is satisfied that there are special reasons for doing so; and
- (c) a final family and domestic violence protection order made against a child is to have a duration of six months or less unless the order is made automatically upon conviction for a specified offence (as per Recommendation 57 below).

RECOMMENDATION 32

[PAGE 109]

Standard conditions not to commit family and domestic violence

That the new Family and Domestic Violence Protection Order Act provide that every family and domestic violence protection order include the following condition: that the person bound by the order is not to commit family and domestic violence against a person protected by the order.

Application to vary or cancel a family and domestic violence protection order by person protected by the order

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) A person protected by a family and domestic violence protection order may apply for a variation or cancellation of the order and may request that the application be heard ex parte.
- (b) Before making an order that varies or cancels a family and domestic violence protection order, the court must ensure that the person protected by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).
- (c) That a court may refuse to vary or cancel the family and domestic violence protection order, may vary the order in a way that differs from the variation sought or may vary the order instead of cancelling it, if the court is satisfied that it is necessary to do so to ensure the safety of a person protected by the order.
- (d) That a court must give a person bound by a family and domestic violence order a reasonable opportunity to be heard before varying an order if the order as proposed to be varied would be more restrictive on the person bound.
- (e) When determining whether to vary or cancel an order upon an application by a person protected by the order the court is to have regard to:
 - (i) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (ii) any current contact between the person protected and the person bound by the order;
 - (iii) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent;
 - (iv) the safety of the protected person and any other person who is protected by the order; and
 - (v) if the order is proposed to be varied and the order, as varied, would be more restrictive on the person bound, the matters referred to in Recommendation 13 above.

Application to vary a family and domestic violence protection order by person bound by the order

That the new Family and Domestic Violence Protection Order Act provide that:

- (a) The person bound by an interim family and domestic violence protection order may apply to vary the order on the mention hearing date that is listed 14 days after the registrar receives the endorsement copy of the family and domestic violence protection order (or as soon as possible thereafter), indicating that the respondent objects to a final order being made (as recommended by Recommendation 25).
- (b) On the mention hearing date, the court may vary the interim order if the variation sought is consented to by the person protected by the order so long as the person protected by the order has been provided with an opportunity to obtain independent legal advice or an opportunity to obtain advice from a victim support worker from the Family Violence Service or Victim Support Service (other relevant agencies that may be prescribed for this purpose).
- (c) On the mention hearing date, the court may refuse to vary the family and domestic violence protection order or may vary the order in a way that differs from the variation sought, if the court is satisfied that it is necessary to do so to ensure the safety of person protected by the order (or any other person protected by the order).
- (d) In determining under (b) above whether to vary the family and domestic violence protection order, the court is to have regard to:

- (a) any expressed wishes of the person protected (including the reasons for seeking the variation or cancellation);
 - (b) any current contact between the person protected and the person bound by the order;
 - (c) whether any pressure has been applied or threat made to the person protected by the respondent or another person on behalf of the respondent; and
 - (d) the safety of the protected person and any other person who is protected by the order.
- (e) On the mention hearing date, the court may determine whether to grant leave for the person bound by the order to continue with the application to vary the order and leave is to be granted if the court is satisfied that there is evidence to support a claim that the restraints imposed by the order are causing the person bound by the order serious and unnecessary hardship and that it is appropriate that the application is heard as a matter of urgency.
- (f) If leave is granted to the person bound by the order, the court may deal with the application to vary the interim order on this date if the person protected by the order consents to the court dealing with the application on this date. If leave is granted, the court is to have regard to the matters set out in Recommendation 13 above when determining whether to vary the order.

RECOMMENDATION 36

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Variation or cancellation of a family and domestic violence protection order on the courts own motion or on an application by either party to the proceedings

1. That the new Family and Domestic Violence Protection Order Act provide that a court exercising criminal jurisdiction may vary or cancel a family and domestic violence protection order on its own motion or upon an application by either party to the proceedings without an application for a variation or cancellation being lodged by the person protected by the order or the person bound by the order, provided that both the person protected by the order and the person bound by the order have been provided with an opportunity to be heard.
2. That the new Family and Domestic Violence Protection Order Act provide that when determining whether to vary or cancel a family and domestic violence protection order, the court is required have regard to the matters specified in Recommendations 13 and 35(d) above.

RECOMMENDATION 37

[PAGE 117]

Penalty for repeated breach of family and domestic violence protection order

That the new Family and Domestic Violence Protection Order Act include a provision modelled on s 61A of the *Restraining Orders Act 1997* (WA) with the only substantive change being that the relevant offences for which the presumptive sentence of detention or imprisonment applies includes the offence of aggravated stalking where the circumstances of aggravation are that the conduct of the offender in committing the offence constituted a breach of a family and domestic violence protection order or a police order.

RECOMMENDATION 38

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Mitigation in sentencing for breaches of family and domestic violence protection orders and police orders

That s 61B(2) of the *Restraining Orders Act 1997* (WA) be repealed and the new Family and Domestic Violence Protection Order Act provide that circumstances where the person protected by a family and domestic violence protection order or police order has actively invited or encouraged the person bound to breach the order may 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).

Defence for breaching a family and domestic violence protection order

1. That the new Family and Domestic Violence Protection Order Act provide that contact or communication that occurs between a person bound by an order and the person protected by an order that is necessary to comply with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a family and domestic violence protection so long as the person bound by the order does not engage in any conduct that constitutes family and domestic violence.

RECOMMENDATION 40**Family and Domestic Violence Protection Undertakings**

That the new Family and Domestic Violence Protection Act provide for the making of family and domestic violence protection undertakings that have the following characteristics:

- (a) A family and domestic violence protection undertaking is to take effect upon making of an order of the court and is to be specifically registered.
- (b) The court approving the family and domestic violence protection undertaking is to provide a copy of the undertaking to the Western Australia Police.
- (c) Failure to comply with the conditions of the family and domestic violence protection undertaking 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 in the appropriate circumstances) and non-compliance can attract specified civil enforcement sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
- (d) A court is to be satisfied that a person has failed to comply with the conditions of the family and domestic violence protection undertaking on the balance of probabilities.
- (e) A finding that a person has failed to comply with the conditions of a family and domestic violence protection undertaking is sufficient evidence to satisfy a court that the grounds for a family and domestic violence protection order have been established, unless there are exceptional circumstances to decide otherwise.
- (f) A family and domestic violence protection undertaking can only be approved by a court if the applicant for a family and domestic violence protection order and the respondent have been provided with the opportunity to obtain independent legal advice.
- (g) A family and domestic violence protection undertaking may include any requirements to be complied with by the respondent that a court could impose if it made a family and domestic violence protection order.

RECOMMENDATION 57**Making of interim and final family and domestic violence protection orders during criminal proceedings**

In addition to s 63A of the *Restraining Orders Act 1997* (WA) as amended by Recommendation 56 above, the new Family and Domestic Violence Protection Order Act provide that:

1. If a person is charged with a specified offence, the court must consider whether it is appropriate to make an interim family and domestic violence protection order against the accused and for the protection of the alleged victim until such time as the charge is determined.
 - (a) The court may make an interim family and domestic violence protection order under 1 above:
 - (i) if it is satisfied that there are grounds for making a family and domestic violence protection order (as set out under Recommendation 12 of this Report);
 - (ii) if it has considered the factors that are relevant (as set out under Recommendation 13 of this Report); and
 - (iii) the person who would be bound by the order and the person who would be protected by the order have been given a reasonable opportunity to be heard.
 - (b) The court is not to make an interim family and domestic violence protection order if the person who would be protected by the order objects to it being made.

2. If a person is convicted of a specified offence, the court is to make a final family and domestic violence protection order.
 - (a) If the offence is a violent personal offence as currently defined under s 63A (or as defined under Recommendation 56 above) the family and domestic violence protection order is to be imposed for life.
 - (b) In any other case, the court has discretion to determine the duration of the order; however, the court is required to ensure that the duration of the order is for a sufficient period in excess of the period of time that the offender will serve in custody under any sentence of imprisonment imposed for the offence.
 - (c) A court is not to make a final family and domestic violence protection order under (b) above unless the person who would be bound by the order and the person who would be protected by the order have been provided with a reasonable opportunity to be heard in relation to the making of the order.
 - (d) A court is not to make a final family and domestic violence protection order if the person who would be protected by the order objects to it being made.
 - (e) The court is not to make a final family and domestic violence protection order if it is satisfied that the order is unnecessary for the protection of the safety of the person who would be protected by the order.
3. A specified offence be defined as one of the following offences where the accused and the victim are in a family and domestic relationship as defined under the Act:
 - (a) the offences under the following sections of the *Criminal Code*:
 - (i) s 283 (attempt to kill)
 - (ii) s 292 (disabling in order to commit an indictable offence)
 - (iii) s 293 (stupefying in order to commit an indictable offence)
 - (iv) s 297 (grievous bodily harm)
 - (v) s 294 (acts intended to caused grievous bodily harm)
 - (vi) s 320 (sexual offences against children under 13 years)
 - (vii) s 321 (sexual offences against children of or over 13 years but under 16 years)
 - (viii) s 321A (persistent sexual conduct)
 - (ix) s 329 (sexual offences by relatives)
 - (x) s 330 (sexual offences against incapable persons)
 - (xi) s 325 (sexual penetration without consent)
 - (xii) s 326 (aggravated sexual penetration without consent)
 - (xiii) s 327 (sexual coercion)
 - (xiv) s 328 (aggravated sexual coercion)
 - (xv) s 332 (kidnapping)
 - (xvi) s 333 (deprivation of liberty)
 - (xvii) ss 338A–C (threats)
 - (xviii) s 338E (stalking)
 - (xix) s 444 (criminal damage)
 - (b) any other offence under Part V of the *Criminal Code* where the offender is sentenced to a term of immediate imprisonment.
4. A court exercising criminal jurisdiction may make a family and domestic violence protection order for any other offence if satisfied that the grounds for making the order are established and the person who would be bound by and the person who would be protected by the order have been provided with a reasonable opportunity to be heard. The court is not to make a family and domestic violence protection order under this provision if the person who would be protected by the order objects to it being made.

Appendix C: List of submissions

1. Trevor Higgs (6 January 2014)
2. Earl Richards (6 January 2014)
3. Magistrate Stephen Wilson (6 January 2014)
4. Maggie Woodhead (17 January 2014)
5. Patricia Giles Centre (24 January 2014)
6. Abbey Cross (28 January 2014)
7. A Murad (28 January 2014)
8. Hayley Barbarich (28 January 2014)
9. Merryn Bojcun (29 January 2014)
10. Martin Chape JP (29 January 2014)
11. Disability Services Commission (31 January 2014)
12. Gosnells Community Legal Centre (31 January 2014)
13. Aboriginal Social Workers Association of Western Australia (31 January 2014)
14. Path of Hope (31 January 2014)
15. Magistrate Liz Langdon (31 January 2014)
16. Office of the Director of Public Prosecutions (4 February 2014)
- 17(a). Family and Domestic Violence Advisory Group, Department of Health, Women and Newborn Health Service (5 February 2014)
- 17(b). Family and Domestic Violence Advisory Group, Department of Health, Statewide Protection of Children Coordination Unit; Child and Adolescent Community Health; Child and Adolescent Health Service (5 February 2014)
- 17(c). Family and Domestic Violence Advisory Group, Department of Health, Child Protection Unit PMH (5 February 2014)
- 17(d). Family and Domestic Violence Advisory Group, Department of Health, Aboriginal Health Division (5 February 2014)
18. Youth Legal Service (12 February 2014)
19. Anne Muir (13 February 2014)
20. Department for Child Protection and Family Support (14 February 2014)
21. Department of the Attorney General (19 February 2014)
22. Commissioner for Children and Young People (21 February 2014)
23. Department of Corrective Services (25 February 2014)
24. Chief Justice of the Supreme Court of Western Australia (27 February 2014)
25. Family Court of Western Australia (27 February 2014)
26. Western Australia Police (27 February 2014)
27. Law Society of Western Australia (25 February 2014)
28. Anglicare (28 February 2014)
29. Relationships Australia (28 February 2014)
30. Peel Community Legal Service (28 February 2014)
31. Women's Law Centre (28 February 2014)
32. Geraldton Resource Centre Inc (28 February 2014)
33. Family Law Practitioners' Association of Western Australia (Inc) (4 March 2014)
34. Women's Council for Domestic and Family Violence Services and Domestic Violence Legal Workers Network (28 February 2014)
35. Legal Aid Western Australia (7 March 2014)
36. Chief Judge of the District Court of Western Australia (11 March 2014)
37. Aboriginal Family Law Services (12 March 2014)
38. Magistrate Pamela Hogan (21 March 2014)

39. Helen Porter, Chief Assessor Criminal Injuries Compensation (27 March 2014)
40. Lorraine Bentley, Kelly Bentley and Gary Bentley (28 March 2014)
41. Tenancy WA (3 April 2014)
42. Victims of Crime Representatives on the Victims of Crime Reference Group (27 March 2014)
43. Magistrate Deen Potter (14 April 2014)

Appendix D:

List of people consulted

Adjuk, Kate – Lawyer, Criminal Unit, Legal Aid Western Australia
Allison, Annette – Community Court Member, Barndimalgu Court (Geraldton)
Anderson, Neil – Aboriginal Legal Service of Western Australia (Family Law Unit)
Antenucci, Robyn – Team Manager, Family Court Counselling and Consultancy Services
Benn, Magistrate Greg – Magistrates Court (Midland)
Bennett, Kevin – Western Australia Police (Geraldton)
Blitz-Cokis, Kathy – Family and Domestic Violence Advisory Group, Department of Health
Bunt, Felicity – Senior Legal Officer, Department for Child Protection and Family Support
Burrows, Amanda – Senior Prosecutor, Office of the Director of Public Prosecutions
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 Corrections Officer, Department of Corrective Services
Cassidy-Vernon, Cheryl – Youth Legal Service
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
Davies, Thomas – Victims of Crime Reference Group
de Cinque, Natarlie – Ombudsman WA
Doherty, Leah – Manager Operational Practice, Department of Corrective Services
Dominguez, Lisa – Director Offender Programs, Department of Corrective Services
Espie, Nick – Legal Aid Western Australia (Kununurra)
Fairclough, Joan – Victim Support Services (Centacare)
Falohun, Santana – Manager, Refuge (Broome)
Fernandez, Dennis –Lawyer, Legal Aid Western Australia (Criminal Unit)
Fletcher, Catherine – Office of the Director of Public Prosecutions (Gender Bias Review Committee)
Foley, Detective Sergeant Stephen – Victims of Crime Reference Group
Fong, Robert – Team Leader Policy and Legislation, Department of Corrective Services
Gibbons, Shayla – Aboriginal Legal Service of Western Australia (Broome)
Gluestein, Magistrate Brian – Magistrates Court (Perth)
Gould, Deborah – Director Case Practice Country, Department for Child Protection and Family Support
Green, Silvana – Family and Domestic Violence Senior Officers Group (Centrelink)
Guldbaek, Heidi – Policy and Law Reform Coordinator, Women’s Law Centre
Gupta, Tara – Counsel, Department for Child Protection and Family Support
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

Higgs, Sergeant Trevor – Western Australia Police

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 Western Australia

Hovane, Vicki

Hudd, Sue – Family and Domestic Violence Advisory Group, Department of Health

Jackson, Julie – Manager Family and Children’s Services, Legal Aid Western Australia

Jarvis, Kylie – Family Violence Services (Midland)

Johnson, Alicia – Anglicare (Broome)

Jonda – Support Worker, Refuge Broome

Jones, Angela – Senior Solicitor, Family and Domestic Violence, Legal Aid NSW

Jones, Murray – Aboriginal Family Legal Services (Broome)

Jordan, Sue – Family and Domestic Violence Advisory Group, Department of Health

Kalder, Astrid – Family and Domestic Violence Senior Officers Group (Department of Corrective Services)

Kaplanian, Carol – Family and Domestic Violence Advisory Group, Department of Health

Kendall, Tamara – Family and Domestic Violence Senior Officers Group, Department for Child Protection and Family Support

Kerin, Kylie – Legal Aid Western Australia (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)

Leggett, Nicole – Manager Family and Domestic Violence Unit, Department for Child Protection and Family Support

Lonnie, Brianna – Legal Aid Western Australia (Kununurra)

Lourey, Barbara – Family and Domestic Violence Advisory Group, Department of Health

Lyons, Jade – Family and Domestic Violence Advisory Group, Department of Health

Maj, Kylie – Ombudsman WA

Marshall, Andrew – Family and Domestic Violence Senior Officers Group, Department of the Attorney General

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)
 Muir, Anne – Domestic Violence Advocate Starick Service
 Munday, Jacqui – Case Management Coordinator, Family Violence Services (Joondalup)
 Mungar, Patrick – Gosnells Community Legal Centre
 Nadalin, Katia – Domestic Violence Legal Unit, Legal Aid Western Australia
 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
 Niclair, Kellie – Lawyer, Legal Aid Western Australia (Criminal Unit)
 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 Western Australia (Kununurra)
 Parker, Tamara – Department for Child Protection and Family Support (Midland)
 Parker, Andrew – Lawyer, Legal Aid Western Australia (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
 Pickering, Georgie – Principal Solicitor, Community Legal and Mediation Service (Bunbury)
 Pillay, Vivienne – Multicultural Women’s Advocacy Service
 Platt, Vicki – Legal Aid Western Australia (Broome)
 Porter, Helen – Chief Assessor, Criminal Injuries Compensation
 Potter, Magistrate Deen – Magistrates Court (South Hedland)
 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
 Roussety, Nawdy – Coordinator Domestic Violence Legal Unit, Legal Aid Western Australia
 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)
 Scadden, Magistrate Dianne – Magistrates Court (Bunbury)
 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)
 Sinclair, Leanne – Manager, Family Violence Program, Victoria Legal Aid
 Smith, Detective Inspector Eric – Family Violence State Coordinator, Western Australia Police
 Snell, Jennifer – Victims of Crime Reference Group

Sorgiovanni, Detective Inspector Valdo – State Coordinator, State Family Violence Coordination Unit, Western Australia Police

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 Western Australia (Broome)

Williamson, Rosemary – Commissioner for Children and Young People

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 Western Australia (Criminal Unit)