

Chapter Four

Family and Domestic Violence Court Intervention Programs



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Introduction

WHAT IS FAMILY AND DOMESTIC VIOLENCE?

The Western Australian *Family and Domestic Violence State Strategic Plan* defines family and domestic violence as:

[B]ehaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear.¹

The key characteristic of family and domestic violence is the use of violence or other forms of abuse to control someone with whom the perpetrator has an intimate or family relationship. The term 'domestic violence' usually refers to abuse against an intimate partner² while 'family violence' is a broader expression encompassing domestic violence and the abuse of children, the elderly and other family members.

Violence within a family or intimate relationship is different to other forms of violence. First, it is hidden: violence of this kind is generally not carried out in public, and is often concealed by both the perpetrator and the victim. Second, it is ongoing. As a consequence of the relationship between the perpetrator and the victim, and the fear of further abuse, family and domestic violence is different to a series of isolated violent incidents. Further, the relationship between the perpetrator and the victim can make it both difficult and dangerous for the victim to resist ongoing abuse or leave the relationship. It has been observed that:

The possibility of subsequent abuse is ever present after the police have left the scene, after the defendant has been released from jail if arrested, and even after the issuance of a restraining order. Once stranger violence has occurred, it rarely will be repeated. With intimate violence, however, the victim may have to live under the constant fear of repeated abuse with ever escalating force, sometimes including deadly force.³

1. Family and Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.
2. Although the term is sometimes used to include violence against children. 'Intimate partners' are people who are in a de facto relationship, married, separated, divorced or in an intimate relationship. 'Intimate partners' is the term most frequently used in this area, including by the Australian Institute of Criminology: see <<http://www.aic.gov.au>>.
3. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 287.

THE PREVALENCE OF FAMILY AND DOMESTIC VIOLENCE

It is difficult to measure the scale of family and domestic violence in the community. In general, if victims of crime are related to the perpetrator they are reluctant to report the matter to the police.⁴ Research indicates that women experiencing domestic violence are more likely to deal with the issue on their own, or talk about it to their friends or family, than report it to authorities.⁵ Studies have shown that male victims are even less likely to access support services than women.⁶

In addition, family and domestic violence is difficult to measure accurately because information sources are varied (eg, police records, victim surveys, hospital records, court records and refuge statistics) and it is not easy to collate and compare the various sources of information.⁷

Violence in intimate relationships

In 2005 the Australian Bureau of Statistics (ABS) reported on the violence experienced by Australian men and women (aged 15 years and over). It found that 0.9% of men and 2.1% of women had experienced violence from their current partner, and 4.9% of men and 15% of women had experienced violence from a previous partner.⁸

It is important to note that family and domestic violence includes sexual assault. The ABS report noted that in the 12 months prior to the 2005 survey, 1.6% of women and 0.6% of men experienced an incident of sexual violence. Of the women who experienced sexual violence, 21% said it was

4. Carach C, *Reporting Crime to the Police* (Canberra: Australian Institute of Criminology, 1997) 4–5.
5. Healey J (ed), 'Domestic Violence' (2005) 38(3) *Issues in Society*, 2.
6. Department of Justice & West Australian Police Service, *Joondalup Family Violence Court, Final Report* (February 2002) xi.
7. See discussion in Marcus G & Braaf R, *Domestic and Family Violence Studies, Surveys and Statistics: Pointers to practice and policy*, Australian Domestic and Family Violence Clearinghouse Stakeholder Paper No. 1 (May 2007) 2–13. In Western Australia the Crime Research Centre at the University of Western Australia has examined and compared various data sources in order to measure the extent of domestic violence in Western Australia: see Ferrante A et al, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996).
8. Australian Bureau of Statistics (ABS), *Personal Safety Survey Australia 2005* (Canberra: Australian Bureau of Statistics, 2006) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductCatalogue/0556FBD355B2719BCA2571C50074ABF2?OpenDocument#>> accessed 25 April 2008.

committed by a previous partner, 39% said it was committed by a family member or friend.⁹ Research is increasingly identifying men, including male children, as victims of sexual assault. In a recent national survey approximately 70% of male sexual assault victims said they were assaulted before they turned 17, most commonly by family members.¹⁰

The International Violence against Women Survey, conducted across Australia during 2002–2003, measured the extent of physical, sexual and psychological violence against women in Australia. The survey found that over one-third of women (who had ever been in an intimate relationship) had experienced some form of violence from a partner during their lifetime. More women experienced violence from a former partner (36%) than from a current partner (10%).¹¹ The survey also reported that 29% of women had experienced physical and/or sexual violence before they turned 16; almost one in five suffered this violence from their parents.¹²

The Commission acknowledges that both men and women can be victims of family and domestic violence. Recently, the incidence of violence committed by women against their male partners has received some attention. Commentators have highlighted that studies show that men and women are equally violent; these studies have been used to call into question the research conducted by the ABS and the Office for the Status of Women.¹³ However, as noted recently by the Victorian Law Reform Commission (VLRC), these studies only considered the incidence of acts of physical aggression and not the severity, impact and motivation behind the acts. Research has found that domestic violence committed by men is more likely to cause the victim physical injury and result in ongoing fear and intimidation.¹⁴ In its comprehensive review of family violence laws, the VLRC concluded that '[w]omen's violence is often a reflection of dependence, whereas men's violence is a reflection of dominance'.¹⁵

Violence against children

Children are both direct and indirect victims of family and domestic violence. The 2005 ABS survey reported that 49% of men and women who had experienced violence by a previous partner had children in their care during the relationship: 36% said that

the children had witnessed the violence.¹⁶ Further, research shows that children in families affected by domestic violence are likely to also experience that violence themselves.¹⁷

The ABS survey found that, before the age of 15, 10% of women and 9.4% of men had experienced physical abuse, and 12% of women and 4.5% of men had been sexually abused.¹⁸ Rates of child abuse constituted by family violence can be difficult to ascertain because reported rates of child abuse include cases of neglect; however, in 2007 the Department for Child Protection stated that 1,151 people contacted the department because of concerns about children experiencing family violence in Western Australia.¹⁹

Violence against the elderly

Elder abuse has been defined as:

Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person.²⁰

In 2002, a survey of 1,017 Western Australian organisations that have contact with older people found that 24% had encountered a known or suspected case of elder abuse in the previous six months. A 2003 survey of older people estimated that 15% had experienced some form of abuse. This research found that elder abuse is hidden, and 'overwhelmingly carried out by close family members'.²¹ Victims of elder abuse are more often female and over 70 years old. Three-quarters of the victims in known cases had reduced decision-making ability; nearly one half had a significant physical disability.²²

Violence against gay, lesbian, bisexual, transgender and intersex people

Gay, lesbian, bisexual, transgender and intersex people are victims of family and domestic violence. It has been estimated that prevalence among this section of the community is at least equal to heterosexual intimate partner violence and 'may

9. Ibid.

10. Carrington K & Phillips J, *Domestic Violence in Australia: An overview of the issues* (Parliament of Australia, 7 August 2003, updated September 2006).

11. Mouzos J & Makkai T, *Women's Experiences of Male Violence: Findings from the Australian component of the International Violence Against Women Survey* (Canberra: Australian Institute of Criminology, 2004) 3.

12. Ibid 4.

13. Victorian Law Reform Commission (VLRC), *Review of Family Violence Laws*, Report (February 2006) [2.31]–[2.32].

14. Headley B et al, 'Domestic Violence in Australia: Are women and men equally violent?' (1999) 2 *Australian Social Monitor* 57–62; VLRC, *ibid* [2.33].

15. VLRC, *ibid* [2.34].

16. ABS, *Women's Safety Australia 1996* (Canberra: ABS, 1996) 8.

17. Phillips J & Park M, *Measuring Domestic Violence and Sexual Assault Against Women: A review of the literature and statistics* (Canberra: Parliament of Australia, 2006) <<http://www.aph.gov.au/library/intguide/SP/ViolenceAgainstWomen>> accessed 24 April 2008.

18. ABS, *Personal Safety Survey Australia 2005* (Canberra: ABS, 2006) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductbyCatalogue/0556FBD355B2719BCA2571C50074ABF2?OpenDocument#>> accessed 25 April 2008.

19. Department for Child Protection, *Annual Report 2006–2007* (2007) 8.

20. Australian Network for the Prevention of Elder Abuse (1999) as cited by Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 11.

21. Boldy D et al, *Elder Abuse in Western Australia* (Perth: Department for Community Development – Senior's Interests, 2002) 3; Faye B et al, *Advocate's Speak Out Survey: SOS on elder abuse* (Perth: April 2003) 17.

22. Boldy, *ibid*.

well be higher'.²³ When participants in a survey on this topic were asked if they had ever been in a relationship where their partners had abused them, a significant proportion reported that they had: 27.9% of males, 40.7% of females, 61.8% of trans-gender males, 36.4% of transgender females, 36.4% of intersex males, and 42.9% of intersex females.²⁴ Although the extent of violence committed by same sex partners is unclear, the authors noted that 'it is likely, given the profile of the sample that a significant amount occurred in same sex relationships'.²⁵

Violence in Aboriginal communities

Family and domestic violence is a very significant issue for Aboriginal communities around Australia; horrifying statistics abound in every category of violence.²⁶ Aboriginal women are 45 times more likely to experience violence than non-Aboriginal women,²⁷ and many times more likely to be admitted to hospital than non-Aboriginal victims of family violence.²⁸ Nearly half of all homicides involving Aboriginal people occur between intimate partners.²⁹ Children in Aboriginal communities are eight times more likely than non-Aboriginal children to be recorded in child protection statistics.³⁰ A recent study by the Office of the Public Advocate identified that there is significant mistreatment of older people in Aboriginal communities and it affects many families.³¹ In 2002, after a lengthy hearing into

family violence in Aboriginal communities in Western Australia, the Gordon Inquiry concluded that:

The true prevalence of Aboriginal family violence is unknown. What is known is that the violence is endemic and presents an extremely troubling picture of the situation in many Aboriginal communities.³²

Aboriginal people prefer the expression 'family violence'.³³ The Western Australian Family and Domestic Violence Unit notes that although Aboriginal people prefer to use the term 'family violence', 'the use of this term should not obscure the fact that Indigenous women and children bear the brunt of family violence'.³⁴

THE IMPACT OF FAMILY AND DOMESTIC VIOLENCE

The former Chief Justice of Western Australia, David Malcolm AC, has observed that:

Domestic violence erodes valuable medical, legal, judicial and social resources, both human and financial, in a way that is not comparable to any other crime.³⁵

It is important to remember that family and domestic violence can be fatal. Approximately two in five homicides in Australia occur between family members, an average of 129 per year.³⁶ In Western Australia, approximately one quarter of all homicides involve intimate partners.³⁷ A history of domestic violence was recorded in 65% of the intimate partner homicides that occurred in Australia in 2005–2006.³⁸ Research shows that homicide is often the final episode in a pattern of violence within a relationship or family.³⁹

23. Pitts M et al, *Private Lives: A report on the health and wellbeing of GLBTI Australians* (Melbourne: Australian Research Centre in Sex, Health and Society, 2006) 52; Vickers L, 'The Second Closet – Domestic Violence in Gay and Lesbian Relationships: A Western Australian study' (1996) 3(4) *Murdoch University Electronic Journal of Law* 37.

24. Pitts, *ibid* 52.

25. *Ibid*.

26. Gordon S et al, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) 48; Department for Victorian Communities, *Victorian Indigenous Family Violence Taskforce Report, Final Report* (December 2003); New South Wales Inquiry into Child Sexual Abuse, *Breaking the Silence: Creating the future* (2006); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Make Mekarle: Little children are sacred* (2007). The Commission examined the issue of Aboriginal family violence in detail in its reference on Aboriginal customary laws: see LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 349–62; LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No. 94 (2006) 18–30; 283–98.

27. Ferrante A et al, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 34.

28. Al-Yaman F et al, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (Canberra: Australian Institute of Health and Welfare, 2006) 57; Gavin A et al, *Hospital Admissions Due to Intimate Partner Violence in Western Australia 1994–2003* (Perth: Department of Health, 2005) <<http://www.population.health.wa.gov.au/Promotion/resources%5CHospital%20admissions%20Intimate%20Partner%20-%20Highlight%20051205.pdf>> accessed 23 April 2008.

29. Al-Yaman, *ibid* 70.

30. Department for Community Development, *Identifying and Responding to Child Abuse and Neglect* (2006) 2.

31. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 4.

32. Gordon S et al, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) 48.

33. See LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No. 94 (2005) 349.

34. Family and Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004) 5.

35. Malcolm D (Speech delivered to the 10th Anniversary Celebration of the Armadale Domestic Violence Intervention Project, Perth, 28 May 2003).

36. During the periods 1989–1990 and 2001–2002, 60% of family homicides involved intimate partners; 17% involved parents killing children; 9% involved children killing parents; 5% involved killing by a sibling; and 9% involved other family members (cousins, in-laws, etc): Mouzos J & Rushforth C, *Family Homicide in Australia* (Canberra: Australian Institute of Criminology, 2003) 1, 2.

37. Davies M & Mouzos J, *Homicide in Australia: 2005–2006 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2007). In 2004–2005 the figure was 36%: see Mouzos J, *Homicide in Australia: 2004–2005 National Homicide Monitoring Program Annual Report* (Canberra: Australian Institute of Criminology, 2006).

38. Davies & Mouzos, *ibid* 25.

39. Mouzos J, *Homicidal Encounters: A study of homicide in Australia 1989–1999* (Canberra: Australian Institute of Criminology, 2000) 173–74; Harris Johnson C, *Come With Daddy: Child murder-suicide after family breakdown* (Perth: University of Western Australia Press, 2005) 35–43.

Family and domestic violence also leads to many serious, non-fatal injuries. In Western Australia, information has only recently been available recording the rates of hospitalisation as a result of family and domestic violence. In 2002–2003 these records revealed that 48% of interpersonal violence hospitalisations involved intimate partners: 85% of them were women. Further, one in four of the people who attended hospital for injuries caused by an intimate partner 'had presented to hospital on at least one other occasion during the study period'.⁴⁰

The social and psychological consequences of family and domestic violence for victims include anxiety, depression and suicide attempts; alcohol and drug abuse; inability to go to work and poor work performance; sleep deprivation; and reduced coping and problem-solving skills. The impact of domestic violence on the children of victims includes emotional and behavioural problems and difficulties with school and peers. Further, children who experience violence are at risk of becoming perpetrators of violence in their future relationships.⁴¹

There have been some attempts to assess the economic impact of family and domestic violence. In 2004, it was estimated that domestic violence cost the Australian economy \$8.1 billion in 2002–2003.⁴² The estimated annual cost of the legal system's response to domestic violence was \$298 million and the total 'second generational' cost of domestic violence (eg, providing services to children affected by violence in their homes) was estimated to be \$220.3 million.⁴³

THE RESPONSE TO FAMILY AND DOMESTIC VIOLENCE

Until the 1970s family and domestic violence was not on the public agenda. It was an issue that was dealt with in private and there were few community resources available to victims seeking assistance. In the past three decades there has been a dramatic shift: family and domestic violence is now seen as a matter of public concern and as a community responsibility. The international community has recognised that the state has a duty to protect its citizens from human rights abuses committed by individuals.⁴⁴ As a consequence, significant efforts

have been made internationally to tackle the problem of family and domestic violence. A very strong motivation for these efforts is the understanding that more effective community responses to domestic violence may prevent death, serious injury and harm.

A wide range of community and government agencies respond to, and deal with, victims and perpetrators of family and domestic violence. These agencies include health, legal, education and housing services. Responses by these various agencies have historically been marked by inconsistency and inadequacy. The challenge for service providers in recent years has been how to improve their services to families experiencing violence and to provide a consistent, effective response.

In 1986 the Western Australian government formed a taskforce to report on domestic violence. In its landmark report, *Break the Silence*, the taskforce found that:

[T]here has been, to date, no consistent coordinated approach in Western Australia to deal with the problem; measures have been ad hoc and generally subject to severe funding constraints.⁴⁵

Since that report, successive Western Australian governments have attempted a coordinated response to family and domestic violence. The government has in place a four-year strategic plan to guide the development and implementation of policies directed at the prevention and reduction of family and domestic violence.⁴⁶ The current strategic plan ends this year and the Commission has been advised that preparation of the next strategic plan (likely to run for three or four years) is underway. Development of the plan will be undertaken by a working group and a committee of high-level senior officers from relevant state and federal government departments, including the police, housing, the Department of the Attorney General, the Department of Child Protection and the Department of Corrective Services.⁴⁷

Many community responses to family and domestic violence are modelled on a system developed in 1981 in Duluth, Minnesota, in the United States. Duluth's Domestic Abuse Intervention Program (as it is now known) is an internationally acclaimed model

40. Milligan R et al, *Hospitalisations Due to Intimate Partner Violence in Western Australia 1994–2003* (Perth: Western Australian Government, 2005) 1, 2.

41. Phillips J & Park M, *Measuring Domestic Violence and Sexual Assault Against Women: A review of the literature and statistics* (Canberra: Parliament of Australia, 2006).

42. Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) 63.

43. Marcus G & Braaf R, *Domestic and Family Violence Studies, Surveys and Statistics: Pointers to Practice and Policy*, Australian Domestic and Family Violence Clearinghouse Stakeholder Paper No. 1 (May 2007) 11; Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) 47, 53.

44. Australia has ratified the *Convention on the Rights of the Child* and the *Convention on the Elimination of all Forms of*

Discrimination Against Women. For a discussion of Australia's international obligations in this area, see VLRC, *Review of Family Violence Laws*, Report (2005) [3.5]–[3.14].

45. Domestic Violence Taskforce, *Break the Silence: Report of the Taskforce on Domestic Violence to the Western Australian Government*, Summary (Perth: 1986) 5.

46. Family and Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004). As part of this strategic plan, the government creates yearly action plans to set goals and monitor the progress of existing policies. The yearly plans are available at <<http://www.community.wa.gov.au/NR/exeres/A8B722B5-2863-450B-8610-90FBB68CAF8A.htm>>.

47. Sherrilee Mitchell, Acting Senior Policy and Engagement Officer, Family and Domestic Violence Unit of the Department for Communities, telephone consultation (28 March 2008).

of community response to domestic violence.⁴⁸ Recently, the co-founder of the Duluth model, Dr Ellen Pence, visited Western Australia to facilitate a safety and accountability audit of the Armadale Domestic Violence Intervention Project. The principles of the Duluth model, as well as the findings of the audit, will be used to inform the government's family and domestic violence policy for the future.⁴⁹

The intervention model developed by Duluth (which reflects world's best practice in the response to family and domestic violence) is underpinned by six main principles. These principles can be summarised as follows:

1. Violence in the home is a crime.
2. The offender must be held accountable for his or her actions.
3. The burden of confronting abusers and placing restrictions on their behaviour should rest with the community and agencies that deal with family and domestic violence, not the victim.
4. All agencies responding to family and domestic violence must work cooperatively in order to provide a consistent response.
5. Interventions must respond to the totality of harm done, not just to discrete incidents.
6. Interventions must focus on the needs of the victim; protection of the victim must take priority when two intervention goals clash.⁵⁰

These principles are incorporated into the various community responses to family and domestic violence in Western Australia (and around the world). Examples of such responses in Western Australia include the Armadale Domestic Violence Intervention Project⁵¹ and the Family Violence Outreach Project (a joint project of the Family and Domestic Violence Unit and the Western Australia Police).⁵²

48. See Minnesota Program Development Inc., 'Domestic Abuse Intervention Project: Overview' <<http://www.duluth-model.org/>> accessed 20 June 2008.

49. Sherrilee Mitchell, Acting Senior Policy and Engagement Officer, Family and Domestic Violence Unit of the Department for Communities, telephone consultation (28 March 2008). Pence et al, *Western Australian Safety and Accountability Audit of the Armadale Domestic Violence Intervention Project* (Perth: Western Australian Government, 2007) 82–94.

50. See Minnesota Program Development Inc., 'Domestic Abuse Intervention Project: Overview' <<http://www.duluth-model.org/>> accessed 20 June 2008.

51. Department for Communities, *Western Australian Safety and Accountability Audit of the Armadale Domestic Violence Intervention Project* (July 2007).

52. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 60.

Family and domestic violence in the justice system

Thirty years ago, family and domestic violence was largely an 'invisible crime',¹ but now matters involving family and domestic violence make up a considerable portion of the workload of the justice system. Victims and perpetrators come before the courts often and for a range of reasons, including if the perpetrator has been charged with a criminal offence; if the victim has made an application for a violence restraining order; and if they are parties to family court proceedings. As more research on the nature and extent of family and domestic violence in the community emerges, the courts and the legislature are working to improve the various ways that the justice system responds to that violence.

THE JUSTICE SYSTEM'S RESPONSE

Criminal justice system

The first step in the criminal justice system's response to family and domestic violence is the involvement of police. Although the police have historically been reluctant to intervene in these matters, this attitude is changing. The recent report by the Department of the Attorney General into the operation of violence restraining orders legislation found that the police no longer take the view that 'it's just a domestic'; it found that there is now

[r]ecognition [by the police] that family and domestic violence is the context in which most serious assault and homicide is sustained in Western Australia and that it is a major and serious crime.²

Accordingly, investigation of family and domestic violence has been transferred from the community policing division of the Western Australia Police to the major crime division.³ The police now have considerable powers of search and entry in family and domestic violence matters, and they are required by statute to investigate incidents where they suspect that a crime has occurred or someone's safety is at risk. In addition, they must report on the action that they have taken after investigation.⁴

Recent statistics from the Western Australia Police show a marked increase in the recording and charging of family and domestic violence incidents. In 2006, 27,702 family and domestic violence incidents were recorded, compared to 16,602 in 2004. In 2006, 22,205 charges were laid against 11,813 offenders compared to 12,089 charges laid against 5,759 offenders in 2004.⁵

The legislative backdrop has also changed; it is now a circumstance of aggravation in an assault if the parties are in a family and domestic relationship.⁶ Laws against stalking criminalise some kinds of behaviour (common in domestic violence matters) that were previously not sanctioned by the law.⁷ In order to address recidivism, courts commonly impose community-based sentences with a program requirement requiring an offender to participate in a family and domestic violence perpetrator program. Perpetrator programs are also available in some prisons.⁸

Improvements to the criminal justice system's response to the needs of victims of family and domestic violence include the establishment of support services for victims (the Family Violence Service, the Victim Support Service and the Child Witness Service). These services provide support, counselling and information to witnesses throughout the criminal justice process. In addition, court procedures⁹ and facilities have been adapted to assist vulnerable witnesses giving evidence in court.¹⁰

Civil proceedings: violence restraining orders

Protection orders issued by the court are an integral part of the justice system's response to family and domestic violence. The *Restraining Orders Act 1997* (WA) enables a party to make an application to the court for an order preventing another person from contacting or coming near the person or property

1. Ministry of Justice, *Report on a Review of Legislation relating to Domestic Violence*, Final Report (2002) 12.

2. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 19.

3. For discussion of the present manner of investigating family and domestic violence, see *ibid* 19–25.

4. *Ibid* 19.

5. *Ibid*.

6. *Criminal Code* (WA) s 221(1)(a).

7. *Criminal Code* (WA) s 338E.

8. The Commission has been advised that in Western Australia at present only Acacia prison has a domestic violence program for prisoners: Maggie Woodhead, Acting Program Consultant Family and Domestic Violence and Sex Offender Treatment Programs, Department of Corrective Services, email communication (28 May 2008).

9. *Evidence Act 1906* (WA) ss 25a & 26.

10. *Evidence Act 1906* (WA) s 106R(3)(b). Witnesses may be declared a 'special witness' if, by reason of their relationship to the accused, they will be likely to suffer trauma or feel distressed or humiliated in giving evidence.

of the applicant.¹¹ If a magistrate is satisfied that violence or abuse has occurred, and will occur again in the future, then an interim order can be made in the absence of the respondent. Final orders (of up to two years) can only be made if the respondent does not object,¹² or does not return an endorsed copy of the interim violence restraining order to the court,¹³ or after a hearing.¹⁴ Breach of these orders can result in imprisonment.¹⁵

In addition, police can make protection orders in circumstances where there is not sufficient evidence for an arrest, but they believe that the victim will be subjected to further violence.¹⁶ Police orders allow a police officer to issue a 24-hour protection order against an individual without judicial approval or the consent of the victim.¹⁷ A 72-hour protection order can still be made without judicial approval, but the consent of the victim is required.¹⁸

Since it was first introduced, the *Restraining Orders Act 1997* (WA) has been the subject of amendment and review. In 2004, the Act was amended considerably, including by the introduction of police orders; the abolition of consent as a defence to a charge of breaching a violence restraining order; and the introduction of the ability to vary or cancel an interim violence restraining order.¹⁹ The Department of the Attorney General recently reviewed the changes made in 2004 and recommended the retention of police orders (with some changes) and made 14 recommendations for improvements to the Act.²⁰

Family court proceedings

The Family Court of Western Australia deals with family violence matters if relevant to the cases within its jurisdiction. It has been observed that family and domestic violence is often the 'root cause' of difficulties with child contact, residence and even property disputes.²¹ Dealing with families where child abuse is occurring is a major part of the function of family courts around Australia; research has indicated that 50% of pre-hearings and 30% of

full hearings in the Family Court of Australia involve allegations of child abuse.²²

Recognition of the impact of violence on children, as well as the fact that serious and sometimes fatal family and domestic violence occurs *after* separation, has been the impetus for reforms in this area. The Family Court of Western Australia has introduced case assessment conferences, which (among other things) enable the identification of matters that involve allegations of family and domestic violence, including child abuse and sexual abuse. If abuse has been identified, then the matter is referred to the Columbus program.²³ This program enables the ongoing risk to children in these circumstances to be assessed and considered in the family court process. A family court registrar and the family court counselling service meet with the parties to attempt to resolve issues such as child contact and residence without recourse to protracted litigation.

Other measures adopted by the Family Court of Western Australia include that, where there is an allegation of child abuse, the child is separately represented by a child representative (a lawyer appointed to promote the best interests of the child in the proceedings). Court experts are also appointed to report to the court on family dynamics; these experts are psychologists, psychiatrists or social workers with expertise in family and children's issues.²⁴

INADEQUACIES OF THE PRESENT SYSTEM

Despite improvements over the past 30 years, there are significant inadequacies in the justice system's response to family and domestic violence. There remain questions about the ability of the justice system to adequately deal with the variety of issues that family and domestic violence presents.²⁵

A fragmented response

The Department of the Attorney General noted in its review of the violence restraining orders legislation that:

Many submissions expressed concern at what they consider to be the unnecessary duplication, consequent inefficiency and re-traumatising to

11. *Restraining Orders Act 1997* (WA) s 13.

12. *Restraining Orders Act 1997* (WA) s 32(1)(b).

13. *Restraining Orders Act 1997* (WA) s 32(2).

14. *Restraining Orders Act 1997* (WA) s 16.

15. Under s 61 of the *Restraining Orders Act 1997* (WA) the maximum penalty for breaching a violence restraining order is a \$6,000 fine or imprisonment for two years or both.

16. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 10, 22.

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

18. *Restraining Orders Act 1997* (WA) s 30G.

19. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 10.

20. Ibid 1–3.

21. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Canberra: Office of the Status of Women, Department of Prime Minister and Cabinet, March 2001) 120.

22. Ibid; Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 25.

23. Murphy et al, 'Developing the Case Assessment Conference Model in the Family Court of Western Australia: Breaking down the firewall' (2005) 11(1) *Journal of Family Studies* 111.

24. Case assessment conferences were introduced after evaluation of the Columbus Pilot program in the Family Court of Western Australia. See further Pike L & Murphy P, 'The Columbus Pilot in the Family Court of Western Australia' (2006) 44 *Family Court Review* 270–286.

25. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 3.

victims when violence restraining order applications are not adequately integrated within the criminal offence process where the incident giving rise to both proceedings is the same.²⁶

For some families, the violence in their homes is the subject of separate files in three different courts; each with their own court procedures and standard of proof. Thus, evidence may have to be given about the same incident at least three different times in order to resolve each separate court matter.

Victims do not have faith in the justice system

The inadequacies of the present system are demonstrated by the fact that many victims of family and domestic violence simply do not use the justice system, and those that do attempt to use it often withdraw from it. Reasons for the failure to access the justice system or the decision to withdraw from the justice system include fear of retribution from the perpetrator; the belief that the perpetrator will change; shame and embarrassment; a lack of awareness of available services; and the difficulty in making contact with service agencies if the victim is under constant 'surveillance' by the perpetrator.²⁷ It has also been noted that victims can lose faith in the justice system if they do not receive the desired outcome or they are faced with a lack of understanding by personnel within that system.²⁸

It has been observed that a victim's principal motivation for contacting police is fear. Victims do not call police or apply for a restraining order with the aim of activating a long, protracted court process.²⁹ The fact that so many victims are not prepared to appear in court as a witness, or at the return date for a restraining order, is evidence that the system is not sufficiently responsive to their needs. The fact that victims choose not to participate in court proceedings, in turn, contributes to low prosecution rates; the laying of less serious charges than the circumstances might indicate; low rates of conviction; and high rates of recidivism amongst perpetrators.

Perpetrators do not respect the justice system

Despite the fact that family and domestic violence is now treated as a crime, it has been observed that

the traditional criminal justice approach does 'little to discourage domestic violence in the home'.³⁰ This is evidenced by the continued prevalence of family and domestic violence, and the frequency with which perpetrators of that violence breach bail conditions, violence restraining orders, community-based orders, suspended sentences and parole orders. It is further demonstrated by the fact that many family and domestic violence offenders plead not guilty to the charges and then place pressure on the complainant not to give evidence against them.³¹ In the recent report of the Department of the Attorney General, a submission from a police officer asserted that:

We have NEVER been successful in convicting an offender when the complainant does not give evidence.³²

The failure of the traditional criminal justice system to change the behaviour of family and domestic violence offenders is evidenced by the high rate of recidivism.³³ In 1994, the Western Australian Chief Justice's taskforce on gender bias found that such offenders 'are known for their relentless pursuit of their victims and are resistant to court control'.³⁴

ADAPTING THE JUSTICE SYSTEM TO RESPOND TO FAMILY AND DOMESTIC VIOLENCE

Over time the justice system has adapted to incorporate the community's expectations regarding family and domestic violence; namely, to treat it as a crime; hold the perpetrator accountable; protect the victim; and coordinate the system's response to the problem. As Winick notes, in the past, prosecuting authorities 'often treated domestic violence complaints less seriously than incidents of stranger violence'.³⁵ Then, the move to treat family and domestic violence as a crime led to police, prosecutors and courts dealing with family and domestic violence and violence committed by strangers as equivalent crimes.³⁶ More recently, it has been accepted that there are some significant differences between stranger violence and family and domestic violence, and that they should be treated differently.

In order to recognise the differences between family and domestic violence and other forms of violence, courts are increasingly 'specialising' their response

26. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 35–36.

27. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Perth: Office of the Status of Women, Department of Prime Minister and Cabinet, March 2001) 120.

28. Ibid.

29. Pence et al, *Western Australian Safety and Accountability Audit of the Armadale Domestic Violence Intervention Project* (Perth: Western Australian Government, 2007) 146. See also Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 34.

30. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 291.

31. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 38.

32. Ibid.

33. Thistlethwaite et al, 'Severity of Dispositions and Domestic Violence Recidivism' (1998) 44 *Crime & Delinquency*, 388–98.

34. Chief Justice of the Supreme Court of Western Australia's Taskforce, *Report on Gender Bias* (30 June 1994) 162.

35. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 286.

36. Ibid.

to family and domestic violence. Specialist training in the nature and dynamics of family and domestic violence has been provided to some personnel in the justice system,³⁷ including magistrates, police prosecutors and community corrections officers. Such specialisation

can enhance familiarity with, and knowledge of, the complexities of domestic violence cases; facilitate the development of experience and expertise in dealing with these cases; and assist in interagency training, co-operation and networking.³⁸

In addition, a specialised response 'provides a healthy signal to offenders that their conduct will not be tolerated and to victims that their suffering will not be ignored'.³⁹

However, the way the justice system traditionally responds to criminal behaviour can be problematic in family and domestic violence matters. Winick has noted that the ongoing nature of the threat in family and domestic violence is perhaps the hardest issue to reconcile with the way that the justice system operates.

A criminal court processing a domestic violence case resolves issues in a piecemeal fashion. It tends to view a particular case or issue to be adjudicated like a still photograph, rather than seeing the incident or event that requires adjudication as being part of a larger, dynamic process.⁴⁰

Other problems with the traditional approach have been identified. The Chief Judge of the District Court in New Zealand has described the difficulty in dealing with family and domestic violence in an adversarial justice system.

The adversarial system does not always serve the victims of violence well, in particular 'the adversary process encourages us to find the worst thing about the other party, to bring it out, and to talk about how terrible that [person] is. This is traumatic to children and, of course, damaging to the relationship of the parents'.⁴¹

The delays in the present system are also a problem; his Honour noted that delays can cause further tension in families, increasing the trauma of the experience; and may also cause victims to withdraw their testimony out of fear of increased violence while waiting for trials to be heard.⁴²

Recognition of the shortcomings of the justice system's response to family and domestic violence has led criminal justice agencies to propose alternative methods of dealing with the issue. This has happened at a time of increasing awareness of alternative theories of jurisprudence and the development of 'problem-solving' court programs. As a result, some of the alternative ways of dealing with family and domestic violence have been based on these theories, such as therapeutic jurisprudence and restorative justice.⁴³ These new approaches aim to improve outcomes for the community, for victims and for offenders by addressing problems and preventing further crime.

37. Ibid 287.

38. Ibid.

39. Ibid.

40. Ibid 210. See also Wexler D, 'Therapeutic Jurisprudence: An overview' (1999) <<http://www.law.arizona.edu/depts/uprintj/>> accessed 16 May 2008.

41. Johnson R, 'The Evolution of Family Violence Criminal Courts in New Zealand' (Paper delivered to the Police Executive Conference, Nelson, New Zealand, 8 November 2005) 6, quoting Wexler *ibid*.

42. Ibid.

43. See discussion under 'The Scope of the Reference: Restorative justice' and 'Therapeutic jurisprudence', Introduction.

Family and domestic violence court intervention programs

The other court intervention programs considered in this Paper are primarily focused on addressing the underlying causes of offending behaviour in order to prevent future crime. While this is clearly also a goal of family and domestic violence court intervention programs, such programs also seek to incorporate the community's goals in responding to family and domestic violence; namely, holding the offender accountable and keeping the victim safe. In most court intervention programs the offender and victim will not be closely related or even known to each other. This means that dealing with underlying causes of offending behaviour can, for the most part, be addressed without any reference to the specific victim of the offence. For example, it is not necessary to address victim's concerns in order to address drug-dependency.¹

Thus, family violence court intervention programs seek to focus both on the rehabilitation of the offender and victim safety and support. For that reason, victim support agencies are closely involved with the program and measures such as restraining orders or protective bail conditions are used to enable victims to be protected while the offenders engage in treatment programs.

DIFFERENT APPROACHES

There are many different models of family and domestic violence court intervention programs. In addition, as noted in the Introduction to this Paper, many jurisdictions in Australia and around the world are establishing specialist family and domestic violence courts that have some features in common with court intervention programs, but have a much broader ambit.² In the United Kingdom two models of specialist domestic violence court have been developed; 98 have been opened around the country.³ In the United States there are also two

models: a specialist domestic violence court and an integrated (multi-jurisdictional) court. These models have already been established in more than 300 courts, with more planned.⁴ In New Zealand there are six family violence courts, three of them in Auckland.⁵

In Australia, each state and territory has taken a different approach. The most established program is the Family Violence Intervention Program in the Australian Capital Territory, which has been operating since 1998 and is part of a 'whole of system' response to family violence in that jurisdiction.⁶ Outside Western Australia, the newest programs are the pilot programs in Victoria and New South Wales, which were both established in 2005.⁷ The New South Wales program was recently evaluated, but the Commission is not aware if the New South Wales government has decided to continue with the program, or to expand it. The Victorian pilot program has been recently been extended for a further two years.⁸

Most jurisdictions have magistrates that sit one day per week in the court location. In South Australia and Victoria the magistrates can order that an offender or a respondent to a violence restraining order participate in a perpetrator program while awaiting the finalisation of their court matter. In South Australia participation is voluntary; but in Victoria participation is part of a court-ordered counselling regime for all respondents to violence restraining orders.⁹ In New South Wales and the Australian Capital Territory perpetrator programs are available to magistrates as a sentencing option.

1. In saying that, the Commission does not dismiss victim issues in other court intervention programs. As mentioned in the Introduction, the involvement of victims in the criminal justice process can be enhanced through restorative justice processes, such as victim-offender conferencing. These processes can operate separately from or in conjunction with court intervention programs. The Commission notes that some Drug Court participants are referred to victim-offender mediation.
2. See discussion under 'Matters Beyond the Scope of this Reference: Specialist family violence jurisdiction', Introduction.
3. Baird V, Solicitor-General for the United Kingdom (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008). See Cook et al, *Evaluation of Specialist Domestic Violence Courts/Fast Track Systems* (United Kingdom, March 2004).

4. Herman K, Associate Director of Domestic Violence Programs, Center for Court Innovation, New York (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008). See also Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 287.
5. Recordon P, Judge of the Waitakere District Court, New Zealand (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).
6. See *Criminal Justice Intervention in Family Violence in the ACT: The Family Violence Intervention program 1998–2006* (Canberra: 2006); Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention program Phase II* (Canberra: Department of Justice and Community Safety, 2001).
7. Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (Sydney: NSW Bureau of Crime Statistics and Research, 2008) 2.
8. Magistrate Toohey, Melbourne Magistrates Court, telephone consultation (8 April 2008).
9. The Commission has been advised that there is always a violence restraining order in place while the offender is on bail in Victoria: *ibid*.

All jurisdictions have specialist victim support services. There are specialist magistrates in New South Wales, the Australian Capital Territory, Victoria, South Australia, and Western Australia. There are specialist prosecutors in Tasmania¹⁰ and the Australian Capital Territory (where the office of the Director of Public Prosecutions conducts prosecutions in the summary jurisdiction).¹¹ Specialist family violence defence lawyers are employed by Legal Aid in Tasmania.¹²

In Tasmania, the Australian Capital Territory and New South Wales there are case-tracking measures in place to ensure that delays are reduced and to enable support services to be accessed.¹³ In Victoria, which has had a specialised list for some time, the pilot program has a very broad jurisdiction, including the power to make family court orders and deal with all criminal matters and violence restraining order matters arising from circumstances of family violence.¹⁴

In Western Australia, there are family and domestic violence court intervention programs operating in both metropolitan and regional areas. In the metropolitan courts, the program is referred to as a 'family violence court'. But the family violence courts are not separately constituted courts; instead they operate as a specialist list within the general magistrates court. There are four family violence courts located at the Joondalup, Rockingham, Fremantle and Midland Magistrates Courts. During 2008 it is planned that two more will commence operation – one at Armadale Magistrates Court and the other at the Central Law Courts. In regional Western Australia, programs vary from court to court and the operation of any program tends to change with the appointment or transfer of a new judicial officer to the court.¹⁵

COMMON FEATURES

Family and domestic violence court intervention programs have a number of common features.

Policing: Special police procedures and policies have been established to support many family and domestic violence court intervention programs.

10. See Magistrates Court of Tasmania, 'Family Violence – General Information' <http://www.magistratescourt.tas.gov.au/divisions/family_violence> accessed 1 June 2007.

11. *Criminal Justice Intervention in Family Violence in the ACT: The Family Violence Intervention program 1998–2006* (Canberra: 2006) 27.

12. See Magistrates Court of Tasmania, 'Family Violence – General Information' <http://www.magistratescourt.tas.gov.au/divisions/family_violence> accessed 1 June 2007.

13. Tasmania: see *Ibid*; Magistrates Court of the ACT, *Family Violence List*, Practice Direction No 2 of 2005; New South Wales Local Court, *Procedures to be adopted for Domestic Violence Court Intervention Model at Campbelltown and Wagga Wagga Local Courts*, Practice Note No. 1 of 2006.

14. See Magistrates Court of Victoria, Family Violence Court Division <<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Specialist+Court+Jurisdictions-Family+Violence+Court+Division>> accessed 3 June 2008.

15. A recent notable example is the family violence court in Geraldton: the Barndimalgu Court.

Some programs are linked to specialist police units; others have policy agreements with local police. These include 'pro-arrest' and 'pro-prosecution' policies, which aim to ensure that reported family and domestic violence matters are followed up, and the offender is prosecuted and dealt with by the court. Other policies focus on investigation, evidence gathering and brief preparation in family and domestic violence matters.

Specialist personnel: Depending on their level of funding and specialisation, court intervention programs usually have a variety of specialist personnel, including judicial officers, prosecutors, defence lawyers, victim support workers and community corrections officers.

Arrangements for victim safety: Inside the court, victim safety measures include separate waiting rooms for victims and the use of screens, remote rooms and closed circuit television to assist victims to give evidence. Outside the court, protective bail conditions and violence restraining orders aim to give the victim protection from further abuse by the offender.

Arrangements for victim support: Specialist personnel are employed to support the victim throughout the court process. These personnel include court support workers, victim advocates and witness assistants. They include employees of government agencies, the prosecution service, or non-government organisations or charities. These workers provide the victim with support in and outside court; information about the legal process, the availability of legal aid and legal representation; advice about outcomes; and referral to other agencies, such as refugees or shelters, housing services and counselling.

Perpetrator programs: Perpetrator programs are sometimes voluntary and sometimes court-ordered. Participation in the program can be a condition of the offender's bail, or his or her sentence, or parole. Offenders are assessed using standardised psychological risk assessment tools to determine their ongoing threat to the victim. Programs usually consist of one or two initial one-on-one assessment sessions, and then attendance at up to 25 weeks of group therapy. During this time offenders are educated about responsibility and accountability for violence and/or an attempt is made to address offenders' personal issues; for example, self-esteem, anger and communication issues.¹⁶

Judicial monitoring and supervision: Depending on the model, judicial officers supervise or monitor the progress of the offender during participation

16. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 7, citing the work of Hopkins & McGregor (1991); Buzawa & Buzawa (1996), Stubbs (1994) and Katzan & Kelly (2000).

on a perpetrator program. In some programs, judicial officers are also involved in other forms of case management, such as ensuring that defended charges are proceeding expeditiously through the system and that victim protection measures are in place.

Interagency cooperation: In some court intervention programs there is interagency co-operation at a strategic level; many have steering committees or reference groups to oversee the functioning of the court program. In some jurisdictions, memoranda of understanding have been developed to jointly agree to operational procedures.¹⁷ At a day-to-day level, interagency cooperation is often achieved through the case management of matters in the court.

THE JOONDALUP FAMILY VIOLENCE PILOT COURT

The first family violence court in Western Australia opened in Joondalup in 1999. It was set up pursuant to recommendations made by the Family and Domestic Violence Taskforce Action Plan in 1995.¹⁸ The then Attorney General, Peter Foss, observed the approach to family and domestic violence taken in other Australian jurisdictions,¹⁹ and commissioned a feasibility study into whether and how a domestic violence court would operate in Western Australia. Acting on that study, a two-year pilot court was established in Joondalup.²⁰ The aims of the program included improving criminal justice responses to family and domestic violence; increasing perpetrator accountability; supporting victims and ensuring their safety; and reducing family and domestic violence in the Joondalup district.²¹

The pilot court was evaluated during 2000 and 2001. The evaluation was conducted by comparing information from the Joondalup pilot court with information from other courts and other police districts. The aim of the evaluation was to see if the measures introduced by the pilot court had an impact on the way that family and domestic violence matters were dealt with. The evaluation found that the existence of a specialist police domestic violence investigation unit resulted in far more charges being laid from call-outs (39% compared to 7.1%).²²

The evaluation also found that only slightly more offenders were referred to perpetrator programs in the pilot court than in the control courts, which

indicated that community corrections officers already had a good awareness of the need for (and availability of) perpetrator programs.²³ However, due to the short time frame within which the pilot court was evaluated it was not possible to measure the effectiveness of the perpetrator programs. Nonetheless, the evaluation did demonstrate the need for close supervision of family and domestic violence offenders. More breaches of the requirements of the program by offenders were detected and recorded in the pilot court. The authors of the evaluation suggested that this may be 'related to the increased information received during case management'.²⁴ Case management was seen to be beneficial, leading to better-informed decisions by the magistrate, and the identification of high-risk perpetrators and victims.²⁵

Overall, the pilot court was described as a 'qualified success'.²⁶ The report certainly made clear that there are significant problems with the way the existing court processes operate with respect to family and domestic violence matters, and that although perpetrator programs and case management are based on sound principles, further evaluation was necessary. Following the evaluation, a family violence court has continued to operate in Joondalup; however, it has changed since the pilot model.

Program operation

The pilot court was overseen by a high-level steering committee, which identified and dealt with problems concerning the day-to-day running of the court.²⁷ The court was linked to a specialist police domestic violence investigation unit, which investigated all reported family violence matters in the region.

The court sat each morning to hear applications for violence restraining orders and one day per week to deal with guilty pleas to family violence offences. There was a specialist magistrate, police prosecutor and duty lawyer. The victim was offered support and assistance throughout his or her contact with the court. Once an offender entered a guilty plea, he or she was monitored on a perpetrator program by the magistrate and a case management team.²⁸

17. Ibid 11.

18. Department of Justice and West Australian Police Service, *Joondalup Family Violence Court, Final Report* (February 2002) 1.

19. Western Australia, *Parliamentary Debates*, Legislative Council, 26 August 2004, 5669 (The Honourable Peter Foss).

20. Krazlan K & West R, 'Western Australia Trials a Specialised Court' (2001) 26(4) *Alternative Law Journal* 197–98, 210.

21. Department of Justice and West Australian Police Service, *Joondalup Family Violence Court, Final Report* (February 2002) 1.

22. Ibid 31.

23. Ibid xii.

24. Ibid 57.

25. Ibid 86.

26. Ibid 84.

27. This committee was comprised of the magistrate, the manager of Community Based Services (as it was then called – now Community Justice Services), the local police superintendent, the project manager, a representative from the local Pat Giles Centre refuge, the manager of the local Relationships Australia, the manager of the local Family and Children's Services (as it was then called – now Department of Child Protection), the manager of the Duty Lawyer Services of Legal Aid, the officer in charge of the Police Domestic Violence Investigation Unit, and the Clerk of the Courts. See Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Office of the Status of Women, Department of Prime Minister and Cabinet, March 2001) 62–63.

28. The case management team was comprised of a case management coordinator (from Victim Support Service), a

The pilot court heard all violence restraining order matters and all criminal charges for offences related to family and domestic violence where the offender entered a guilty plea. With violence restraining order applications, as soon as court staff realised that the matter related to an incident of family or domestic violence, the applicant was referred to the victim support worker for assistance with the application. The application, and any return dates or hearings in respect of the application, were heard in the family violence court.

Where criminal charges were laid, the police referred the matter straight to the family violence court. If the offender entered a not guilty plea, then the trial of the matter was conducted in the general magistrates court. If the offender entered a guilty plea (and was suitable for release on bail) then he or she could be remanded on bail for assessment for suitability to participate in a perpetrator program. The community corrections officer acted as surety for the offender's bail in order to ensure that he or she could be returned to court quickly if any bail conditions were breached.²⁹

Offenders assessed as unsuitable for the program were sentenced at the next court appearance in the usual manner. Offenders who were assessed as suitable and accepted onto the program were required to attend the program as a condition of bail. After three months, the offender was brought back into court for the magistrate to review his or her progress. Offenders not performing well on the program could be sentenced at that time. Offenders making progress were remanded for a further three months to complete the program.

Each matter was the subject of regular case management meetings to discuss the offender's progress and monitor the victim's safety. Throughout the process, victim support workers offered the victim support and assistance. Safety audits and risk assessments were carried out to determine the victim's safety and assist with decision making about the offender. The victims were also 'case managed' in an attempt to ensure that their needs for housing, counselling, health and other services were being met, and that issues relating to children were being dealt with.

Powers of the court and program outcomes

The Joondalup family violence pilot court operated without any specific legislative powers. Because sentencing cannot be deferred for longer than six

months,³⁰ participants would be sentenced no later than six months after entering a plea of guilty. At the completion of the perpetrator program a report was prepared by community corrections for the magistrate and the offender's progress on the program was taken into account in sentencing. The majority of successful participants received fines; many also were given a spent conviction. The evaluators reported that spent convictions for family and domestic violence matters were more likely to be imposed by the pilot court than by other general courts dealing with similar matters.³¹

THE FAMILY VIOLENCE COURTS EXPANSION PROJECT

The Department of the Attorney General has stated that the success of the pilot court led to the Western Australian government's decision to expand the family violence court model throughout the metropolitan area.³² The Western Australian Family and Domestic Violence Action Plan 2006–2007 states that the new courts 'are primarily modelled on the Joondalup pilot court'. However, there are some significant differences between the new family violence courts and the pilot court.

It is notable that, despite the lack of Aboriginal participation in the pilot court,³³ the funding for the expansion of the family violence courts in the metropolitan area was obtained as part of an initiative to reduce the rate of imprisonment of Aboriginal people in Western Australia.³⁴

METROPOLITAN FAMILY VIOLENCE COURTS

The project to establish a family violence court in every metropolitan court in Western Australia is still underway. The first 'new' court to be established was Rockingham in June 2007 and the most recent was Midland in January 2008. The Commission has been advised that an independent 'process' evaluation is presently being undertaken, with a report expected at the end of June 2008. Sentence information is being collected so that an 'outcomes' evaluation can be carried out in 2009 or 2010.³⁵ Since the new family

victim support worker (from the Pat Giles Centre), a community corrections officer, the officer-in-charge of the police domestic violence investigation unit, and a representative from Family and Children's Services. See Department of Justice & West Australian Police Service, *Joondalup Family Violence Court*, Final Report (February 2002) 1.

29. Ibid 4.

30. *Sentencing Act 1995* (WA) s 16(2).

31. Department of Justice and West Australian Police Service, *Joondalup Family Violence Court*, Final Report (February 2002) 56.

32. See Department of the Attorney General, 'Family Violence Court' <www.justice.wa.gov.au>.

33. Department of Justice and West Australian Police Service, *Joondalup Family Violence Court*, Final Report (February 2002) xi.

34. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).

35. Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General, telephone consultation (20 May 2008).

violence courts started, 148 offenders have been referred for assessment (22 of them Aboriginal); 55 offenders have been accepted onto the perpetrator program (13 of them Aboriginal); and 27 offenders have completed the program.³⁶

Program operation

As mentioned above, there are family violence courts in Joondalup, Fremantle, Rockingham and Midland. A reference group continues to oversee the operation of the Joondalup court and it is planned that a similar group will be established for each metropolitan family violence court.³⁷

At each court location, the family violence court sits one day per week. Each family violence court has a dedicated magistrate and a Family Violence Service worker.³⁸ The Commission has been advised that the program aims to have dedicated prosecutors in each court. At present there is usually a dedicated prosecutor at Rockingham, Midland and Fremantle.³⁹ Unlike some other court intervention programs, Legal Aid duty lawyers are not assigned exclusively to the family violence courts.

The family violence courts deal with a variety of family and domestic violence matters, including applications for and hearings in relation to violence restraining orders, sentencing and some trials.⁴⁰ However, the majority of the workload stems from the case management list: the monitoring of offenders who are participating in perpetrator programs.

There are places for 24 offenders in each court location: eight of these places are reserved for Aboriginal offenders. The Joondalup family violence court usually operates at above full capacity, having had up to 50 offenders on the case management list at one time.⁴¹ On the other hand, the more recently established courts are not yet operating at full capacity,⁴² although referrals to these courts appear

to be increasing.⁴³ At present there are 11 offenders currently being monitored by the family violence court at Midland (with four pending acceptance);⁴⁴ eight offenders currently being monitored by the family violence court at Rockingham;⁴⁵ 12 currently being monitored by the family violence court at Fremantle;⁴⁶ and 31 offenders currently being monitored by the family violence court at Joondalup.⁴⁷

Eligibility criteria

Only offenders charged with a 'family violence related offence' are eligible for the family violence court. A family violence related offence is defined (in the operating procedures) as 'an offence that has resulted from a family violence related incident'.⁴⁸ Family violence is defined as:

Conduct by a person with a *family and/or domestic relationship* with the victim whether actual, or threatened towards the victim and/or their property, and/or their family and/or their property that causes the victim, that member or any other member of the person's family fear about their well being and safety. Such conduct may be emotional, physical, sexual, financial, spiritual or psychological.⁴⁹

The definition of 'family and domestic relationship' is taken from the *Restraining Orders Act 1997*:⁵⁰

A relationship between 2 persons —

- (a) who are, or were, married to each other;
- (b) who are, or were, in a de facto relationship with each other;
- (c) who are, or were, related to each other;
- (d) one of whom is a child who —

36. Ibid.

37. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).

38. There are two victim support workers at each court; however, generally only one is involved in the family violence courts, the other's role is to assist with violence restraining order matters.

39. Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General, email communication (3 June 2008).

40. The operating procedures state that there will be a dedicated list to hear trials of family violence related offences: Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 8.

41. Meeting with Hildreth Glendinning, Joondalup Family Violence Service (12 February 2008).

42. In November 2007, it was reported that since the family violence court at Fremantle Magistrates Court opened in August 2007, eight offenders had been for assessment: five were being currently case managed; one had been terminated and two not accepted. Since the family violence court at Rockingham Magistrates Court opened in June 2007, 34 offenders had been referred for assessment, 27 had been accepted to the

program, 15 were currently being case managed, one had completed the program, 11 had been terminated and seven not accepted: Western Australia, *Parliamentary Debates*, Legislative Council, 29 November 2007, 5597 (Honourable Sue Ellery, Minister for Child Protection, Communities, Women's Interests, Seniors and Volunteering).

43. When the Commission visited the family violence court at Rockingham Magistrates Court in January 2008, the program was operating below its capacity with eight offenders being case managed at that time. However, the Commission was advised in May 2008 that the family violence court at Rockingham had received a steady amount of new referrals, with 15 offenders on the case management list: Magistrate Gluestein, telephone consultation (12 May 2005).

44. Maria Reason, Family Violence Service, Midland Magistrates Court, email communication (3 June 2006).

45. Rochelle Watson, Family Violence Service, Rockingham Magistrates Court, email communication (3 June 2006).

46. Evan King-Macskasy, Family Violence Service, Fremantle Magistrates Court, email communication (9 June 2008).

47. Hildreth Glendinning, Family Violence Service, Joondalup Magistrates Court, email communication (3 June 2006).

48. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 5.

49. Ibid (emphasis added). This definition of family violence is taken from the *Family Law Act 1975* (Cth) s 4. The operating procedures state that this definition was preferred to the definition of family and domestic violence found in the 2004 amendments to the *Restraining Orders Act 1997* because it was considered to be 'more inclusive of the nature of family violence in Aboriginal relationships'.

50. This definition is used in s 221 of the *Criminal Code*, which provides that an assault is aggravated if the victim and the offender are in a family and domestic relationship.

- (i) ordinarily resides, or resided, with the other person; or
- (ii) regularly resides or stays, or resided or stayed, with the other person;
- (e) one of whom is, or was, a child of whom the other person is a guardian; or
- (f) who have, or had, an intimate personal relationship, or other personal relationship, with each other.⁵¹

Thus, the definition of a family violence offence is broad and includes all kinds of abusive behaviour by people in current and former family relationships. Because the range of conduct covered by the definition of a family violence offence is broad, the jurisdiction of the court includes first offenders, and offenders facing a range of possible penalties: from those most likely to be fined, to those who have breached violence restraining orders or suspended sentences (who are, therefore, more likely to receive a sentence of imprisonment).⁵² Offenders being sentenced for a family violence offence can also be sentenced for other related offences.⁵³

Additionally, in order to participate in the case management list, an offender must be willing to participate in, and must be assessed as suitable for, the perpetrator program. Clearly, there must be a place available or becoming available in the program.⁵⁴ Generally, a plea of guilty (and an admission of the statement of material facts as provided by the police) is required, but in some circumstances an offender who is found guilty at trial may be referred for an assessment.⁵⁵

Importantly, an offender will not be accepted onto the case management list unless the magistrate considers that there is a 'reasonable prospect' of ensuring the safety of the victim while the offender is on bail. Factors that are considered in assessing the victim's safety include the criminal history of the offender (including the frequency and severity of any previous family violence offences); the nature and severity of the circumstances of the matter before the court; the current bail conditions and the offender's compliance with them; whether there is a violence restraining order in place and the offender's compliance with such an order; whether contact has been established with the victim and the offender; and the victim's current living arrangements.⁵⁶

The family violence courts do not have special jurisdiction over violence restraining orders. The

operating procedures state that the courts may hear defended applications for violence restraining orders or urgent applications at the end of the case management list if time permits. In fact, the family violence court magistrates hear applications for violence restraining orders before the family violence court commences sitting on the days that the courts operate. The Commission is not aware of how often the time allocated allows the magistrates sitting in the family violence courts to hear applications for, or defended hearings in respect of, violence restraining orders. The Commission notes that the hearing of violence restraining orders or contested family violence offences by family violence courts is not undertaken as part of a coordinated response to all family violence matters in the relevant location; instead family violence court magistrates assist the general magistrates to complete all family violence matters.

Referral and court process

A referral to a family violence court can be made at the suggestion of the police, the offender or a magistrate. There are three stages in the program: referral for assessment, review of assessment and a progress review hearing. At the end of the program the offender appears in the family violence court for sentencing.

Referral for assessment

If, at the offender's first appearance in the family violence court, the eligibility criteria is satisfied then the offender is remanded on bail for assessment. The family violence court magistrate will set appropriate bail conditions (if not already set). Typically, bail conditions include conditions imposed for the purpose of protecting the victim of the offence by prohibiting the offender from contacting (or going near) the victim. For example, bail conditions often provide that the offender will not:

- communicate or attempt to communicate by whatever means (including telephone, SMS and email or through another person) with the protected person;
- approach within 50 metres of the protected person; or
- enter or remain upon specified premises, or any premises where the protected person lives or works, or be within 50 metres of the nearest external boundary of such premises.

If the offender and the victim are still in contact, or are living together, the magistrate may impose a condition that the offender will not 'behave in an aggressive or violent manner towards the protected person or his or her children'.⁵⁷ Bail conditions of this

51. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 5. See also *Restraining Orders Act 1997* s 4.

52. Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services, telephone consultation (10 March 2008).

53. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 8.

54. *Ibid* 10.

55. *Ibid* 9.

56. *Ibid* 10.

57. The Commission is grateful to Magistrate Gluestein for providing a copy of his 'usual' protective bail conditions.

kind are referred to as 'protective conditions'.⁵⁸ If an offender does not comply with a protective condition he or she is liable to arrest and revocation of bail, and will be charged with an additional offence. Further, the offence of breaching a protective condition is classified under the *Bail Act 1982* (WA) as a serious offence. If charged with a serious offence while on bail for another serious offence, the offender will be remanded in custody unless he or she can establish exceptional circumstances. Although not categorised as 'protective conditions', participation in the assessment process and supervision by a community corrections officer are also made terms of the offender's bail.

The offender is usually remanded on bail for four weeks to enable an assessment of the circumstances of both the offender and the victim. The community corrections officer and the perpetrator program provider assess the offender's suitability for the perpetrator program, including willingness to change his or her behaviour and practical considerations, such as whether he or she is able to get to the place where the program is held. The community corrections worker carries out standardised tests to determine the level of ongoing risk the offender poses to the victim and the community.⁵⁹

Other factors that might influence the offender's ability to participate are mental health issues or drug and alcohol use.⁶⁰ The Commission was advised that offenders with mental health, drug or alcohol problems that were being 'managed' were not necessarily deemed unsuitable for the program; however, 'unmanaged' issues of this kind mean that the offender is generally not suitable for group work and, therefore, not suitable to participate in the perpetrator program.⁶¹

In addition to assessing the offender's level of risk, a risk assessment from the victim's point of view is usually conducted. During this interview, the victim is supplied with a 'safety pack' containing (among other things) emergency numbers, reading on family violence, and information on violence restraining orders. The victim is also referred to relevant local government or non-government agencies that may be able to provide assistance.⁶²

After this assessment process has been undertaken and information has been gathered from the victim and the offender, the case management team meets to discuss the matter.

Review of assessment

At the end of the assessment process the offender appears again in the family violence court. A pre-sentence report is provided to the magistrate, and the magistrate makes the decision about whether the offender is to be accepted onto the program. If the offender is found to be unsuitable for the program, or is subsequently unwilling to participate, the magistrate sentences the offender at this court appearance. If the offender is assessed as suitable, then he or she is remanded for up to three months to commence the perpetrator program. The bail conditions initially imposed are reviewed at this hearing and may be altered depending on the circumstances; protective conditions are usually maintained and additional requirements for supervision or participation in the program may be imposed.

In the next three months, the offender participates in the perpetrator program. As part of the program the offender is required to attend weekly, two-hour group meetings.⁶³ The community corrections officer monitors the offender's performance, both through contact with the offender and with the program providers. The Commission has been advised that the community corrections officers usually allow offenders to miss two consecutive or three cumulative sessions. If the offender does not attend the sessions the community corrections officers 'read the riot act' and advise the offender that his or her bail will be breached for failure to attend. Consequences of breach include a fine and the possibility that the offender will be removed from the program (and therefore sentenced straight away).⁶⁴

The Commission has been advised that community corrections officers (in consultation with the case management team) tailor the program requirements to the meet the specific needs of the participants. For example, offenders who work away from the metropolitan area can have a more flexible attendance timetable to suit their work schedule. In Joondalup, some offenders for whom group work is not appropriate have had one-on-one counselling sessions with psychologists approved by the Department of Corrective Services. Funding restrictions have meant that sometimes offenders pay for these sessions themselves (approximately \$95 per session). The community corrections officers also link up offenders with other suitable programs, such as Yorgum (Aboriginal counselling service) and AADS (Aboriginal Alcohol and Drug Service).⁶⁵

58. *Bail Act 1982* (WA) Sch 1, Pt D (2).

59. These tests are the 'Harm Assessment', 'Case Needs Assessment' and 'Spousal Risk Assessment'.

60. Walsh A & Ruthven R, *Metropolitan Family Violence Court Expansion* (Paper presented at the *Family Violence and Aggression: Fear is not the Only Consequence*, Adelaide, 24–26 October 2007) (unpaginated).

61. Debra McLean, Manager, Relationships Australia, telephone consultation (7 April 2008).

62. Rochelle Watson, Family Violence Service, Rockingham Magistrates Court, email communication (12 May 2008); Hildreth Glendinning, Family Violence Service, Joondalup Magistrates Court, email communication (19 May 2008).

63. Debra McLean, Manager, Relationships Australia, telephone consultation (7 April 2008).

64. Maggie Woodhead, Acting Programs Coordinator, Sex Offender Treatment Program, Offender Management and Professional Development, Department of Corrective Services, telephone consultation (5 March 2008); Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services, telephone consultation (10 March 2008).

65. Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services, telephone consultation (10 March 2008).

While the offender participates in the program, the victim support worker continues to support the victim where appropriate. The case management team meets weekly to monitor the offender's attendance at and participation in the group meetings. They also monitor the victim's safety and any issues relating to children.

There are five agencies involved in case management meetings; unlike drug courts and some other court intervention programs, the magistrate and the offender's lawyer are not part of the case management team. The roles of each member of the case management team are described by the program's operating procedures and are summarised below.⁶⁶

Case management coordinator (Family Violence Service): The coordinator chairs and documents the meetings of the case management team; conducts the initial assessment of the matter from the victim's perspective; puts the victim in touch with other agencies; helps the victim to make plans for his or her safety; and provides the victim with information to help understand the court process. The coordinator remains in contact with the victim and provides updates to both the case management team about the victim's perspective, and to the victim about the offender's progress on the program.

Family violence senior community corrections officer (Community Justice Services): The community corrections officer is the offender's main link to the family violence court. The community corrections officer supervises the offender's bail conditions and participation in the program; prepares the pre-sentence reports that are provided to the magistrate at each stage of the process; and appears in court and provides information to the magistrate during court hearings, if required. The community corrections officer maintains contact with the offender throughout the program and provides information to the case management team about the offender's progress, which can be used by the other members of the team in their own roles.

Police representative: The police representative attends the case management meetings to provide information about police investigations of family violence matters, and any police operations involving the offenders or their families in the family violence court.⁶⁷ The police representative may be provided

with information at the meetings that requires a police response or intervention; for example, where it is alleged that there has been a breach of bail conditions or a breach of a violence restraining order. The police representative can also provide general information to other members of the team about police procedures and responses.

Department of Child Protection caseworker: The child protection caseworker can provide information to the case management team about any contact that the Department of Child Protection has (at any time) with the family involved in the family violence court, and is a point of contact for the family with the Department, if the Department needs to become involved.

Perpetrator program provider: Generally, the person from the perpetrator program who attends the meetings will be involved in the therapeutic intervention conducted with the offender. However, as noted above, some offenders have one-on-one counselling so this may not always be possible. The program providers conduct regular assessments of the offenders and report their findings back to the case management team, including the victim support worker, to enable them to continue to assist with the victim's safety planning.

In the weekly meetings each member of the team provides information that can be relied upon by each other member in providing services to the victim and the offender involved. For example, information from the victim support worker may be used by the program provider to assist with the therapeutic intervention with the offender. The child protection worker can also provide information if there are children involved. The information provided in the case management team meetings is used to determine how genuinely the offender is participating in the program and if there are any specific concerns that need to be addressed.⁶⁸ At the end of each meeting the coordinator creates a case management plan for each offender, which is then circulated to each team member to record and remind them of any matters that they must follow up.⁶⁹

66. See Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007).

67. Currently, because of funding restrictions, the police are only able to attend case management meetings in the family violence court at Joondalup Magistrates Court: meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008). The Commission was advised that,

despite the police not attending case management meetings at Rockingham, they are available to answer queries in relation to matters being discussed by the case management team by telephone during the meeting: meeting with case management team, Rockingham Magistrates Court (10 January 2008). However, the Commission was also told that the absence of police from the case management team is a 'huge concern with regards safety of victims and children': Evan King-Macskasy, Family Violence Service, Fremantle Magistrates Court, email communication (9 June 2008).

68. Meeting with the case management team, Rockingham Magistrates Court (10 January 2008).

69. Rochelle Watson, Family Violence Service, Rockingham Magistrates Court, email communication (12 May 2008); Hildreth Glendinning, Family Violence Service, Joondalup Magistrates Court, email communication (19 May 2008).

Progress review hearing

Approximately halfway through the perpetrator program (three months) the offender appears again in the family violence court to enable his or her progress to be monitored. At the end of this first period the case management team provides information to the community corrections officer to be included in a pre-sentence report for the magistrate. At the progress review hearing, the magistrate is given the updated pre-sentence report and then talks to the offender about his or her progress on the program and compliance with the bail conditions.

The magistrate addresses the offender directly (even if the offender is represented by a lawyer) about his or her progress, or otherwise, on the program. Because of the detailed pre-sentence reports and previous interaction with the offender in court, the magistrate is armed with considerable information about the offender's personal circumstances. The magistrate uses this information to discuss the offender's progress. In so doing, magistrates in family violence courts are mindful of the principles of therapeutic jurisprudence in relation to respect for and engagement with the offender.⁷⁰

If the offender's progress is satisfactory, then he or she is remanded on bail for a further three months to complete the program. Changes can be made to the bail conditions at this time if necessary. If the offender's progress is not satisfactory, then the magistrate discusses this directly with the offender. If there have been serious breaches of the bail conditions, the magistrate may terminate the offender's participation in the program and sentence him or her at that time. Less serious breaches may be dealt with by a reprimand from the magistrate or changes to the bail conditions. If the offender wishes to continue in the program, and the magistrate and the case management team decide that, despite the unsatisfactory progress, the offender ought to be given another chance to participate, then the offender will be remanded for a further three months.

The next three-month period is for the offender to complete the program. The community corrections officer continues to supervise the offender's participation in the program and compliance with bail conditions. The victim support worker continues to support the victim and family as appropriate or required. The case management team continues to meet weekly to discuss the progress of the matter and returns the offender to court if required.⁷¹

Powers of the court and program outcomes

There is no specific family violence court legislation. The courts use the general legislative power to defer sentencing for up to six months to provide the offender with the opportunity to participate in the family violence court program. At the end of the program, the offender appears for the final time in the family violence court. Before that hearing, a further pre-sentence report is prepared by the community corrections officer (on the basis of information provided by all the members of the case management team) and given to the magistrate. The victim may, if he or she chooses, provide information to be included in the pre-sentence report. The magistrate can take the information provided in the pre-sentence report into account in sentencing the offender. If the offender has not finished the program, the magistrate may impose a community-based sentence with a program requirement to allow for the program to be completed. If not already in place, a violence restraining order may be granted to continue to protect the victim after sentencing.

The victim support worker provides support and assistance to the victim before and at the sentencing hearing, including assisting with the preparation of a victim impact statement, if desired. Once the program is completed, the victim support worker also ceases involvement with the victim; however, the victim support worker ensures that the victim is linked up with local government and non-government agencies that can provide him or her with ongoing support. Community Justice Services also deals with victim issues as part of its supervision of the offender if a community-based order has been imposed.

GERALDTON MAGISTRATES COURT

The Geraldton Magistrates Court has a history of innovative programs; the first (GASR) is discussed in Chapter Five of this Paper. The GASR is a general court intervention program addressing a variety of underlying problems including family and domestic violence. Another program, 'Roads to Healing', was established by the Geraldton Magistrates Court in conjunction with the Geraldton Regional Domestic Violence Project, local victim support and treatment agencies program in 2003.⁷² The objective of the program was to provide counselling (including substance abuse counselling, relationship and family counselling, parenting skills programs, sexual assault counselling, anger management and mediation) to parties to a violence restraining order.⁷³ Willing and suitable participants would attend counselling and

70. Meeting with Magistrate Gluestein (10 January 2008); meeting with Magistrate G Lawrence (18 March 2008).

71. Meeting with case management team, Rockingham Magistrates Court (10 January 2008).

72. King M, 'Roads to Healing: Therapeutic jurisprudence, domestic violence and restraining order applications' (2003) 30(7) *Brief* 14.

73. *Ibid* 14–15.

an interim restraining order would remain in place for the duration of the program. The magistrate monitored the participants by conducting regular court reviews.⁷⁴ It was envisaged that if the issues between the parties were adequately resolved, the interim restraining order could be cancelled.⁷⁵ The Roads to Healing program is no longer continuing; the program had some practical difficulties, including that there was nothing to enforce compliance by the participants. The Commission has been advised that of the 35 couples who were referred to counselling only one couple completed the program.⁷⁶

Barndimalgu Court

In August 2007 the Barndimalgu Court commenced operation in the Geraldton Magistrates Court. It is a specialist Aboriginal court dealing with Aboriginal family and domestic violence offenders. 'Barndimalgu' means 'to fix things, make good' in the local Wajarri language.⁷⁷

Program operation

The aim of the court is to give Aboriginal offenders who are facing a term of imprisonment an opportunity to address their offending behaviour through pre-sentence programs. The eligibility criteria are very broad and flexible: if the offender is pleading guilty, willing to participate in the program and the community corrections officer considers him or her suitable, then the offender is able to participate. Unlike other family violence courts, the Barndimalgu Court permits offenders with significant drug and alcohol problems to participate.⁷⁸

A referral to the court can come from the offender, his or her lawyer, the prosecutor, the magistrate or the community corrections officer. The Barndimalgu Court does not sit in the traditional courtroom at Geraldton; rather, it sits in another room in the courthouse that has been specially adapted for its purposes. The members of the court sit around an oval table painted specially for the court; the Aboriginal artwork on the table and in the room focuses on 'family', and the Aboriginal flag hangs in the room.⁷⁹ The court is opened with an acknowledgement to country, and the court is closed to all but those who are directly involved in a matter. The proceedings are conducted as informally as possible. Those present at the table are the magistrate, two respected members of the local Aboriginal community (who sit on either side of the magistrate), an Aboriginal police prosecutor, the

offender, his or her lawyer and a senior community corrections officer.⁸⁰

When an offender first appears in the court the plea is taken and then the two respected Aboriginal community members address the offender directly about his or her behaviour and the impact that it has on the community. There is then a discussion of the offence and any factors (such as drug or alcohol abuse) that may have contributed to the offending behaviour. Those present at the table determine collaboratively what steps the offender should be required to take to address his or her offending behaviour. The Magistrate gives the offender an idea of the kind of sentence that might be imposed if the pre-sentence requirements are not complied with. The offender is then remanded on bail to be assessed for suitability to participate in the programs that have been suggested. Protective bail conditions can be imposed, as well as requirements for the offender to submit to breath or urine testing, if the offender has drug or alcohol problems.

Following an assessment by the community corrections officer for suitability to participate in rehabilitation programs, the offender returns to court. If considered suitable for the program, the offender is required to appear in court fortnightly to be monitored by the magistrate and other members of the court. Any progress on, or difficulties with, the program are discussed, and the offender can be praised, or rebuked, as a consequence.⁸¹

A key component of the Barndimalgu Court is a family violence program that Community Justice Services has adapted from a model used in the Northern Territory. All offenders in the court participate in this program, as well as any other suitable and available programs, such as drug and alcohol counselling. Magistrate Sharratt explained to the Commission that offenders in the Barndimalgu Court may have to comply with requirements on a daily basis: it is a very intensive program. The court is also an opportunity to link the offender with other services or agencies that may be able to assist. Magistrate Sharratt noted that homelessness and housing is a problem for many offenders in the Barndimalgu Court, and that the court makes referrals to address this issue.⁸²

There is no victim representative on the court. It is not considered desirable for the victim, or a victim representative, to be directly involved in the court because of the importance placed on enabling the offender 'to be up front and honest in meetings'.⁸³ That does not mean that there is no support for victims: there is a Victim Support Services office in Geraldton,

74. Ibid 14–16.

75. Ibid.

76. Steve Ford, Geraldton Magistrates Court, telephone consultation (13 May 2008).

77. Samantha Haring, Department of Corrective Services, Geraldton, email communication (13 May 2008).

78. Magistrate Sharratt, email communication (5 March 2008).

79. Samantha Haring, Department of Corrective Services, Geraldton, email communication (13 May 2008).

80. Magistrate Sharratt, telephone consultation (5 March 2008).

81. Samantha Haring, Department of Corrective Services, Geraldton, telephone consultation (6 March 2008).

82. Magistrate Sharratt, telephone consultation (5 March 2008).

83. Samantha Haring, Department of Corrective Services, Geraldton, telephone consultation (6 March 2008).

which provides assistance to applicants for violence restraining orders, and court support and assistance to victims of criminal offences involving family and domestic violence matters. Sometimes, in order for Victim Support Services to become involved, the magistrate requests a victim impact statement as part of the assessment process. Victim safety is also considered by the community corrections officer as part of the assessment of the offender's suitability for the program.⁸⁴ The community corrections officer contacts the victim during the program to hear his or her views about the offence and the offender's progress on the program, if appropriate.

Powers of the court and program outcomes

The program operates without special legislative powers. Because the program targets offenders facing imprisonment, some participants can be placed on a Pre-Sentence Order for up to two years. If a Pre-Sentence Order is not imposed, sentencing is deferred for six months. Even though the program has only been operating for a short time, it appears to be working well.⁸⁵ Magistrate Sharratt advised the Commission that compliance rates of offenders were good, and that offenders were motivated by what the Barndimalgu Court could offer them; for example, help with alcohol and drug problems, relationship issues and practical concerns like getting a job and a drivers licence. Because of the intensive nature of the program, successful participants do not usually receive significant further punishment; some receive conditional release orders or other community-based sentences depending on the nature of the offence and the offender's performance on the program.⁸⁶

84. Ibid.

85. Magistrate Sharratt, telephone consultation (5 March 2008); Samantha Harring, Department of Corrective Services, Geraldton, telephone consultation (6 March 2008).

86. Magistrate Sharratt, telephone consultation (5 March 2008).

Consultation issues

The Commission recognises that the justice system's response to family and domestic violence raises some difficult questions, and that there are a range of divergent views about the best way in which the issues should be approached. In particular, the Commission notes the challenge of incorporating the community's goals—protecting victims, holding offenders accountable and reducing the incidence of family and domestic violence—into the court system.

The Commission's consultation process is crucial to the formulation of recommendations about the appropriate legislative and policy framework in this area. The Commission hopes to gather the views of those working in the family violence courts and other intervention programs in Western Australia, as well as others working in the broader field of family and domestic violence research, policy and practice. The Commission invites submissions on any aspect of family and domestic violence court intervention programs, but especially seeks submissions on the questions posed in this section.

In the Introduction to this Paper, the Commission has proposed that consideration be given to a broader court response to family and domestic violence: the establishment of specialist family violence jurisdiction that could deal with all aspects of family and domestic violence in the court system. The Commission invites those making submissions on the questions posed in this chapter to also give consideration to Proposal 1.1.

BENEFITS OF FAMILY AND DOMESTIC VIOLENCE COURT INTERVENTION PROGRAMS

From the Commission's research and preliminary consultations it is clear that court intervention programs in the area of family and domestic violence can benefit victims, perpetrators and the community. Further, specialist family and domestic violence programs can benefit the justice system.

Specialisation

Personnel working in a specialised court or program develop an understanding of the nature of family and domestic violence and the availability (and limitations of) support and services for victims, perpetrators and their children.¹ This enhanced understanding has the

1. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 10.

capacity to greatly improve the services provided by the justice system and to better inform the decision-making of magistrates. Further, through steering committees and other forums, people working in specialist courts and programs can share this knowledge with other government agencies and the wider community. The experience of the Joondalup pilot court showed that having skilled and dedicated staff is crucial to the success of a family violence court,² it 'provides skills, energy, commitment and drive for the project that would be lacking if a more mainstreaming approach was adopted'.³

Integrated response

One of the key principles of the Western Australian government's response to family and domestic violence is that the various government and non-government agencies that provide that response need to do so collaboratively.⁴ This enables diverse agencies to work toward the same goals and ensure consistency of response to victims and perpetrators. The court can also be a linking point for government and non-government agencies, so that both victims and perpetrators are made aware of the services that can be provided to them, such as housing assistance, drug and alcohol counselling, and parenting groups. Moreover, it is an attempt to have the community agencies take some joint responsibility for the management of the problem; rather than relying on the victim to access all agencies independently and be the sole 'manager' of the assistance provided.

Integration occurs at two levels in the present model of family violence courts used in the metropolitan area. There will soon be steering committees for each of the metropolitan family violence courts, which will bring together high-level representatives from relevant agencies to make policy decisions.⁵ The case management team provides an interagency response to individual matters; linking up services and working to reduce the fragmentation of the justice system's response to families by providing

2. Urbis Keys Young, *Research into Good Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* (Office of the Status of Women, Department of Prime Minister and Cabinet, March 2001) 69.

3. Ibid.

4. Family Domestic Violence Unit, *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* (Perth: Department for Community Development, 2004).

5. At present there is only a steering committee at Joondalup: meeting with Andrea Walsh, Project Manager, Metropolitan Expansion of the Family Violence Court, Department of the Attorney General (31 January 2008).

assistance with violence restraining orders, child protection issues and criminal matters.

Improved efficiency of the court process

The Department of the Attorney General has recently reported on the increased number of charges being laid in family and domestic violence matters as a result of improved policing.⁶ This may lead to more family and domestic violence matters in the magistrates and other courts, and more offenders being sentenced to imprisonment or community-based orders. Because this development is recent, the Commission is not aware what impact this change in policing has had on workload of the justice system.⁷

Although court intervention programs clearly require considerable resources, some programs may have the potential to reduce justice costs. Family and domestic violence programs provide an incentive for perpetrators to address their behaviour and, in turn, this may encourage more guilty pleas and therefore less contested matters. The support offered and the safety measures put in place for victims in family and domestic violence court intervention programs may further reduce delay and cost. For example, victims may be less likely to refuse to give evidence if appropriate support has been given.

Offender accountability

Family and domestic violence court intervention programs take advantage of the 'crisis point' of contact with the justice system to motivate offenders to address their offending behaviour.⁸ Magistrate Geoff Lawrence told the Commission he has observed that, through the perpetrator program, many offenders have gained valuable insights into the dynamics of their relationships and into their behaviour. He also noted that the strategies employed by the court 'seem to be working'; that offenders 'do not want to leave groups – a threat to leave leads to pleas to stay'; and that there are 'powerful positive forces at work that indicate that such programs are fulfilling a need in [offenders]'.⁹

A number of community corrections officers told the Commission that there is real value in pre-sentence family and domestic violence programs because offenders are more motivated in such programs.¹⁰ This is shown in a better attendance rate at meetings and a better relationship with the community corrections officers.¹¹ Magistrate Noreen Toohey—from the Family Violence Division of the Melbourne Magistrates Court—described to the Commission the benefits of court-ordered counselling. She commented that 'some offenders are ready to grab anything to resurrect their lives, some are ashamed and won't take themselves off to counselling, and have to be ordered to do so'.¹²

Victim safety

The guiding principles for the family violence courts state that '[s]afety of victims ... is paramount at all times'.¹³ This makes the process in this court quite different to the usual criminal justice process: information and services are provided to the victim; magistrates understand the nature and dynamics of family and domestic violence; and the case management team takes the victim's safety into account in monitoring the performance of the offender on the program. In addition, the emphasis on rehabilitation is crucial to the safety of many victims, because of the frequency with which victims remain in a relationship, or reconcile, with offenders.¹⁴

OPERATIONAL ISSUES

In this section the Commission discusses the operation of the family violence courts in the metropolitan area. Regional family and domestic violence court intervention programs are considered below.¹⁵

Acceptance of the statement of material facts

In addition to pleading guilty, offenders must presently admit the facts as alleged in the police statement of material facts before being assessed

6. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 19.

7. At a recent conference on specialist family violence courts, speakers from courts all over the world noted that changes in police policy had resulted in significant increases in domestic violence matters coming before the courts, and that this had led those courts to develop special procedures for dealing with these matters. For example, Baird V, Solicitor-General for the United Kingdom; Wyant RE, Chief Judge of the Provincial Court of Manitoba; Herman K, Associate Director of Domestic Violence Programs, Center for Court Innovation, New York, USA; Morgan M, Associate Professor, Massey University, New Zealand; and Jones M, Senior Family Violence Prosecutor, ACT Office of the Director of Public Prosecutions (Speeches delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).

8. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 292.

9. Meeting with Magistrate G Lawrence (18 March 2008).

10. Maggie Woodhead, Acting Programs Coordinator, Sex Offender Treatment Program, Offender Management and Professional Development, Department of Corrective Services, telephone consultation (5 March 2008); Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services, telephone consultation (10 March 2008); Hazel Moore, Coordinator Aboriginal Family and Domestic Violence Program, Department of Corrective Services, telephone consultation (13 March 2008).

11. Maggie Woodhead, Acting Programs Coordinator, Sex Offender Treatment Program, Offender Management and Professional Development, Department of Corrective Services, telephone consultation (5 March 2008).

12. Magistrate Toohey, Melbourne Magistrates Court, telephone consultation (8 April 2008).

13. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 4.

14. Meeting with Magistrate G Lawrence (18 March 2008). See also Johnson R, 'The Evolution of Family Violence Criminal Courts in New Zealand' (Paper delivered to the Police Executive Conference, Nelson, 8 November 2005).

15. See discussion below under 'Broader Issues: Regional courts'.

for suitability for the perpetrator program. In family and domestic violence matters, often an offender is prepared to plead guilty, but not to completely accept the nature of the offending behaviour described by the police. Stewart states that:

Denial, minimisation and justification by offenders of their violent and abusive conduct are renowned.¹⁶

During visits to the family violence courts, the Commission observed a number of offenders whose eligibility for participation in the family violence courts was debated, not because the offender was not prepared to plead guilty or be assessed for suitability for the program, but because the offender was not prepared to accept the entire statement of material facts.

In other jurisdictions a plea of guilty is not required. In South Australia all that is required is a willingness to do the perpetrator program.¹⁷ A program worker from the Central Violence Intervention Program told the Commission that, in his experience, willingness to participate does not necessarily equate with pleading guilty to all charges.¹⁸ What is required is an admission that the offender has committed an act of abuse or violence against a partner at some previous time. This is sometimes obtained by encouraging the offender to recognise that the fact that the police were called is a problem—and he or she was the cause of that problem—even if the offender is not able to accept that all of it is his or her fault.¹⁹

South Australian Magistrate Tony Newman has said that offenders ‘must want to do something about their behaviour’.²⁰ He also notes that ‘[i]t is not unusual for an initial denial of a charge to become an admission after assessment or partway through participation in a group’.²¹ Similarly, the manager of Relationships Australia in Western Australia advised the Commission that many offenders are initially very defensive and ‘minimise their behaviour to everyone, including themselves’.²² However, she said some offenders are able to accept more responsibility for their behaviour, even after the initial assessment, because of the environment in which the assessment takes place and the ability of the trained counsellor. The fact that counsellors might be better placed to ‘negotiate’ with offenders about the allegations

against them was recognised by an experienced duty lawyer who spoke to the Commission. He noted that there was often ‘niggling’ over the facts and suggested that he would rather ‘leave that to the specialists’.²³

In some matters, this negotiation about the alleged facts results in adjournments and offenders making more than one appearance before the magistrate before their eligibility for participation is decided. Consequently there is a significant delay between when the charges are laid and when the offender commences the program. The Commission was told that such delays are not desirable; the impetus for change that can follow contact with the justice system may be lost.²⁴

The Commission believes that earlier intervention and better protection for victims might be achieved if offenders are permitted to commence participation in the family violence perpetrator programs without requiring full acceptance of the police statement of material facts. Similarly, enabling participation on the basis of an indicated plea may also achieve these goals. The Commission understands that family and domestic violence perpetrators need to accept some element of wrongdoing before program participation would be considered appropriate, but the current practice may unwittingly exclude many suitable participants. Nevertheless, the Commission seeks submissions about whether such a change would affect the operation or the success of the program, and whether there are any procedural or other problems that might arise.

CONSULTATION QUESTION 4.1

Acceptance of statement of material facts

The Commission invites submissions about the following matters:

- Whether offenders being dealt with in the family violence courts should be eligible to be assessed for suitability to participate in the perpetrator program if they indicate that a plea of guilty will be entered or, alternatively, that they are willing to plead guilty to the offence charged (but they dispute some aspect of the statement of material facts).
- Whether removing the requirement to offer a formal plea of guilty or the requirement for a full admission of the statement of material facts would demand any changes to the eligibility criteria to ensure that participation in perpetrator programs is targeted to appropriate offenders (for example, should an offender be required to admit that he or she has previously been violent or abusive to a family member).

16. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 5.

17. Cornelia Steinhäusser, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia, telephone consultation (2 April 2008).

18. Richard Putnam, Men's Worker, Central Violence Intervention Program, South Australia, telephone consultation (1 April 2008).

19. Cornelia Steinhäusser, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia, telephone consultation (2 April 2008).

20. Newman T, 'Adelaide Family Violence Court and Central Violence Intervention program' (Paper delivered to *At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts* conference, Perth, 6 May 2005) 3.

21. Ibid.

22. Debra McLean, Manager, Relationships Australia, telephone consultation (7 April 2008).

23. Andrew Parker, Duty Lawyer Service, Legal Aid Western Australia, telephone consultation (13 March 2008).

24. Hazel Moore, Coordinator Aboriginal Family and Domestic Violence Program, Department of Corrective Services, telephone consultation (13 March 2008).

Superior court matters

Some serious family violence related offences must be dealt with by a superior court (eg, grievous bodily harm, deprivation of liberty and sexual assault). These types of serious offences are often excluded from court intervention programs. However, the Commission is of the view that court intervention programs may be appropriate for certain superior court matters.²⁵ In Chapter Six the Commission has proposed that if an offender is participating in a court intervention program in the magistrates court, a magistrate could require the offender to reappear in the magistrates court for judicial monitoring purposes. The offender could be required to appear at any time from the date when the matter is committed to the superior court until the first appearance in the superior court. This proposal is particularly relevant for court intervention programs that do not require a plea of guilty; offenders can commence the program soon after arrest and then continue to participate until and after a plea is entered.

The Commission seeks submissions about whether offenders who plead guilty to family and domestic violence offences that must be dealt with by a superior court should be able to commence a perpetrator program while the matter is in the magistrates court, with judicial monitoring to continue until the matter is heard in the superior court. However the Commission recognises that there may be certain indictable offences that are too serious to be dealt with in court intervention programs. The Commission, therefore, seeks submissions about whether any specific offences (such as sexual offences involving children) should be automatically excluded.

CONSULTATION QUESTION 4.2

Superior court matters

The Commission invites submissions about whether family violence courts should be extended to enable offenders who plead guilty to superior court family violence related offences to participate in perpetrator programs in the family violence courts. If so, are there any offences that should be excluded or that are inappropriate for existing perpetrator programs?

Bail variations

One of the challenges for family violence courts is how to deal with applications to vary protective bail conditions. As noted above, in many cases in family violence courts the offender's bail conditions prevent him or her from contacting or approaching the victim. Given that the perpetrator program can take up to six months to complete—and also given

the frequency with which offenders seek to reconcile with the victim—the family violence courts often hear applications to vary protective bail conditions to allow contact with the victim.

At each of the family violence courts visited by the Commission concern was expressed about the best procedure to be adopted in these circumstances. In each court it was recognised that protective bail conditions should only be varied when the victim has been consulted and consents to the change. Different approaches are taken. In some courts, the magistrate seeks the opinion of the victim support worker about the application and the victim support worker tells the magistrate (in court) whether the victim consents or not. In other courts, the victim support worker consults the police prosecutor and the police prosecutor takes the victim's view into account when deciding whether to oppose the application to vary the orders. In all courts there is concern that the offender may place pressure on the victim to agree to a variation of the conditions. Further, there is concern that if the application is refused on the basis that the victim does not consent, the victim's safety might be compromised.

This problem is a common one in family violence courts. It appears to be agreed across all jurisdictions that variations to bail should only be considered after all the parties have been informed and allowed to comment. What is less clear is how the comments can be provided to the court and taken into account in the decision.

The Commission was told by a program worker from South Australia that this issue is a current concern there; it is presently under consideration by the program's steering committee.²⁶ In that jurisdiction, bail variations are handled by the police prosecutors. The police contact the victim, if the victim talks to the police and does not agree with the bail variation, then the police will oppose the application. This is done 'so it doesn't look like it is coming from the victim'.²⁷ The problem that has been identified with approaching the matter in this way is that there is a lack of transparency in the process if it is not clear why the police oppose the variation. In addition, many police prosecutors do not have sufficient time to contact victims and some victims are reluctant to speak to police at all.

Given that victim support workers are more able to engage victims to discuss their attitude to the variation of orders, and given their advocacy and support role, it seems most appropriate that victim support workers inform the court if there are any issues of victim safety that must be taken into account. However, reservation was also expressed

25. For example, the Perth Drug Court currently enables participation by offenders charged with some types of robbery and aggravated burglary offences.

26. Richard Putnam, Men's Worker, Central Violence Intervention Program, South Australia, telephone consultation (1 April 2008).

27. Ibid.

to the Commission about proceeding this way. It was stated that requiring the victim support worker to inform the court that the victim did not consent compromised the safety of the victim, and perhaps also the victim support worker.²⁸

The practical problem is that sometimes these applications are made without notice in a busy list; the victim support worker, prosecutor and magistrate have little time to consider the best approach. For that reason, the Commission suggests a practice direction to be followed in applications to vary bail conditions should be published to provide a clear guide to all concerned about how such decisions are made.

The practice direction might include a period of notice that must be given to the court before an application can be made, so that the views of all concerned can be ascertained. The Commission seeks submissions as to the practicality of having the case management team meet to discuss the application and provide a formal report to the magistrate on the application, so that the view of the victim is only part of the process.²⁹ This would ameliorate, to an extent, concerns that the offender may 'blame' an individual for refusal of an application.

CONSULTATION QUESTION 4.3

Bail variations

The Commission invites submissions about the following matters:

- the best way to ensure that the court is aware of the victim's views about any application by the offender to vary protective bail conditions in a family or domestic violence court; and
- whether an application to vary protective bail conditions should only be heard after a sufficient period of notice has been given and/or after the case management team has had an opportunity to discuss the application and provide a report to the court.

Bail conditions and restraining orders

As stated above, magistrates in the family violence courts often make protective conditions a term of the offender's bail in order to protect the victim from further abuse. Clause 2 of Schedule 1 in Part D of the

Bail Act 1982 (WA) provides (among other things) that a judicial officer may impose conditions on a grant of bail in order to ensure that the accused does not endanger the safety, welfare or property of any person; and does not interfere with witnesses or otherwise obstruct the course of justice.

It is also provided that, before imposing a bail condition for one of the above purposes, the judicial officer should consider whether 'that purpose would be better served, or could be better assisted, by a restraining order made under the *Restraining Orders Act 1997*'.³⁰ If the judicial officer determines that a restraining order is more appropriate, then a final order can be made under s 63 of the *Restraining Orders Act 1997* (WA). This section empowers a judicial officer to make a violence restraining order during other proceedings, but in the case of criminal proceedings there is 'no capacity for an interim order'.³¹

It is apparent from the Commission's preliminary consultations that some magistrates in the family violence courts consider that protective bail conditions are more effective and appropriate than violence restraining orders to meet the purposes described above. In a practical sense, it would be unlikely that a magistrate could be satisfied to the required standard that there were grounds for making a violence restraining order during bail proceedings. Further, in some ways protective bail conditions provide greater protection for victims; unlike violence restraining orders, bail conditions cannot be withdrawn by the victim.

Nonetheless, violence restraining orders have some advantages over protective bail conditions. The Commission was told that it is difficult to get the police to act on a breach of bail; whereas, they are more likely to act on a breach of a violence restraining order.³² There are also potentially more serious consequences; breach of bail does not usually attract a severe penalty, while a breach of a violence restraining order can lead to a sentence of imprisonment.

In a recent review of violence restraining orders, submissions suggested that s 63 of the *Restraining Orders Act* should be amended to allow the judicial officer to make an interim violence restraining order; however, that review did not make a recommendation to that effect.³³ The Commission has been advised that it is common for both protective bail conditions

28. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008); meeting with Maria Reason, Family Violence Service, Midland Magistrates Court (25 March 2008).

29. The coordinator of the Family Violence Service at Fremantle suggested that protective bail conditions should not be able to be changed by the offender without victim and case management team input: Evan King-Macskasy, Family Violence Service, Fremantle, email communication (9 June 2008).

30. *Bail Act 1982* (WA) Sch 1, Pt D, cl 2(2a)

31. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 36.

32. Paula Hyde, Senior Community Corrections Officer, Department of Corrective Services, email communication (17 April 2008); Rochelle Watson, Family Violence Service, Rockingham, email communication (12 May 2008).

33. Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (May 2008) 36–37.

and a violence restraining order to be in place in family violence courts matters.³⁴ The Commission invites submissions about the intersection between violence restraining orders and protective bail conditions; in particular, the best option for the protection of victims.

CONSULTATION QUESTION 4.4

Protective bail conditions and violence restraining orders

The Commission invites submissions about the following matters:

- whether clause 2(2a) of Schedule 1 Part D of the *Bail Act 1982* (WA) should be repealed or amended; and
- whether s 63 of the *Restraining Orders Act 1997* (WA) should be amended to enable a judicial officer hearing a bail application to make an interim, rather than a final, violence restraining order.

Victim input at sentencing

The victim of an offence has a choice whether or not to provide input into the final pre-sentence report that will be relied on by the magistrate in sentencing. When the Commission visited the family violence courts in Western Australia, there was a range of views expressed about how the victim's input is, and should be, taken into account. Similar concerns were raised about the possibility of compromise to victim safety as with bail variations.

Some members of case management teams said that victims often said that they did not wish to have their views recorded, as they were likely to experience abuse from the offender if their views were thought to have been unhelpful. Others considered that magistrates would understand, from the absence of input, that the victim did not feel safe enough to include his or her views. Some suggested that there needed to be a way that the victim's views could be communicated to the magistrate without the offender being made aware of them. A South Australian program worker advised the Commission that they experience similar problems with their program; case management reports to the magistrate 'reflect views of the partners without using their words'.³⁵

The operating procedures for the family violence courts state that:

Whenever possible, appropriate and safe, and with the consent of the victim, the Magistrate should

seek information from the Case Management Coordinator regarding the victim's perspective about the offender's behaviour whilst engaged with the Family Violence Court program. In some circumstances, where it is safe and appropriate, the victim may choose to report this information to the Court directly rather than through the Case Management Coordinator.³⁶

This problem presents a difficult balancing exercise for the family violence court. On one hand, the magistrate seeks to take into account the victim's safety throughout the process, including in sentencing. On the other, concerns for the victim's safety may prevent the victim from putting forward his or her views. It would be contrary to fundamental principles of justice for information to be provided to the magistrate without the offender's knowledge. This issue highlights the importance of the victim support worker's role in the family violence courts. Given the concerns (and divergent views) expressed to the Commission in its preliminary consultations, the Commission invites submissions from those working in family violence courts about whether the operating procedures should be clarified or changed.

CONSULTATION QUESTION 4.5

Victim input in the family violence courts

The Commission invites submissions about the input of the victim at the time of sentencing in the family violence courts, in particular:

- how the victim's views about the offender's behaviour while on the perpetrator program can be best communicated to the magistrate; and
- whether any changes to the operating procedures in relation to the provision of information from victims are required.

Support and assistance to victims

A key component of family and domestic violence programs is the implementation of effective measures to support and assist victims. This support is essential to promote victim safety; to encourage victims to continue to support the prosecution of family violence offences; and to give practical assistance to avoid future episodes of violence. South Australian Deputy Chief Magistrate Andrew Cannon stressed to the Commission the importance of providing assistance to victims of family and domestic violence in the court process. He noted that the program in South Australia has mixed success with perpetrators, but that the 'best hope of doing something useful is concentrating on the victim'.³⁷

34. Evan King-Macskasy, Family Violence Service, Fremantle, email communication (9 June 2008).

35. Richard Putnam, Men's Worker, Central Violence Intervention Program, South Australia, telephone consultation (1 April 2008).

36. Department of the Attorney General, *Magistrates' Courts: Metropolitan Family Violence Court Operating Procedures* (24 May 2007) 19.

37. Dr Andrew Cannon, Deputy Chief Magistrate of South Australia, telephone consultation (2 April 2008).

Support and assistance to victims is primarily undertaken by victim support workers; the importance of their role cannot be understated. The Western Australian family violence courts rely on the victim support workers at every point in their process. They help victims to complete the necessary written applications for a violence restraining order;³⁸ they provide a safe waiting place when victims come to court; they provide counselling, advice about the court process, and information about the progress of the particular matter; and they give practical help with matters such as emergency housing, childcare and locksmiths. The victim support workers contact and try to remain in contact with victims throughout the process; this is not always an easy task because victims can be difficult to contact or reluctant to engage with the justice system.

In each of the metropolitan family violence courts there are two workers employed by the Family Violence Service to support victims. The main role of one of the workers is to provide advice and support in relation to violence restraining orders. The other, the senior victim support worker, is the coordinator of the case management team and oversees the monitoring of the offender on the program. They are also required to attend court (some sit at the bar table) and provide information to the magistrates if required.

From the Commission's observations it appears that the role of the victim support worker is (at least) three different roles merged into one: victim advocate, victim support person and witness assistant. In some other jurisdictions these roles are performed by three different people.³⁹ There are also different employers; some victim support workers are employed by government agencies, others are employed by non-government agencies contracted to perform the task.⁴⁰ In some, there is a combination of government and non-government employees.

38. In restraining order matters the victim may be represented by a lawyer. Legal Aid (WA) has a specialist Domestic Violence Legal Unit.

39. In the Australian Capital Territory Family Violence Intervention Program there is an external victim advocate and an internal witness assistance officer employed within the Office of the Director of Public Prosecutions: Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 15. In the Clark County, Vancouver, Washington specialist domestic violence court victim support (and advice to the court on protection orders) is provided by an independent agency (contracted by the City of Vancouver) and there are witness assistants employed in the prosecutor's office to make sure that the victim is informed and able to testify: 20.

40. In the pilot court at Joondalup the role of victim support worker was carried out by a non-government organisation, the Pat Giles Centre women's refuge. The Commission was advised that there is a need for non-government victim services to be involved in the family violence courts because they can provide a better service for money; are flexible, knowledgeable, and victim focussed; and have the same accountability requirements as government services. It was also noted that victims sometimes feel safer with non-government agencies (particularly Aboriginal people and people from a culturally and linguistically diverse backgrounds): Kedy Kristal, Chief Executive Officer, Pat Giles Centre, telephone consultation

In some jurisdictions a victim advocate can address the court on the victim's behalf.⁴¹ In some metropolitan family violence courts the victim support worker addresses the court, although there is no formal arrangement for them to do so.⁴² The Commission observed that different procedures were adopted in each court. For example, in Rockingham the victim support worker sits (with the community corrections officer) adjacent to the bar table, in front of the magistrate. In Joondalup the victim support worker sits at the back of the court (while the community corrections officer sits at the bar table) and provides information (informally) to the magistrate if requested. It was suggested to the Commission that the issue of the advocacy role of the victim support worker deserves further consideration in the family violence courts context.⁴³

The Commission seeks submissions about the role of the current victim support worker; in particular, whether the victim support worker should sit at the bar table and provide formal submissions to the court. Further, if this role was to be adopted, what impact might it have on the victim support worker's ability to simultaneously provide court support to the victim?

CONSULTATION QUESTION 4.6

Victim support workers

The Commission invites submissions as to how the victim support worker should provide information to the magistrate during court proceedings.

Need for a 'family violence order'?

In Chapter Two, the Commission has proposed, for the purposes of the Drug Court, the introduction of a pre-sentence Drug Treatment Order. This proposal has been made because the Commission is of the view that many of the processes used by the Drug Court require legislative backing. Orders of this kind do not appear to be appropriate in family violence matters. Unlike drug court participants, offenders in the family violence courts are not necessarily facing imprisonment. In fact, some are first offenders and most might otherwise have been dealt with by the

(1 April 2008). In South Australia, the victim support workers are employed by the Salvation Army. A Salvation Army court support worker stated that non-government agencies are a vital part of the family violence court in South Australia: Cornelia Steinhauer, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia, telephone consultation (2 April 2008).

41. For example, in the Waitakere family violence court in West Auckland, New Zealand: Recordon P, Judge of the Waitakere District Court, New Zealand (Speech delivered to the *Just Partners* conference, Canberra, 22–23 May 2008).

42. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).

43. Meeting with Magistrate G Lawrence (18 March 2008).

imposition of a fine or community-based sentence. Moreover, compliance with family violence-type orders would not be capable of clinical assessment in the way that is possible with Drug Court orders. Introducing a 'points system' or monitoring compliance daily would involve placing a great deal of pressure on the victim to 'police' the orders. This would effect an unacceptable shifting of obligations from the court to the victim.

In Chapter Six, the Commission has proposed a number of changes to the current provisions dealing with Pre-Sentence Orders. Specifically, it is proposed that all references to a 'speciality court' in Part 3A of the *Sentencing Act 1995* (WA) be deleted and replaced with the phrase 'a court administering a prescribed court intervention program'. On the basis of these proposals (and that family violence courts would be prescribed) a family violence court would be able to impose specific conditions in relation to treatment and counselling; order that the offender reappear for regular reviews; and amend or cancel the order at any time.⁴⁴ However, Pre-Sentence Orders remain available only for those offenders facing an immediate term of imprisonment.

The Commission's preliminary consultations did not suggest the need for any special 'family violence order'. However, it was suggested that some form of custodial sanction for breaches may be useful.⁴⁵ Therefore, the Commission invites submissions from any interested party about whether there is any merit in a special family violence order under the *Sentencing Act 1995* (WA).

CONSULTATION QUESTION 4.7

A specific 'family violence order'

The Commission invites submissions as to whether a specific 'family violence order' under the *Sentencing Act 1995* (WA) is necessary. If so, what specific powers should be available to courts imposing such an order?

Post sentence operation

Currently, contact with the family violence courts ends when the offender is sentenced. Stewart has observed that in some overseas models of specialist domestic violence courts the judicial officer can recall the offender to court after sentencing for review during a community-based sentence or prior to release from prison. This may increase the offender's accountability to the court.⁴⁶ Winick has also noted that if the court can recall offenders it will

make it clear to them that the court is serious and will enforce its rulings. This can greatly increase the ability of the court to hold perpetrators accountable and to increase their compliance with court orders and conditions.⁴⁷

In South Australia, some offenders have sought assistance at the end of the perpetrator program, so that the program now has a worker to follow up offenders after the 24-week program is finished. This worker does not have regular contact with the offenders, but is available for the offender to meet or call after they have finished the program.⁴⁸

This is an issue common to many court intervention programs; offenders are provided with extensive support from program workers and the court during the program, but this support is suddenly brought to an end at sentencing. The Commission has sought submissions about whether, if a court sentences an offender to a Conditional Release Order, a Community Based Order, an Intensive Supervision Order, Suspended Imprisonment or Conditional Suspended Imprisonment, the court *may* order that the offender reappear in court at a particular date and time so that the court can ascertain whether the offender has complied or is complying with the order.⁴⁹ This would enable a sentencing court to provide ongoing encouragement and compliance monitoring if considered appropriate.

Given the overall preference (expressed during the Commission's preliminary consultations) for court intervention programs to operate pre-sentence, and the Commission's view that pre-sentence options are more appropriate,⁵⁰ the Commission has not made any proposals in relation to post-sentencing options. However, the Commission would be interested to hear from those involved in family violence courts whether there is need for any reform to the post-sentencing options available.

CONSULTATION QUESTION 4.8

Post-sentencing options

The Commission invites submissions as to whether any changes are required to the current post-sentencing options available under the *Sentencing Act 1995* (WA) to assist in the operation of the family violence courts. In particular, how would a general power to recall offenders to court for a post-sentencing review operate in the family violence courts context (see Consultation Question 6.5)?

44. See Proposals 6.10, 6.11 & 6.12.

45. Meeting with Magistrate G Lawrence (18 March 2008).

46. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 11.

47. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 288.

48. Cornelia Steinhäusser, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia, telephone consultation (2 April 2008).

49. See Consultation Question 6.5.

50. See further discussion under 'Pre-sentence Options', Chapter Six.

Case management

As described above, the family violence courts in Western Australia operate with a case management team. Case management is a key aspect of court intervention programs operating in the family and domestic violence area. Winick has described the benefits of case management in this area, including more effective responses to the problems faced by victims and offenders; increased awareness of victim needs; better monitoring of compliance with protective orders and treatment programs; more effective risk assessment and therefore reductions in future violence; and the stimulation of additional resources for the treatment of perpetrators and services to victims.⁵¹ Some of these benefits are evident in the Western Australian context; in particular, the Commission was told that case management results in better and more detailed pre-sentence reports.⁵² Better information in turn improves the effectiveness of the court's response.

There are different models of case management in Western Australian court intervention programs. In the Barndimalgu Court the magistrate, offender and his or her lawyer are part of the team, and there is no victim representative. By contrast, in the metropolitan family violence courts the offender, his or her lawyer and the magistrate are not part of the case management team.

The Commission has observed that, in bringing together the expertise of people within and outside the court system, the family violence courts create potential for conflict between the expectations and goals of the different agencies. In particular, there may be conflict between the community model of intervention in cases of family and domestic violence (where the safety of victim is paramount) and the requirements and obligations of the court system that is monitoring the progress of an offender on a pre-sentence program. It is clear that the sometimes competing public interests at work in the family violence courts must be discussed and understood by all working in the courts so that agreed practices and procedures can be developed.

The Commission noted that there were some instances in which members of case management teams were unsure about how and what information should be shared with other members of the team, and what information discussed in the meeting should be provided to the magistrate. There is a good reason for this: information in this context can be used to perpetuate abuse and control in a relationship. However, concerns were also expressed to the Commission that conclusions might be reached

in case management team meetings (and fed into pre-sentence reports) without the offender being afforded procedural fairness.⁵³ Further, the victim-focus of the meetings may mean that 'issues that the offender thinks are important can be overlooked' and that 'genuine concerns that the offender may have about the behaviour of the other party and difficulties with kids are not taken seriously'.⁵⁴ The Commission recognises the benefits of memoranda of understanding, which contain statements of principle about participation in case management; however, the Commission suggests that practical examples of situations in which information-sharing problems might arise (and the appropriate way of resolving them) might be of more assistance.

A further problem in the newer family violence courts is that a lack of funding has resulted in some agencies who are part of the case management team not being able to participate; in particular, the police and Department of Child Protection.⁵⁵ In contrast, in the established family violence court at Joondalup the case management team is comprised of representatives from the Department of Child Protection, the Joondalup Police domestic violence unit, Relationships Australia, the Department of Corrective Services and Victim Support Service.

The project manager of the expansion of the family violence courts, Andrea Walsh, has observed that one of the challenges facing the project is 'cross-government participation due to resource constraints and differing priorities despite recognition of the merits of the process'.⁵⁶ The Commission is of the view that the case management approach is arguably undermined if all of the relevant agencies are not funded to participate. At the same time, the Commission understands that there may be differing views about which agencies should be involved as members of the case management team. Accordingly, the Commission invites submissions about the best way to facilitate a team-based and coordinated approach to case management in family violence courts.

51. Winick B, 'The Case for a Specialized Domestic Violence Court' in Winick B & Wexler D (eds), *Judging in a Therapeutic Key* (Durham: Carolina Academic Press, 2003) 290.

52. Meeting with Magistrate Gluestein (10 January 2008).

53. Hazel Moore, Coordinator Aboriginal Family and Domestic Violence Program, Department of Corrective Services, telephone consultation (13 March 2008).

54. Andrew Parker, Duty Lawyer Service, Legal Aid (WA), telephone consultation (13 March 2008).

55. Neither the Department of Child Protection nor the Western Australia Police have received specific funding to participate in the family violence courts project. Walsh notes that this 'has been difficult and required negotiations': Walsh A & Ruthven R, 'Metropolitan Family Violence Court Expansion' (Paper presented at the *Family Violence and Aggression* conference, Adelaide; 24–26 October 2007) (unpaginated).

56. Walsh & Ruthven, *ibid*.

CONSULTATION QUESTION 4.9

Case management

The Commission invites submissions about the following matters:

- the best way to encourage interagency cooperation in the family violence courts but, at the same time, ensure that the rights of offenders are protected; and
- the structure of case management teams and which agencies are essential to the process.

Policing

In the pilot Joondalup family violence court, a specialist police unit was set up to support the operation of the court. Policing was one of the most marked benefits of the Joondalup pilot. A member of the case management team said:

It is really important. It makes such a difference. You have complete confidence in the police officers. You are now dealing with half a dozen specialist officers, rather than 300 general duties officers. That's crucial.⁵⁷

In jurisdictions with specialist police units attached to family violence courts the focus is usually on two aspects of policing that have been identified as problematic in these matters: evidence gathering and charging policy. Improved evidence gathering can improve the quality of prosecution briefs and thereby increase the number of convictions and guilty pleas. Police policy that encourages officers to charge offenders when they attend family and domestic violence call-outs are known as 'pro-arrest' policies.⁵⁸

The Commission notes that, since the Joondalup pilot court was established, there have been attempts to make pro-arrest policies and improved evidence gathering part of the response to family and domestic violence by all Western Australian police officers. Nonetheless, it is clear that there are still inadequacies in the police response. The Commission was told in preliminary consultations that most family and domestic violence prosecution briefs consist only of the statement of the victim; rarely do the arresting officers attend to give evidence about their observations at the time of arrest; and other investigative techniques (such as photographs and forensic samples) are seldom used.

The Department of the Attorney General reported recently that there has been an increase in the percentage of call-outs for family and domestic violence matters that lead to an arrest; however, the Commission was also told that in many instances victims who report incidents of family and domestic violence are advised by the police to obtain a violence restraining order, and charges are not laid. The Commission suggests that better policing practices will not only improve the conviction rate in family violence matters but also place less pressure on victims in the process. If offenders are aware that the police have independent evidence against them, then they are more likely to admit responsibility and more likely to engage in perpetrator programs.

These shortfalls alone may be sufficient reason to assign specialist police to all family violence courts; however, the Commission suggests that it may also be beneficial in order to enforce protective bail conditions and violence restraining orders. The Commission has been advised that is very difficult to get the police to enforce protective bail conditions. The Commission suggests that a specialist police officer (or unit) might be more responsive to requests to investigate alleged breaches.⁵⁹ Given the importance of the protective bail conditions to both the safety of the victim and the integrity of the family violence court process, these breaches should not be treated lightly. The Commission notes that bail conditions (including curfews) are policed strictly in the Drug Court, and seeks submissions about why the enforcement of bail conditions should be any less rigorous in family violence courts.

CONSULTATION QUESTION 4.10

Policing

The Commission invites submissions as to:

- whether a specialist police officer or unit should be attached to each of the family violence courts; and
- whether any changes can be made to police policies or practices to improve the operation of family violence courts.

57. Krazlan K & West R 'Western Australia Trials a Specialised Court' (2001) 26(4) *Alternative Law Journal* 197, 198.

58. In some United States jurisdictions there are mandatory arrest policies: Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 11.

59. The Commission was advised that 'there is an awareness that some high-risk offenders are or have flouted non-contact protective bail conditions. Victims mention this in confidence, as they are generally too fearful to pick up the phone and report it to police. A "routine" visit from police or a family violence court case management team representative would enable this situation to be brought into the open without increasing risk to the victim. This highlights the need for police involvement in family violence courts': Evan King-Macskasy, Family Violence Service, Fremantle Magistrates Court, email communication (9 June 2008).

Prosecutors

In some family violence courts prosecutors are assigned to the court; the Commission is not aware if these prosecutors are trained in family and domestic violence matters or are specialists by reason of their experience with matters of that nature. As with magistrates, many police prosecutors working in the magistrates court in Western Australia probably have some degree of expertise in family and domestic violence matters simply because these matters make up a large proportion of the court's workload.

However, even where prosecutors are assigned to the family violence courts, there is not sufficient funding to enable police prosecutors to participate in case management. The Commission has been advised that the police have not received extra funding for family violence courts. The Western Australia Police recognise the desirability of specially trained prosecutors and their participation in case management; however, they do not have sufficient funds, or appropriately qualified personnel.⁶⁰

PROPOSAL 4.1

Specialist prosecutors

That the Western Australia Police be funded for the appointment of specialist police prosecutors to appear in each family violence court and to participate in case management meetings.

Defence lawyers

Unlike the Perth Drug Court, the family violence courts do not have duty lawyers assigned to them. In Western Australian family violence courts, most offenders are represented by the general duty lawyer service of Legal Aid (WA). Commentators have argued that it is important to have defence lawyers who are familiar with the aims and goals of courts such as the family violence courts.⁶¹ In some jurisdictions, duty lawyers are specifically assigned to the court. Accordingly, the Commission seeks submissions about whether funding should be made available to Legal Aid to enable specialist duty lawyers to appear in the family violence courts. And further, whether there are any practical considerations that would make a specialised approach unworkable. In this regard, the Commission notes that the maximum number of participants in the case management list in each metropolitan family violence court is 24. This is considerably less than the number of offenders appearing in the Drug Court. It may be preferable to ensure that general duty lawyers are given adequate

60. Lawrence Panaia, Acting Superintendent, Prosecuting Branch, Western Australia Police, telephone consultation (7 April 2008).

61. Stewart J, *Specialist Domestic/Family Violence Courts within the Australian Context*, Australian Domestic and Family Violence Clearinghouse Issues Paper No. 10 (2005) 16.

training about the operation and objectives of the family violence courts.

CONSULTATION QUESTION 4.11

Duty lawyers

The Commission invites submissions as to whether specialist Legal Aid duty lawyers should be assigned to each family violence court and, if not, the best way of ensuring that general duty lawyers and other defence lawyers are sufficiently informed about the objectives and the operation of the family violence courts.

Better information for participants and others

At present there is no printed material for victims, offenders, lawyers and others involved in the family violence courts. There is a short explanation of the courts on the website of the Department of the Attorney General. The Commission is not aware whether it is anticipated that such material will be developed in the future. The Commission notes that the website for the Magistrates Court is presently being developed and that it may contain information about the family violence courts.

The need for appropriate and easily accessible information has been stressed. South Australian Magistrate Newman has stated that:

Provision of information in a timely and appropriate manner is important. Oral information provided in court is important and should always happen, but the provision of written information is even more useful.... [T]he circumstances surrounding a court appearance are very stressful. The need to appear in the foreign and stressful environment of a courtroom adds to that. An understanding of the process is greatly enhanced by providing written information that may be referred to later or as circumstances change.⁶²

South Australia and Victoria have published material explaining the court processes and there are also detailed explanations on the websites of each of the courts.⁶³ The Commission suggests that the setup of the Victorian website—with separate information for the offender and the victim—is an appropriate model.

62. Newman T, 'Adelaide Family Violence Court and Central Violence Intervention program' (Paper delivered to *At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts* conference, Perth, 6 May 2005) 6.

63. See 'Information for Persons Served with Restraining Orders' and 'Information for Persons Who Have Been Granted a Restraining Order' <http://www.courts.sa.gov.au/courts/magistrates/index_cvip.html> accessed 1 June 2008; 'Information for People Who Have Experienced Family Violence and for Defendants' <<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Specialist+Court+Jurisdictions-Family+Violence+Court+Division>> accessed 1 June 2008.

PROPOSAL 4.2

Program information

- That the Department of the Attorney General website contain detailed information about how the family violence courts operate, including specific information for victims and offenders.
- That the Department of the Attorney General prepare written brochures about the family violence courts with relevant information about the operation of the courts and any important contact details that may assist offenders and victims.

Programs for respondents to violence restraining orders

As noted above, a relatively small percentage of family violence matters are reported to police, and many matters that are reported to police do not result in charges being laid. Thus many victims of family and domestic violence seek violence restraining orders to protect them from future violence. The existing perpetrator programs in family violence courts are only available to offenders; therefore, the options for respondents to violence restraining orders are to either voluntarily seek assistance or do nothing.

Writing about the Roads to Healing program, Magistrate King commented that:

In many cases, unless the underlying issues are resolved, the problem of violence could continue, whether in the relationship which is the subject of the proceedings or in relationships entered into by the parties in the future; the parties can experience ongoing dysfunction in their lives.⁶⁴

In the family violence division of the Magistrates Court in Victoria, respondents to violence restraining orders are ordered by the court to participate in counselling programs. It is a criminal offence to fail to comply with a counselling order (without reasonable excuse).⁶⁵ The Commission has been advised that there has been an increase in the number of respondents to violence restraining orders who consent to orders after counselling. This reduces the stress and anxiety suffered by the victim, who is then not required to give evidence at a final order hearing.⁶⁶

In South Australia, all respondents to violence restraining order applications are offered the opportunity to be assessed for the 'stopping violence'

program.⁶⁷ Participation in the program is voluntary and, because the participants in the program are not 'offenders', the program is not managed by the Department for Correctional Services, South Australia.⁶⁸

The Commission seeks submissions about whether it is desirable to give respondents to violence restraining orders the opportunity to participate in perpetrator programs and whether such participation should be compulsory or voluntary. The Commission also seeks information about whether such participants—some not yet classified as 'offenders'—could be incorporated into the programs that are presently running, or whether new programs would need to be created. Further, given the problems encountered with compliance in the Roads to Healing program (mentioned above), the Commission seeks submissions about how participation in the programs could best be monitored and enforced.

CONSULTATION QUESTION 4.12

Programs for respondents to violence restraining orders

The Commission invites submissions about the following matters:

- whether respondents to violence restraining orders should have the opportunity for court-referred counselling programs;
- whether participation by respondents to violence restraining orders in court-referred counselling programs should be voluntary or ordered by the court;
- how the respondents' participation in a court-ordered counselling program could be monitored or enforced; and
- whether the existing perpetrator programs could accommodate respondents to violence restraining orders.

BROADER ISSUES

Ensuring broader access to family violence courts

Research on family and domestic violence is increasingly identifying specific groups that are at particular risk of becoming victims of such violence. These vulnerable groups include Aboriginal people, people with disabilities, people suffering from mental

64. King M, 'Roads to Healing: Therapeutic jurisprudence, domestic violence and restraining order applications' (2003) 30(7) *Brief* 14.

65. *Crimes (Family Violence Act) 1987* (Vic) s 8D(4).

66. Magistrate Toohey, Melbourne Magistrates Court, telephone consultation (8 April 2008).

67. Newman T, 'Adelaide Family Violence Court and Central Violence Intervention program' (Paper delivered to *At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts* conference, Perth, 6 May 2005) 3.

68. Cornelia Steinhäusser, Case Manager, Central Violence Intervention Program, Department for Correctional Services, South Australia, telephone consultation (2 April 2008).

illness, women who have previously had contact with the criminal justice system, and people involved in high-risk behaviour such as drug use. As noted at the start of this Chapter, there is also an increasing awareness by the community of the abuse suffered by elderly people and gay, lesbian, bisexual, transgender and intersex people.

Historically, Aboriginal people have been reluctant to become involved with the criminal justice system and related welfare agencies. The Gordon Inquiry reported that Aboriginal women

see aspects of that system—particularly prisons—as an aspect of the violence cycle which de-socialises, brutalises and de-skills their menfolk. There is profound mistrust of social work agencies who may take the children away from a violent home, and there is still considerable suspicion of police involvement in domestic disputes.⁶⁹

The consultations undertaken by the Commission for its Aboriginal customary laws reference showed that when Aboriginal people seek assistance with family violence they do not necessarily wish for the offender to be permanently removed from the family.⁷⁰ Despite the fact that court intervention programs for family violence offences give offenders an opportunity to avoid imprisonment, there has been to date mixed success in engaging Aboriginal victims and offenders in these programs.

The Barndimalgu Court at Geraldton is an example of a court intervention program that is successful in engaging Aboriginal offenders.⁷¹ It is an Aboriginal-specific program involving respected persons from the local Aboriginal community. Significantly, it targets offenders facing imprisonment; arguably the possibility of avoiding prison is a strong motivating factor. On the other hand, the evaluation of the Joondalup pilot court found that Aboriginal people did not utilise the resources of the court, 'indicating that the issue of Aboriginal family violence does not appear to be addressed through the use of court-based interventions, and alternatives need to be considered'.⁷²

Consideration has been given to the involvement of Aboriginal offenders in the expansion of the family violence courts model in the metropolitan area. This is because the funding for the expansion project has been obtained as part of the Western Australian government's investment in initiatives that aim to reduce the rate of imprisonment of Aboriginal

people.⁷³ Measures to encourage the involvement of Aboriginal victims and offenders include the formation of an Aboriginal reference group to provide advice to the family violence courts; the development of a perpetrator program for Aboriginal offenders;⁷⁴ the employment of Aboriginal staff members where possible; and cultural awareness training for family violence court staff.⁷⁵

Nonetheless, the manager of the metropolitan family violence courts expansion project has stated that the engagement of Aboriginal people remains one of the main challenges facing the project. The quota for Aboriginal participants in the perpetrator program at the Rockingham Court is eight: this has yet to be filled. In May 2008 there were five Aboriginal offenders in the program.⁷⁶ As noted by the project manager, this 'appears contrary to the demographic'.⁷⁷ The project manager has stated her intention 'to inform the community about the program and build their confidence in it'.⁷⁸

The Commission seeks submissions about the way in which the metropolitan family violence courts might better meet the needs of Aboriginal offenders and victims. Regional family and domestic violence court intervention programs are discussed below.

CONSULTATION QUESTION 4.13

Aboriginal participation in family violence courts

The Commission invites submissions about how the family violence courts can better meet the needs of Aboriginal victims and offenders.

The Commission is not aware of the level of participation in the family violence courts by other vulnerable groups. Accordingly, the Commission seeks submissions about the extent to which these vulnerable groups are participating in the family violence court programs and accessing the available support services. Further, the Commission is interested to hear any views about the best way to meet the needs of vulnerable groups in the family violence courts and other family and domestic

69. Gordon S et al, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 86 (footnote omitted).

70. LRCWA, *Aboriginal Customary Laws*, Discussion Paper (2005) 355–57.

71. Magistrate Sharratt, telephone consultation (5 March 2008); Samantha Haring, Department of Corrective Services, Geraldton, telephone consultation (6 March 2008).

72. Department of Justice and West Australian Police Service, *Joondalup Family Violence Court*, Final Report (February 2002) xi.

73. Meeting with Lynne Ridgeway, Acting Coordinator of the Family Violence Service, Department of the Attorney General, and Andrea Walsh, Project Manager, Metropolitan Family Violence Courts Expansion Project, Department of the Attorney General (31 January 2008).

74. Hazel Moore, Coordinator Aboriginal Family and Domestic Violence Program, Department of Corrective Services, telephone consultation (13 March 2008).

75. Walsh A & Ruthven R, *Metropolitan Family Violence Court Expansion* (Paper presented at the Family Violence and Aggression conference, Adelaide, 24–26 October 2007) (unpaginated).

76. Magistrate Gluestein, telephone consultation (12 May 2008).

77. Walsh A & Ruthven R, *Metropolitan Family Violence Court Expansion* (Paper presented at the Family Violence and Aggression conference, Adelaide, 24–26 October 2007) (unpaginated).

78. Ibid.

violence court intervention programs operating in Western Australia.

CONSULTATION QUESTION 4.14

Participation in family violence courts by vulnerable groups

The Commission invites submissions about what measures can be put in place to ensure that the needs of particularly vulnerable groups in the community are met in the family violence courts.

Regional courts

The Commission believes that, in general, specialist court intervention programs are not suitable in regional locations. Population levels and available resources could not sustain the establishment of a number of separate specialist programs (ie, a drug court, a family violence court and a mental impairment program) in every regional court. In relation to family and domestic violence, King observed that:

[S]maller communities may not have the resources or the incidence of violence that would justify the establishment of a specialist court.

Thus, he suggested that regional courts should develop court intervention programs suited to the particular location and the available resources.

In Chapter Five, the Commission has recommended the establishment of a general court intervention program in Western Australia (to be piloted in the metropolitan area and one regional location). If successful such a program should be expanded statewide. General programs do not restrict eligibility to specific problems; they address all kinds

of underlying issues and different types of offending behaviour. The Commission seeks submissions from magistrates and others working in regional courts about whether family and domestic violence offending could be included within such a general program, and the best way to facilitate access to family and domestic violence court intervention in regional areas. The Commission would also be interested to hear about any informal programs or interventions used in regional courts to address family and domestic violence.

CONSULTATION QUESTION 4.13

Family and domestic violence court intervention programs in regional courts

The Commission invites submissions about:

- whether a general court intervention program (as proposed in Chapter Five) could accommodate family and domestic violence offending; and
- the best way to facilitate access to family and domestic violence court intervention in regional areas.

See 'Specialist Family Violence Jurisdiction' in the Introduction to this Paper for the Commission's proposal for an inquiry into a broader family violence jurisdiction. See also Chapter Six for the Commission's proposals regarding the legislative and policy framework for all proposed court intervention programs, including family violence courts.

