

**ATTACHMENT [AF 5]**

This is the attachment marked “[AF 5]” referred to in the witness statement of Arie Freiberg dated 30 July 2015.

# Sentencing Practices for Breach of Family Violence Intervention Orders Final Report

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# Contents

Contributors	v
Executive Summary	vii
Background	vii
Current Sentencing Practices for Breaching an Intervention Order	viii
Guiding Principles	xi
Recommendations	xii
<b>Chapter 1: Introduction</b>	<b>1</b>
Terms of Reference	3
Scope of This Report	3
The Council's Approach	4
<b>Chapter 2: Family Violence Intervention Orders</b>	<b>7</b>
Family Violence in Victoria	9
The Offence of Breaching an Intervention Order	22
Police Response to Breaches	24
<b>Chapter 3: Current Sentencing Practices for Breach of Family Violence Intervention Orders</b>	<b>33</b>
Introduction	35
Current Sentencing Guidance	35
Overview of Sentencing Practices for Breach of Family Violence Intervention Orders	41
Specific Sanctions	50
<b>Chapter 4: Conditions Attached to Sentencing Orders</b>	<b>71</b>
Rehabilitative Conditions	73
Protective Conditions	83
<b>Chapter 5:</b>	
<b>Sentencing Factors Particularly Relevant to Breach of Family Violence Intervention Orders</b>	<b>89</b>
Introduction	91
Factors Relating to the Victim	92
Factors Relating to the Offender	122

<b>Chapter 6: A New Approach</b>	<b>131</b>
Introduction	133
Appropriateness of Current Sentencing Practices	133
Possible Reasons Behind Current Sentencing Practices	137
Guiding Principles: Achieving More Appropriate and Consistent Sentences?	139
<b>Appendices</b>	<b>143</b>
<b>Appendix 1:</b>	
<b>Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders</b>	<b>145</b>
1. Purpose of Sentencing	145
2. Sentencing Factors	147
3. The Sentencing Range and the Appropriateness of Particular Sanctions	150
<b>Appendix 2: Statistical Analysis Methodology</b>	<b>152</b>
<b>Appendix 3: Person Analysis: Recidivism</b>	<b>155</b>
<b>Appendix 4: Consultation</b>	<b>158</b>
Meetings/Visits	158
Responses to Draft Report	158
<b>Appendix 5: Survey of Victorian Magistrates</b>	<b>159</b>
<b>Bibliography</b>	<b>161</b>
<b>Cases</b>	<b>165</b>
<b>Legislation</b>	<b>166</b>

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# Executive Summary

## Background

### Terms of Reference

In March 2006, the Victorian Law Reform Commission published a report on family violence laws. The report contained a large number of recommendations, including a recommendation that the Sentencing Advisory Council should review the sentencing of defendants and penalties imposed for breach of family violence intervention orders. This recommendation was made in response to reported community concern about sentencing practices for breach of family violence intervention orders.

In April 2008, the Attorney-General, the Honourable Rob Hulls MP, wrote to the Sentencing Advisory Council asking it to consider this matter. The current report responds to this request.

In his letter, the Attorney-General also asked the Council to examine two related matters:

- The appropriate maximum penalties for the three offences of breach of a stalking intervention order, breach of a family violence intervention order and breach of a family violence safety notice. The Council reported to the Attorney-General on this matter on 30 May 2008.<sup>1</sup>
- Sentencing practices following the commencement of the new *Family Violence Protection Act 2008* (Vic). The Council will report on those practices in a subsequent report.

### The Review Process

The Council reviewed the relevant literature on family violence, analysed data on sentencing for the offence of breach of an intervention order and consulted with those involved in the sentencing process.

In particular, the Council consulted magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group. The consultation with magistrates included meetings and a survey.

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<sup>1</sup> Sentencing Advisory Council, *Breaching Intervention Orders* (2008) (Vic).



## Current Sentencing Practices for Breaching an Intervention Order

### Are Sentences Reflecting the Seriousness of the Offence?

All of the stakeholders consulted considered breach of a family violence intervention order to be a serious criminal offence; however, few were of the opinion that current sanctions reflect this seriousness. There is significant frustration amongst some stakeholder groups at what they perceive to be leniency in sentencing these matters.

The Council's data analysis confirms stakeholder perceptions that there is a predominance of lower-end orders (particularly fines and adjourned undertakings) for breach offences. For example, the most common sentence imposed on people sentenced for breaching an intervention order between July 2004 and June 2007 was a fine (37.2 per cent), and the second most common sentence was an adjourned undertaking (18.5 per cent). The most common fine was between \$500 and \$1,000.

Courts also imposed these lower-end orders relatively frequently on repeat offenders. For example, the Council examined people sentenced for breach of a family violence intervention order on more than one occasion from July 2004 to June 2007. The Council was concerned to find that approximately half (50.9 per cent) of people who received a fine for the first offence also received a fine for the second offence.

Also of concern was that many offenders who received a sanction greater than a fine for the first offence in the period examined, received a fine for the second offence in the period. For example, 29.8 per cent of the people who received a community-based order for the first offence received a fine for the second offence. Even more striking is that 19.4 per cent of people who received a wholly suspended sentence for the first offence and 11.9 per cent of people who received a sentence of imprisonment for the first offence received a fine for the second offence.

Despite their widespread use, many (both in the Council's consultations and in the relevant literature) consider fines and adjourned undertakings to be inappropriate sentences for breaches of intervention orders. Fines do not address the offending behaviour. They have the potential to adversely affect the victim's finances. Given the low amount of most fines for this offence (average \$500) it is not clear that they satisfy any relevant sentencing purpose.

Adjourned undertakings, which require an offender not to breach a court order, are arguably inappropriate sanctions for offenders who have already disregarded a court order. Even if the court attaches a treatment condition, at present there is often no supervision of the offender's participation in the relevant program. This detracts from its rehabilitative potential. It is also questionable which sentencing purposes are met by the use of this sanction for this offence.

## Are Sentences Effective in Fulfilling Their Purpose?

The only purposes that a sentence can have are punishment, deterrence, rehabilitation, denunciation, community protection or a combination of two or more of these purposes.<sup>2</sup> A measure of the effectiveness of sentencing practices for an offence is the extent to which the sentences imposed achieve one or more of these purposes. Appropriately balancing these purposes is a delicate task in family violence cases, where measures intended to protect the victim can place them at increased risk, and sentences designed to punish the offender may indirectly punish the victim.

The function of a family violence intervention order is to protect the victim from future harm. Therefore, in sentencing an offender for breaching an order, the protection of the community, which encompasses ensuring the future safety and protection of the victim, should be the central purpose against which other sentencing purposes are balanced.

Denunciation, deterrence and punishment are also important purposes in sentencing for breach of a family violence intervention order. The intervention order system relies on the perception that there will be serious consequences if orders are breached. However, caution should be exercised to ensure that these purposes do not conflict with considerations of community protection, particularly as regards the victim. For example, some offences will require a sentence of immediate imprisonment that appropriately punishes the offender and denounces the offender's conduct. Such a sentence will protect the victim in the short term by incapacitating the offender and may have some deterrent effect. However, the long-term protection of the victim is also important.

Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the Council's data analysis has shown that the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim as much or more than the offender. Payment of the fine may affect the offender's ability to provide financial support to the victim. The offender may even coerce the victim into paying the fine. Therefore, sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition), which are structured to ensure that it is the offender that must serve the punishment, may be more effective in achieving this sentencing purpose.

Another sentencing purpose that can be compatible with protecting the victim (particularly in the long term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine. Such sentences may achieve more in ensuring long-term compliance with the intervention order.

The weight given to the often competing purposes of sentencing will differ according to the circumstances of each case. However, in all cases involving breach of an intervention order, the central purpose should be achieving compliance with the order to ensure the protection of the victim and the community. This is not to suggest that these offenders should always receive sentences of imprisonment. The Council would suggest that in some cases sanctions that intervene in the offender's pattern of violent behaviour, such as community-based orders and intensive correction orders, may be more appropriate.

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2 *Sentencing Act 1991* (Vic) s 5.

## Is Sentencing Consistent?

The Council is limited in its ability to assess whether or not there is consistency in sentencing for breaches of family violence intervention orders amongst magistrates, as there is no available data to support such an analysis. However, anecdotal evidence obtained from the Council's consultations suggests that inconsistency is an issue when sentencing for this offence.

## Possible Reasons Behind Current Sentencing Practices

Given the unique and complicated issues associated with family violence, sentencing for breaches of family violence intervention orders presents a particularly difficult challenge. The general sentencing guidance provided by the *Sentencing Act 1991* (Vic) needs to be applied in light of the particular context of this offence.

There are many reasons why sentencing for breaches of family violence intervention orders is difficult. Not only are magistrates operating with very little in the way of guidance in sentencing breach matters, but they often have only minimal information at their disposal about the background and context of the breach. This limits their ability to impose appropriate sentences because without the relevant background, much of the behaviour covered by this offence may seem low on the scale of offending.

Family violence matters are also highly emotive. Unlike victims of many other offences, family violence victims may have conflicting feelings about the proceedings. Some may withdraw their support late in the process whereas others may ask magistrates to show mercy towards offenders in sentencing. Offenders may have no prior convictions and present as 'model citizens' apart from their history of family violence. Unless magistrates have a solid understanding of these and other issues, as well as the particular dynamics of each case before them, it will be difficult to impose appropriate sentences.

The Council's research and consultations also revealed problems associated with:

- the use of men's behavioural change programs as sanctions (conditions attached to community-based orders or adjourned undertakings); and
- the ongoing protection of the victim where an offender is sentenced for breach of a family violence intervention order, but the order itself has expired.

## Guiding Principles

The Council considered and consulted upon a number of possible solutions to promote more appropriate and consistent sentencing practices for breach of family violence intervention orders.

In light of its research, data analysis and consultation, the Council formed the view that, in addition to the general sentencing guidelines provided in the *Sentencing Act 1991* (Vic), sentencing courts would be assisted by specific guidance about sentencing for breaches of family violence intervention orders.

In the Council's consultations, there was broad support for some form of guidance for sentencing breaches of intervention orders. Those supporting the development of guiding principles included the Magistrates' Court and the Law Institute of Victoria. Some of those consulted by the Council emphasised the importance of judicial education about sentencing in the context of family violence in addition to guiding principles. Others, such as Victoria Legal Aid, advocated providing judicial education instead of guiding principles.

Drawing on the results of its research, consultation and data analysis, the Council has developed guiding principles for use by those sentencing breach of family violence intervention orders (Appendix 1).

In the guiding principles, the Council:

- Identifies the main purpose of sentencing for family violence intervention orders as being community protection, particularly to ensure the safety and protection of the victim.
- Sets out a number of sentencing factors that are particularly relevant to breach of family violence intervention orders, and suggests ways in which judicial officers may consider these factors to ensure that appropriate weight is placed on the most relevant factors.
- Provides a table of sanctions, which includes an examination of the different sentencing orders and some relevant considerations for the court when sentencing particular types of breaches.

The Council intends that these guiding principles will promote some level of consistency of approach among sentencing courts. The guidance provided is not in any way designed to displace judicial discretion. The principles were developed in consultation with stakeholders, including magistrates, and are for the purpose of ensuring that magistrates have as much information as possible at their disposal to assist them in exercising their discretion.

The Council also sees a wider role for the guiding principles to be used by all involved in the sentencing process. Police prosecutors and defence lawyers may use the guiding principles in formulating their submissions to the court at sentencing hearings for breaches of family violence intervention orders. The principles can promote consistency by providing a framework for submissions across different courts around Victoria.

## Recommendations

The report contains three recommendations that are intended to complement the guiding principles in ensuring the ongoing protection of victims of family violence.

### Attaching Men's Behavioural Change Programs to Sentencing Orders

The Council identified that magistrates are frequently attaching to adjourned undertakings a condition that the offender complete a men's behavioural change program, and that magistrates are occasionally attaching such a condition to community-based orders. The benefit of including such a condition is that it provides an opportunity to intervene in the offender's violent behaviour as a means of facilitating rehabilitation. If successful, this provides the best option for the ongoing protection of the victim. Several magistrates and other stakeholders expressed a preference for these programs over the general violence intervention programs offered by Corrections Victoria, as the latter are not specifically aimed at family violence offenders.

However, the Council's research and consultation revealed that there are a number of problems with using these programs in this way, including:

- The programs were not designed or funded to be used in this way, and program providers are struggling to keep up with demand.
- There are no formal communication protocols between the courts and service providers and as such there is little capacity for courts to monitor offenders' participation in the programs.
- Some magistrates appear to have very little information at their disposal about the programs operating in their jurisdiction and will sometimes make inappropriate orders as a result.
- Some magistrates perceive that a condition that the offender completes a men's behavioural change program cannot be included in a community-based order. This view is based on the perception that Corrections Victoria does not supervise offenders on these programs. Therefore, these magistrates use adjourned undertakings as a vehicle for including a condition about these programs. However, Corrections Victoria advises that they will supervise offenders ordered to complete non-Corrections behavioural change programs. Therefore, where a sentencing court wants to require an offender to attend a behavioural change program as a condition of sentence, it may be preferable to do so using a community-based order rather than an adjourned undertaking, to appropriately reflect the gravity of the offence and to ensure that the offender's participation in the program is supervised.

Given the widespread use of the men's behavioural change programs as conditions attached to sanctions, and the issues concerning accessibility and supervision, the Council recommends that the government consider funding the development and delivery of a statewide men's behavioural change program specifically designed for offenders found guilty of offences committed in the context of family violence (**Recommendation I.1**). Recommendation I.1 also provides for program accreditation, practice standards, information sharing and evaluation.

The Council recommends that until Recommendation I.1 is implemented, courts should ensure that they monitor the compliance of offenders who have been ordered to attend men's behavioural change programs as part of an adjourned undertaking (**Recommendation I.2**).

## Continuing Protection of Victims of Family Violence

The Council identified that a potential risk to victims can arise at the time of sentencing for breach of an intervention order if the original intervention order is no longer in force. Even though the offender has been sentenced for the breach, some sentences (for example a fine) do not have the direct capacity to protect the victim from further unwanted contact or harassment by the offender (for example by prohibiting the offender from doing so).

One way to partially address this is for courts granting applications for family violence intervention orders to grant them for longer at first instance. This practice may be encouraged by the factors the court now has to consider when imposing an order under the *Family Violence Protection Act 2008* (Vic). However, there will be situations where the level of risk increases after the order has been imposed in a manner that was not foreseeable by the courts. There may also continue to be breaches that occur towards the end of some intervention orders, even if imposed for a longer period.

The full risk of harm to a victim may only be identified once a breach has occurred. Therefore, the Council considers that while preparing the brief of evidence for the breach hearing, police informants should consider the status of the original intervention order and the need for any further application.

The Council recommends (**Recommendation 2**) that Victoria Police should consider establishing a process requiring the police informant or informants responsible for investigating the breach of intervention order to consider whether or not an application should be made:

- to extend the existing family violence intervention order; or
- for a new family violence intervention order.

This process could be included in the *Police Code of Practice for the Investigation of Family Violence*.



# Chapter 1: Introduction





## Terms of Reference

- 1.1 In April 2008, the Attorney-General, the Honourable Rob Hulls MP, requested that the Sentencing Advisory Council consider the appropriate maximum penalties for breaches of stalking intervention orders under the *Crimes (Family Violence) Act 1987* (Vic), and for breaches of the new family violence intervention orders and family violence safety notices as proposed in the Family Violence Protection Bill 2008.
- 1.2 On 30 May 2008, the Council provided this advice to the Attorney-General.<sup>3</sup> The Council's recommendation, that the maximum penalty for breach of a family violence intervention order and a family violence safety notice be two years' imprisonment, was accepted by the government and now forms part of the *Family Violence Protection Act 2008* (Vic).<sup>4</sup>
- 1.3 In addition, the Attorney-General requested that the Council consider:
- current approaches to sentencing and those following the commencement of the new legislation. In particular, I ask that the Council refer to the issues raised in the Victorian Law Reform Commission's *Review of Family Violence Laws: Report* regarding sentencing practices relating to breaches of family violence intervention orders.

## Scope of This Report

- 1.4 The Council does not propose to duplicate the work done by the Victorian Law Reform Commission (VLRC) for its 2006 report *Review of Family Violence Laws*.<sup>5</sup> Although this report provides some background material on family violence generally, its emphasis is on sentencing practices in relation to breaches of family violence intervention orders. In accordance with the Attorney-General's reference, the Council has examined:
- current approaches to sentencing breaches of family violence intervention orders under the *Crimes (Family Violence) Act 1987* (Vic). This examination is based on statistical analysis and consultation; and
  - the issues raised through the VLRC's consultations, which include the finding that stakeholders regarded sentencing for breaches as:
    - not reflecting the seriousness of the offending; and
    - inconsistent.
- 1.5 For the third part of this reference, the Council will be monitoring and reporting on sentencing practices under the new *Family Violence Protection Act 2008* (Vic).

<sup>3</sup> Sentencing Advisory Council, *Breaching Intervention Orders* (2008) (Vic).

<sup>4</sup> Under the *Crimes (Family Violence) Act 1987* (Vic), the relevant offence was breach of an intervention order. However, the new legislation refers to 'contravention' of a family violence intervention order: s 123 of the *Family Violence Protection Act 2008*. As this report refers to sentencing practices under the 1987 Act, the term 'breach' is used throughout the body of the report. The term 'contravention' is used only in relation to the guiding principles in Appendix I, as the principles are to be used in sentencing for contraventions under the 2008 Act.

<sup>5</sup> Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006).

## The Council's Approach

### Statistical Analysis

- 1.6 In order to report on current Victorian sentencing practices for breaches of family violence intervention orders, the Council undertook a detailed statistical analysis of the sentence distribution for this offence, and also examined how the sentence distribution varies across a number of key factors. The aim was to provide a detailed understanding of sentencing for this offence.
- 1.7 The data source for this analysis was the criminal component of the Magistrates' Court case management system, Courtlink. The Sentencing Advisory Council receives regular extracts from this system, and using these extracts has built a database of all sentences imposed for all charges in the Magistrates' Court from 1 July 2004 onwards.<sup>6</sup>

### Consultations and Observations

- 1.8 The Council conducted a series of initial consultations and court visits from August to October 2008. The aim of these consultations was to find out how the criminal justice process, in particular the sentencing process, works in relation to breach of family violence intervention orders, and to gauge the views of stakeholders on the effectiveness of sentencing practices. The consultations, which are listed in Appendix 4, included:
- observation visits to the Family Violence Divisions of the Magistrates' Court at Heidelberg and Ballarat;
  - meetings with court staff at Heidelberg and Ballarat, including magistrates, registrars, applicant workers, defendant workers, police prosecutors and duty lawyers;
  - a meeting with a group of Melbourne magistrates;
  - three focus groups with Victoria Police representatives from Melbourne, Region 4 and the Ballarat region;
  - a meeting with a family violence victims' group based in Ballarat;
  - telephone consultations with family violence service providers, Department of Justice officials, lawyers, members of Victoria Police, Corrections Victoria and Forensicare;
  - roundtables with community legal centre representatives, family violence service providers, Victoria Legal Aid representatives and workers from men's family violence programs; and
  - a survey of Victorian magistrates.<sup>7</sup>
- 1.9 The Council also sent a draft report to a small number of targeted stakeholders for comment. The responses, along with the results of the initial consultations, were considered by the Council and have been incorporated into this final report.<sup>8</sup>

<sup>6</sup> Further details of the Council's methodology, data sources and datasets are contained in Appendix 2.

<sup>7</sup> The Council distributed the survey to all Victorian magistrates (See Appendix 4). Thirteen surveys were completed and returned.

<sup>8</sup> See Appendix 4 for a list of responses received in relation to the draft report.

## The Structure of This Report

- 1.10 Chapter 2 provides some general information and statistics about family violence and family violence intervention orders issued under the *Crimes (Family Violence) Act 1987* (Vic). It also describes the new *Family Violence Protection Act 2008* (Vic) and examines the offence of breach of a family violence intervention order. It discusses the investigation and prosecution of breaches, and police attitudes to breach of intervention orders.
- 1.11 Chapter 3 examines current sentencing practices for breach of family violence intervention orders in light of the statistical evidence, stakeholder consultations and research. Many stakeholders were of the view that sentencing practices suggest that magistrates are not taking breaches—whether involving physical violence or not—seriously enough. All stakeholders with whom the Council consulted viewed a breach of a family violence intervention order as a serious criminal offence, yet many felt that the courts often treat these matters less severely than other criminal offences.
- 1.12 Chapter 4 looks at the use of conditions attached to sentencing orders for breaches of family violence intervention orders. It considers the current use of men's behavioural change programs as conditions attached to sanctions for breach of intervention orders. In particular, it examines issues around accessibility, suitability and offender supervision. The Council makes recommendations as to how to improve the use of these programs (**see Recommendation 1.1–1.2**). This chapter also considers the potential risk to victims where an offender is sentenced for breach of a family violence intervention order, but the order itself is no longer in force. It provides some options for ensuring the ongoing protection of the victim (**see Recommendation 2**).
- 1.13 Chapter 5 discusses sentencing factors particularly relevant to breach of an intervention order, and presents some ways in which courts can consider and apply these factors when sentencing for breach of family violence intervention orders. This chapter also seeks to clarify what sort of information can be presented to the court on sentencing for a breach.
- 1.14 Chapter 6 summarises the Council's findings and makes the case that guidance for courts in breach matters over and above the standard guidance provided by the *Sentencing Act 1991* (Vic) is desirable to promote more appropriate and consistent sentencing practices. The Council's *Guiding Principles for Sentencing Breaches of Family Violence Intervention Orders* can be found in Appendix 1.



## Chapter 2: Family Violence Intervention Orders



## Family Violence in Victoria

- 2.1 The criminal justice system is a limited mechanism for dealing with a complex societal problem such as family violence.<sup>9</sup> Only a very small number of family violence cases come before the courts. However, despite its limitations in responding to family violence, the criminal law has a 'highly symbolic' function, in providing 'public disapproval and reprobation'.<sup>10</sup> Punishment is intended to act as a deterrent to both offenders and potential offenders and as a form of protection for the victim.<sup>11</sup>

### Family Violence as a Gendered Harm

- 2.2 Gendered harms are injuries which happen overwhelmingly to women.<sup>12</sup> Most victims of family violence are women; it can thus be described as a gendered harm.<sup>13</sup>
- 2.3 Most family violence intervention orders are sought for the protection of women against men. In the period July 2004 to June 2007, 70.8 per cent of family violence intervention orders issued in Victoria were initiated by or on behalf of women,<sup>14</sup> while 84.8 per cent of family violence intervention orders were issued against male defendants.<sup>15</sup>
- 2.4 The gender imbalance is even more striking for breaches of family violence intervention orders. In the period June 2004 to July 2007, 92 per cent of people sentenced for breach of a family violence intervention order were men.
- 2.5 The gendered nature of family violence was acknowledged by the Victorian Parliament in the *Family Violence Protection Act 2008* (Vic), which recognised that 'while anyone can be a victim or perpetrator of family violence, family violence is predominately committed by men against women, children and other vulnerable persons'.<sup>16</sup>

9 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2002); Law Reform Commission [Australia], *Domestic Violence*, Report No. 30 (1986) 80; Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 55–9. See also Patricia Easteal, *Less Than Equal: Australian Women and the Legal System* (2001); Renata Alexander, *Domestic Violence in Australia* (3rd ed, 2002) 53–4; Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal*, 32.

10 Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions*, Australian Domestic Violence Clearinghouse: Issues Paper 3 (2001) 2.

11 Robyn Holder and Nicole Munstermann, 'What do women want? Prosecuting family violence in the ACT', Paper presented at Expanding Our Horizons: Understanding the Complexities of Violence Against Women (Sydney, 18 February 2002, 1–2).

12 Morgan and Graycar (2002), above n 9, 300.

13 VLRC (2006), above n 5, 20; Douglas and Godden (2003), above n 9, 36; Victorian Health Promotion Foundation, *Two Steps Forward, One Step Back: Community Attitudes to Violence Against Women: Progress and Challenges in Creating Safe and Healthy Environments for Victorian Women: A Summary of Findings* (2006) 13.

14 Police and other designated people can make applications for a family violence intervention order on behalf of the affected family member. See *Crimes (Family Violence) Act 1987* (Vic) s 7; *Family Violence Protection Act 2008* (Vic) s 45.

15 A similar pattern was exhibited in Queensland. Out of the 694 applications for a domestic violence order in the Brisbane Magistrates' Court in 2001, Douglas and Godden found that in the majority of cases, a woman was the aggrieved person (79.7 per cent) and the respondent spouse was a man (80.7 per cent). See Douglas and Godden, above n 9, 36.

16 *Family Violence Protection Act 2008* (Vic) Preamble.



## The Extent of the Problem

- 2.6 The Australian Bureau of Statistics reported in 1996 that 23 per cent of women who had ever been married or in a de facto relationship experienced physical violence from a male partner.<sup>17</sup> The Personal Safety Survey conducted in 2005 found that 16 per cent of women had experienced current or previous partner violence since the age of 15.<sup>18</sup> Victoria Police statistics show that 31,676 family violence incidents were reported to them in 2007–08, up from 29,648 in the previous financial year.<sup>19</sup>
- 2.7 One indication of the level of reported domestic violence is the number of family violence intervention orders issued by the courts. In the period from July 1999 to June 2007, there were 76,043 family violence intervention orders issued by Victorian courts, of which 11,279 were issued between July 2006 and June 2007.
- 2.8 It is difficult to know exactly how many women are affected by family violence because, like sexual assault, family violence is chronically underreported.<sup>20</sup> The Australian component of the International Violence Against Women Survey in 2004 found that, overall, only 14 per cent of women who experienced violence from an intimate partner had reported the most recent incident to the police.<sup>21</sup>
- 2.9 There are a number of reasons why women may not report violence perpetrated against them by their partners or ex-partners. Some of the main reasons discussed in the International Violence Against Women Survey were that the woman felt that the violence was too minor to report, that it was a private matter or that reporting may result in further violence.<sup>22</sup>
- 2.10 The Australian Institute of Criminology has found that a large proportion of fatal violence (43 per cent) is preceded by some form of family violence.<sup>23</sup> In light of such evidence, Wallace argued that '[d]omestic violence should be treated as seriously, if not more seriously, than violence in any other setting, in that it has the highest potential for lethal violence'.<sup>24</sup>

<sup>17</sup> Australian Bureau of Statistics, *Women's Safety Australia 1996* (1996) 50.

<sup>18</sup> Australian Bureau of Statistics, *Personal Safety Survey* (2006) as cited in Victorian Health Promotion Foundation (2006), above n 13, 13.

<sup>19</sup> Victoria Police, *Family Violence Incident Statistics 2007–08* (2008).

<sup>20</sup> *Ibid.* See also Kate Paradine and Jo Wilkinson, *Protection and Accountability: The Reporting, Investigations and Prosecution of Domestic Violence Cases*, Research and Literature Review (2004) 4.

<sup>21</sup> Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey*, Research and Public Policy Series No 56, Australian Institute of Criminology (2004) 101.

<sup>22</sup> *Ibid.* 105. See also Douglas and Godden (2003), above n 9, 39–40.

<sup>23</sup> Jack Dearden and Warwick Jones, *Homicide in Australia: 2006–07 National Homicide Monitoring Program Annual Report*, Australian Institute of Criminology Monitoring Reports Number 1 (2008) 15.

<sup>24</sup> Alison Wallace, *Homicide: The Social Reality*, Research Study Number 5, New South Wales Bureau of Crime Statistics and Research (1986) 183. See also Douglas and Godden (2003), above n 9, 35.

## Victorian Government Responses to Family Violence

- 2.11 Traditionally, family violence was viewed as being outside the concern of the State as it occurred in the private sphere, 'into which the law does not purport to peer'.<sup>25</sup> The public/private dichotomy was challenged in the late 1960s and early 1970s by the feminist movement. This movement raised awareness of family violence and advocated for its criminalisation.<sup>26</sup>
- 2.12 In the 1980s, extensive research was undertaken across Australia in relation to family violence.<sup>27</sup> In 1981, the Victorian Department of Premier and Cabinet convened a Domestic Violence Committee to examine this complex social and criminological problem. The Legal Remedies Sub-Committee of the Domestic Violence Committee produced a discussion paper in 1985 which presented a number of options for policy and legislative reform.<sup>28</sup> One of the options put forward was the introduction of a new civil remedy of intervention orders.

### *The introduction of intervention orders*

- 2.13 The Sub-Committee's 1985 Discussion Paper argued that due to the criminal law's inability to address fully the issues raised by domestic violence, there was a need for civil family violence intervention orders. In particular, the paper argued that:
- criminal law cannot be tailored to suit the variety of problems arising out of domestic violence; for example, the criminal law could not be applied to exclude the assailant from the matrimonial home;
  - criminal remedies are retrospective and cannot act as a preventative measure;
  - many women may be reluctant to involve the police at first instance; and
  - the criminal standard of proof of beyond reasonable doubt is difficult to satisfy when the only evidence is the victim's word against the defendant's.<sup>29</sup>
- 2.14 The Sub-Committee's proposals led to the passage of the *Crimes (Family Violence) Act 1987* (Vic). The scheme of intervention orders created under that Act was 'designed to provide ongoing protection to a victim of violence in the home'.<sup>30</sup> The Sub-Committee proposed a maximum penalty of two years' imprisonment for the offence of breach, which would 'equate breach of an intervention order with other serious breaches of the criminal law which are dealt with by the Magistrates' Court'.<sup>31</sup>

25 Katherine O'Donovan, *Sexual Divisions in Law* (1985) as cited in Graycar and Morgan, above n 9, 33.

26 Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal*, 220, 221; Partnerships Against Domestic Violence, *Current Perspectives on Domestic Violence: A Review of National and International Literature* (1999) 9.

27 See, for example Law Reform Commission [Australia] (1986), above n 9; New South Wales Domestic Violence Committee, *Report to the Premier The Hon B J Unsworth on a Survey of Non-Spousal Family Violence* (1987); *Domestic Violence Attitude Survey* Queensland Domestic Violence Taskforce, *Beyond These Walls: Report of the Queensland Domestic Violence Taskforce* (1988); Public Policy Research Centre, *Domestic Violence Attitude Survey* (1988); See also Victorian Health Promotion Foundation (2006), above n 13.

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

29 Ibid 120–23. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

30 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

31 Women's Policy Co-ordination Unit, Department of Premier and Cabinet (1985), above n 28, 137.

- 2.15 The Sub-Committee stressed that the intervention order was not designed to 'usurp' the criminal law and replace criminal justice system responses to domestic violence. It also noted that an application for an intervention order would not preclude charging the defendant with other offences, such as assault.<sup>32</sup> This point was reiterated in the second reading speech on the *Crimes (Family Violence) Act 1987* (Vic).<sup>33</sup> The Act implemented many of the Sub-Committee's recommendations, though the maximum penalty for the offence of breach was set at six months' imprisonment rather than two years.
- 2.16 Commencing in 1995, the *Crimes (Amendment) Act 1994* (Vic) made a number of changes to intervention orders. The most significant of these was that it broadened the range of people who could apply for an intervention order under the *Crimes (Family Violence) Act 1987* (Vic).<sup>34</sup> The 1994 Act also increased the maximum penalty available for breach of an intervention order from six months to two years' imprisonment for a first offence.<sup>35</sup> A separate, higher maximum penalty of five years' imprisonment was introduced for second or subsequent offences, although this higher maximum penalty could never actually be imposed by the courts. This is because section 113A of the *Sentencing Act 1991* (Vic) provides that no court may impose more than two years' imprisonment for a summary offence, regardless of the statutory maximum penalty that applies for that offence. As breach of an intervention order is a summary offence, a court was prohibited from imposing a sentence of imprisonment of greater than two years.<sup>36</sup>

#### *More recent developments*

- 2.17 There have been a number of further legislative and policy developments in Victoria aimed at developing an integrated, multi-layered approach to family violence that incorporates a wide range of agencies and services across government.
- 2.18 In August 2002, the Statewide Steering Committee to Reduce Family Violence was convened. The Committee consists of a number of government and non-government representatives. Its purpose is to provide policy advice to agencies across government involved in addressing the problem of family violence. In October 2002, the Victorian Women's Safety Strategy was launched, which provided a framework for a number of strategies to provide a response to violence against women in the community.<sup>37</sup>

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32 Ibid 123.

33 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

34 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1994, 1384 (Mr Coleman, Minister for Natural Resources). Under the original legislation, an application could only be made for an intervention order against a 'family member'—spouses, de facto spouses, and people related to each other and those who are ordinarily members of the same household. This definition was expanded to include people who have had a close personal relationship but have not lived together. The 1994 Act also empowered the courts to impose intervention orders where a person who could establish on the balance of probabilities that they had been stalked (with reference to the meaning of stalking under section 21A of the *Crimes Act 1958* (Vic)).

35 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1994, 1385 (Mr Coleman, Minister for Natural Resources).

36 *Crimes (Amendment) Act 1994* (Vic). See Sentencing Advisory Council (2008), above n 3, 12–13.

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

- 2.19 Another key initiative, the *Police Code of Practice for the Investigation of Family Violence* ('the Code'), was launched in 2004. The Code was developed in conjunction with the Statewide Steering Committee and the Office of Women's Policy in response to a recommendation in a Victoria Police review on violence against women.<sup>38</sup> Its main aims are 'safety and support for victims, early intervention, investigation and prosecution of criminal offences, and minimisation of family violence in the community'.<sup>39</sup> The Code provides a framework for police attending family violence incidents, including guidelines as to what action should be taken in particular circumstances.
- 2.20 In 2005, the Victorian Government established the Family Violence Division of the Magistrates' Court to operate at the Heidelberg and Ballarat courts. This specialist division was introduced to improve the justice system's response to family violence. The specialist division has dedicated applicant and defendant support workers and family violence registrars. The Family Violence Division has the power to order a male defendant to attend a men's behaviour change program when an intervention order is imposed, as part of the Family Violence Court Intervention Project.<sup>40</sup>
- 2.21 This formal structure was followed by the development of the Specialist Family Violence Services in Melbourne, Frankston, Sunshine and Werribee Magistrates' Courts. This service provides specialist workers and family violence court registrars to provide a better service to victims of family violence.<sup>41</sup>
- 2.22 In 2006, the VLRC released its *Review of Family Violence Laws: Report*, an extensive research and consultation project in response to a reference from the Attorney-General in 2002. The report contained 153 recommendations, including the repeal of the *Crimes (Family Violence) Act 1987* (Vic). The report recommended that new legislation should be enacted that encompasses a much wider definition of family violence, with a number of accompanying changes to the intervention order scheme. Further, the VLRC made a number of recommendations in relation to police and court practices.<sup>42</sup>
- 2.23 In 2008, the *Family Violence Protection Act 2008* (Vic) was passed, which incorporated a number of recommendations from the VLRC report. The new Act included a number of changes to the law, including:
- redefining what constitutes family violence under the law;
  - expanding the definition of a 'family member' for the purposes of the Act;
  - introducing family violence safety notices;
  - making changes to the way victims of family violence give evidence in court; and
  - providing a mechanism for excluding a respondent from the family home.<sup>43</sup>

38 Victoria Police, *A Way Forward: Violence Against Women Strategy: A Summary of the Review into All Matters Related to Violence against Women* (2002).

39 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2004), x.

40 VLRC (2006), above n 5, 5: Department of Justice, *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 28. See also *Family Violence Protection Act 2008* (Vic) pt V.

41 Department of Justice (2008), above n 40, 28.

42 Victoria, *Parliamentary Debates, Legislative Assembly*, 26 June 2008, 79–84 (Rob Hulls, Attorney-General).

43 Victoria, *Parliamentary Debates, Legislative Assembly*, 26 June 2008, 79–84 (Rob Hulls, Attorney-General). This Act came into operation on 8 December 2008.

- 2.24 While it is difficult to gauge how successful the more recent Victorian reforms have been,<sup>44</sup> they appear to have had some effect. For example, the number of family violence offences charged increased significantly after the introduction of the *Police Code of Practice*. In 2004–2005, there was a 73 per cent increase in the number of family violence charges filed.<sup>45</sup>
- 2.25 However, the overall rate of prosecution for family violence matters remains low.<sup>46</sup> This low rate of prosecution has been referred to as the ‘decriminalisation’ of family violence, whereby civil protection orders are used in lieu of prosecutions for substantive criminal offences.<sup>47</sup> This is despite very clear directions from parliament at the time civil protection orders were introduced that they were to be used alongside criminal proceedings and not as a replacement.
- 2.26 The widespread use of civil intervention orders reinforces the need to deal effectively with offenders at sentencing for breaches of family violence intervention orders, as breach prosecutions may be the only way that many family violence offenders come before the criminal courts.

## Family Violence Intervention Orders

- 2.27 There were two different types of intervention orders available under the *Crimes (Family Violence) Act 1987* (Vic): family violence intervention orders and stalking intervention orders. The new *Family Violence Protection Act 2008* (Vic) is limited to family violence intervention orders.<sup>48</sup>
- 2.28 The threshold requirement for making a family violence intervention order is whether or not the parties are family members within the definition of the Act. Under the *Crimes (Family Violence) Act 1987*, ‘family member’ was defined quite broadly.<sup>49</sup> The term encompassed:
- a current or former spouse or domestic partner of the person;
  - someone who is in or has had an intimate personal relationship with the person;
  - a current or former relative of the person;
  - a child who normally or regularly resides with the person;
  - a child for whom the person has acted as guardian; and
  - someone who has ordinarily been a member of the person's household.<sup>50</sup>

44 The Family Violence Division of the Magistrates' Court, the Specialist Family Violence Services and the Family Violence Court Intervention Project are all currently the subject of an evaluation. See Department of Justice (2008), above n 40, 28.

45 VLRC (2006), above n 5, 56.

46 Ibid.

47 Douglas and Godden (2003), above n 9; Kimberley Everton-Moore, ‘Anna’s Story: Law’s Response to Domestic Violence’ (2006) 15 *Griffith Law Review*, 196, 215; Heather Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review*, 439, 447.

48 For more information on stalking intervention orders under the *Crimes (Family Violence) Act 1987* (Vic), see Sentencing Advisory Council (2008), above n 3. Stalking intervention orders will now be dealt with under the *Stalking Intervention Orders Act 2008* (Vic).

49 *Crimes (Family Violence) Act 1987* (Vic) s 3.

50 *Crimes (Family Violence) Act 1987* (Vic) s 3. Subsection 2 further defines ‘family member’ with a list of people (including blood relatives, half and in-law relatives): parents, grandparents, uncles, aunts, sons, daughters, grandsons, granddaughters, brothers, sisters, nephews, nieces, cousins and, in the case of domestic partners, people who would be family members if the domestic partners were married.

- 2.29 This definition has been expanded under the *Family Violence Protection Act 2008* (Vic). All of the above categories are included; however, 'family member' can include a child of a person who has or has had an intimate personal relationship with the person applying for an order. 'Family member' also now includes:
- any other person whom the [applicant] regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member.<sup>51</sup>
- 2.30 The reasonableness requirement is satisfied by referring to the circumstances of the relationship, including the 'provision of sustenance or support between the relevant person and the other person'.<sup>52</sup> This particular circumstance was included in the new Act to cover relationships between a person with a disability and his or her carer. There is also an expanded definition for Aboriginal or Torres Strait Islander people: the definition of 'relative' includes anyone who is considered as such though tradition or contemporary social practice.<sup>53</sup>
- 2.31 Under the *Crimes (Family Violence) Act 1987* (Vic), an intervention order could be made against a defendant where the court was satisfied on the balance of probabilities that:
- the defendant has assaulted a family member or caused damage to the property of a family member and is likely to do so again; or
  - the defendant has threatened to assault or damage the property of a family member and is likely to actually take those steps; or
  - the defendant has harassed or molested a family member or behaved in an offensive manner to the family member and is likely to do so again;<sup>54</sup> or
  - a child, who is a family member of the defendant or the aggrieved family member and has heard or witnessed violence by the defendant and is likely to do so again.<sup>55</sup>
- 2.32 The *Family Violence Protection Act 2008* (Vic) simply states that the court can impose a family violence intervention order, where it is satisfied on the balance of probabilities that 'the respondent has committed family violence against the affected family member and is likely to do so again'.<sup>56</sup>

51 *Family Violence Protection Act 2008* (Vic) s 8(3).

52 *Family Violence Protection Act 2008* (Vic) s 8(3)(i).

53 *Family Violence Protection Act 2008* (Vic) s 10(1)(b).

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

55 *Crimes (Family Violence) Act 1987* (Vic) s 4A.

56 *Family Violence Protection Act 2008* (Vic) 74.

- 2.33 The definition of 'family violence' in the *Family Violence Protection Act 2008 (Vic)* goes beyond traditional understandings of this conduct as being limited to physical violence.<sup>57</sup> For the purposes of this Act, 'family violence' is defined as behaviour by a person towards a family member of that person if that behaviour:
- is physically or sexually abusive; or
  - is emotionally or psychologically abusive; or
  - is economically abusive; or
  - is threatening; or
  - is coercive; or
  - in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.<sup>58</sup>
- 2.34 In addition, the definition of family violence specifically includes any 'behaviour by a person that causes a child to hear or witness, or otherwise be exposed'<sup>59</sup> to any of the conduct described above. The Act provides that behaviour may be considered family violence even if the conduct alleged would not amount to a criminal offence.<sup>60</sup> To assist the court further, the Act sets out a number of examples of economic, emotional and psychological abuse.<sup>61</sup>

### Intervention Orders Issued Under the *Crimes (Family Violence) Act 1987 (Vic)*<sup>62</sup>

- 2.35 Figure 1 shows the numbers of family violence intervention orders issued and the number of aggrieved family members each financial year between July 1999 and June 2007. After remaining relatively steady between July 1999 and June 2004, the number of intervention orders issued increased by 35.5 per cent between June 2004 and June 2007. This increase is largely due to the introduction of the *Police Code of Practice* in 2004.<sup>63</sup>
- 2.36 The Code provides that:
- [p]olice must make and sign an application (complaint) for an intervention order wherever the safety, welfare or property of a family member appears to be endangered by another. This may mean making an application without the agreement of the aggrieved family member who may be fearful of the consequences of initiating such action.<sup>64</sup>

57 VLRC (2006), above n 5, 15. As pointed out by the VLRC, the literature in the area and the accounts of victims have long since acknowledge that family violence is broader than physical violence; however, it seems to have taken some time for the general community and the legal system to get to this stage as well.

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

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

60 *Family Violence Protection Act 2008 (Vic)* s 5(3).

61 *Family Violence Protection Act 2008 (Vic)* s 6, 7.

62 All data in this section were obtained from Courts Statistical Services Unit, Department of Justice.

63 Magistrates' Court of Victoria (Submission).

64 Victoria Police (2004), above n 39, [5.3.2].

- 2.37 Between July 2004 and June 2007, the percentage of family violence intervention orders initiated by police increased from 22.4 per cent to 47.3 per cent.<sup>65</sup>
- 2.38 Over this same period, the number of aggrieved family members increased by 64.7 per cent, more sharply than the increase in intervention orders issued. According to the Magistrates' Court, this is attributable to the 2004 amendments to the *Crimes (Family Violence) Act 1987* (Vic) 'requiring courts to consider making orders to include children who "hear or witness violence"'.<sup>66</sup>
- 2.39 The sharper increase in aggrieved family members compared with intervention orders reflects the fact that there was also an increase in the number of aggrieved family members *per intervention order*. In the period July 2006 to June 2007 there was an average of 1.6 aggrieved family members per intervention order, up from 1.3 from July 2003 to June 2004.

**Figure 1:** Number of family violence intervention orders and aggrieved family members by financial year, 1999–2000 to 2006–07



- 2.40 From July 2004 to June 2007, the Magistrates' Court of Victoria issued 32,247 family violence intervention orders. The following data relate to the orders made during that period.

<sup>65</sup> Courts and Tribunals Unit, Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria, Intervention Order Statistics, 2002/03–2006/07* (2009) 45.

<sup>66</sup> Magistrates' Court of Victoria (Submission).

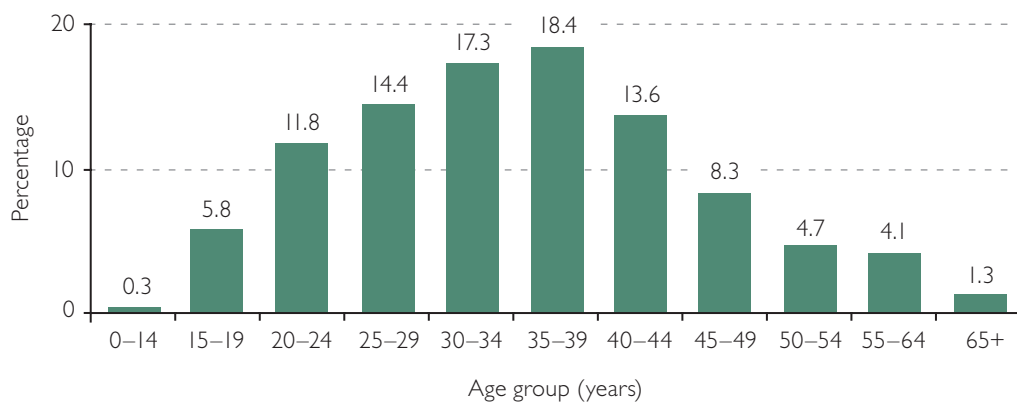


## Sentencing Practices for Breach of Intervention Orders

*Age and gender of defendants*

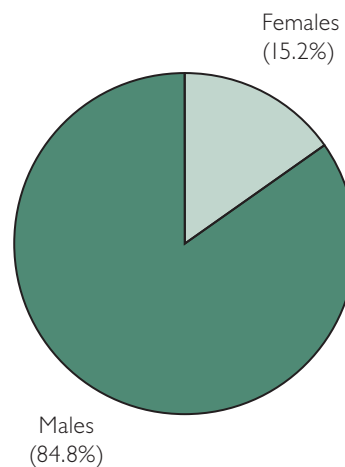
2.41 The average defendant age for family violence intervention orders from July 2004 to June 2007 was 35 years and 3 months. Figure 2 shows the age distribution for defendants issued with a family violence intervention order. While the distribution is spread over the entire age range, it is concentrated in the younger ages—50 per cent between 25 and 39 years.

**Figure 2:** Percentage of defendants issued with a family violence intervention order by age group of defendant, 2004–05 to 2006–07



2.42 Figure 3 shows the gender breakdown for defendants issued with a family violence intervention order. The majority of family violence intervention orders were issued against male defendants (84.8 per cent).

**Figure 3:** Percentage of defendants issued with a family violence intervention order by gender of defendant, 2004–05 to 2006–07

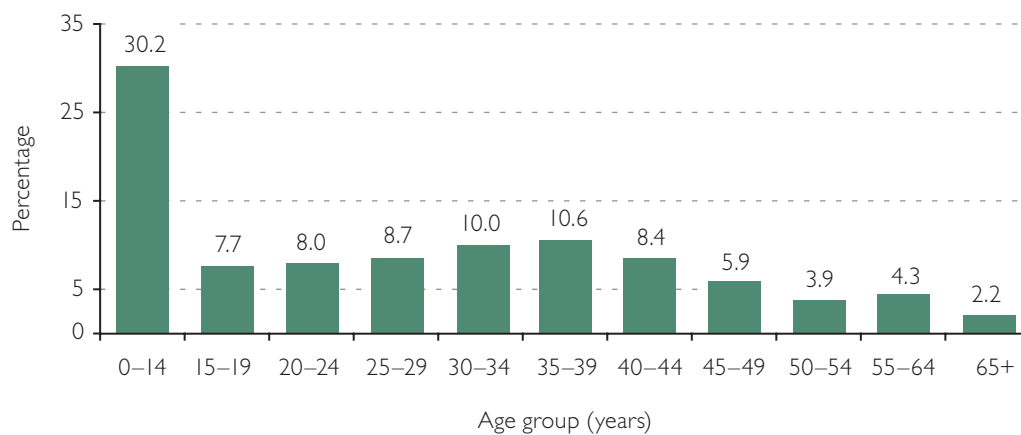


### Age and gender of aggrieved family members

2.43 From July 2004 to June 2007, for the 32,247 defendants issued with family violence intervention orders, there were 48,734 aggrieved family members.

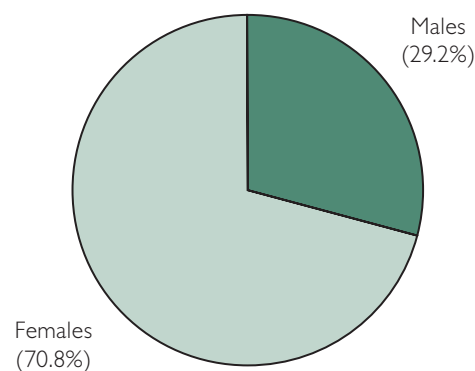
2.44 The average age of aggrieved family members for family violence intervention orders issued during this period was 27 years. Figure 4 shows the age distribution of aggrieved family members. The most common age group among aggrieved family members was 0 to 14 years (30.2 per cent). The likely reason for this prominence of children is the frequency of the scenario in which a parent includes their children as aggrieved family members on the intervention order. As in many cases there is more than one child, this increases the proportion of aggrieved family members aged between 0 and 14.

**Figure 4:** Percentage of aggrieved family members who had a family violence intervention order issued by age group of aggrieved family member, 2004–05 to 2006–07



2.45 Figure 5 shows the gender breakdown of aggrieved family members across all age groups. Females comprised the majority of aggrieved family members for family violence intervention orders issued (70.8 per cent).

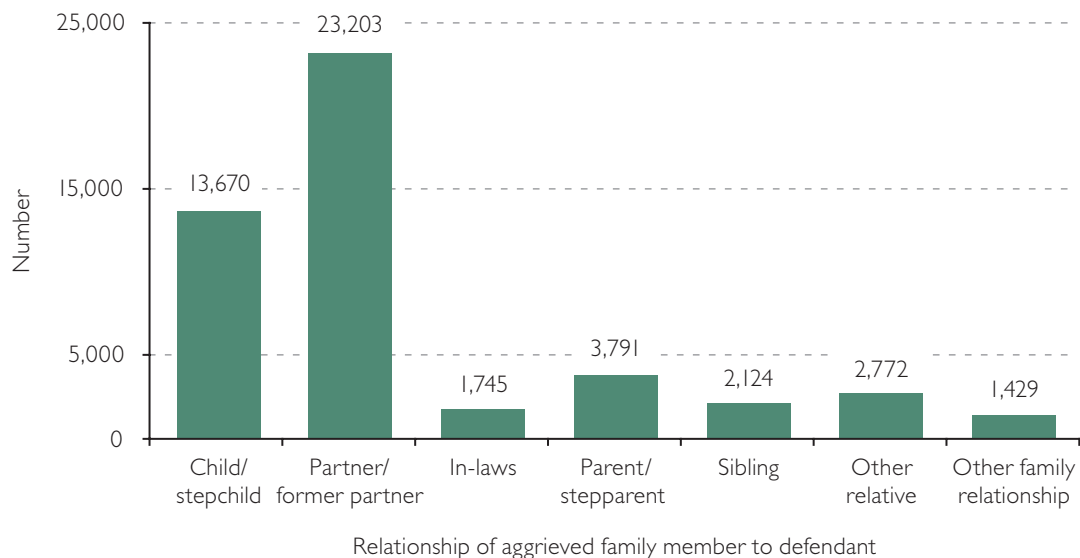
**Figure 5:** Percentage of aggrieved family members for whom family violence intervention orders were issued by gender of aggrieved family member, 2004–05 to 2006–07



### *Relationship between aggrieved family member and defendant*

2.46 Figure 6 shows the distribution of relationship types between the aggrieved family member and the defendant for family violence intervention orders. From July 2004 to June 2007, nearly half of the aggrieved family members for whom a family violence intervention order was issued were the defendant's partner or former partner<sup>67</sup> (47.6 per cent), while over one quarter were the defendant's child or step-child (28.1 per cent).

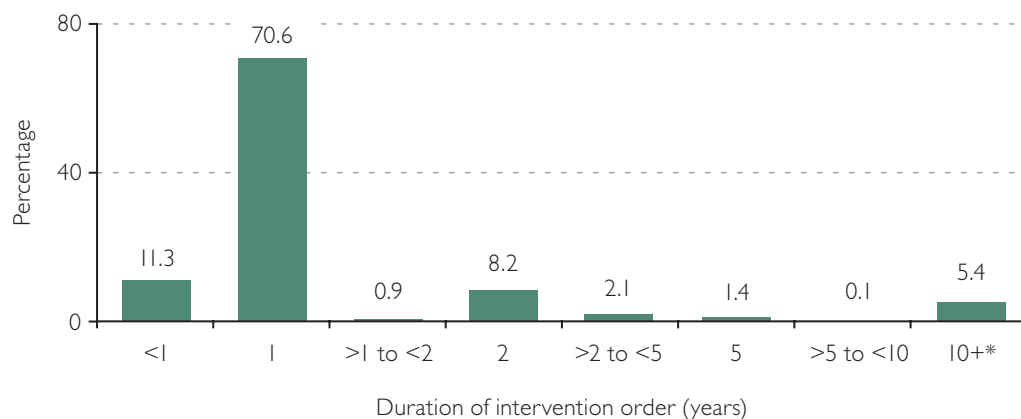
**Figure 6:** Number of aggrieved family members for whom a family violence intervention order was issued by relationship of aggrieved family member to defendant, 2004–05 to 2006–07



### *Duration of intervention order*

2.47 The majority of family violence intervention orders issued from July 2004 to June 2007 were for a period of 12 months. Figure 7 shows that 70.6 per cent of family violence intervention orders were imposed for 12 months.

**Figure 7:** Percentage of family violence intervention orders issued by duration of order, 2004–05 to 2006–07



\* Includes orders where duration was 'until further order'.

67 Partner/former partner includes domestic partner/former domestic partner and intimate personal relationship.

## Family Violence Safety Notices

- 2.48 Under the *Family Violence Protection Act 2008* (Vic), police officers with the rank of Sergeant or higher are empowered to issue a family violence safety notice.<sup>68</sup> The reason for the creation of this new order was outlined by the Attorney-General in his second reading speech:
- A key issue identified in the VLRC report concerned access to protection outside of court hours. In response, the bill establishes a system of police-issued family violence safety notices for use outside of court hours to provide another tool to police to ensure that immediate protection is available when police respond to an incident.<sup>69</sup>
- 2.49 Any police officer who attends the scene of a family violence incident may make an application to another officer of the appropriate rank, if a number of conditions are satisfied, including that the application is made before 9am or after 5pm on a weekday or on a Saturday, Sunday or public holiday.<sup>70</sup>
- 2.50 In order to issue a family violence safety notice, the police officer must believe on reasonable grounds that there is no family violence intervention order already in place between the parties. Further he or she must believe that a family violence safety notice is necessary:
- to ensure the safety of the affected family member; or
  - to preserve any property of the affected family member; or
  - to protect a child who has been subject to family violence committed by the respondent.<sup>71</sup>
- 2.51 Most of the same conditions that can be attached to a family violence intervention order can be attached to a family violence safety notice. The exception is conditions that relate to the use of firearms.<sup>72</sup> The contravention of a family violence safety notice is a criminal offence.<sup>73</sup>
- 2.52 The safety notice remains in operation from the time of issue until a court has had the opportunity to decide whether or not a family violence intervention order is required (the first mention date).<sup>74</sup> The application must be heard by the court within 72 hours of the notice being served.<sup>75</sup>
- 2.53 The Division of the *Family Violence Protection Act 2008* (Vic) that deals with family violence safety notices expires two years after it commences.<sup>76</sup>

68 *Family Violence Protection Act 2008* (Vic) s 24.

69 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 80 (Rob Hulls, Attorney-General).

70 *Family Violence Protection Act 2008* (Vic) s 24(f)(i)(ii).

71 *Family Violence Protection Act 2008* (Vic) s 26(1).

72 *Family Violence Protection Act 2008* (Vic) s 29(1), 81(2).

73 *Family Violence Protection Act 2008* (Vic) s 37.

74 *Family Violence Protection Act 2008* (Vic) s 30.

75 *Family Violence Protection Act 2008* (Vic) s 31(3)(a). The only exception to this section is where a public holiday means that it will be more than 72 hours before the matter can be heard in court. In these circumstances, the case must be heard on the next working day after the public holiday; *Family Violence Protection Act 2008* (Vic) s 31(3)(b).

76 *Family Violence Protection Act 2008* (Vic) s 41.

## The Offence of Breaching an Intervention Order

- 2.54 Under section 22 of the *Crimes (Family Violence) Act 1987* (Vic), a person was guilty of breaching an intervention order if he or she:
- was the subject of the intervention order;
  - had been served with a copy of the order or had the order explained to him or her; and
  - contravened any condition of the order.
- 2.55 This offence has been repealed and replaced with the offence of contravening a family violence intervention order under section 123 of the *Family Violence Protection Act 2008* (Vic). The new offence is in the same form, with largely the same elements. The level of culpability required to establish the offence still means that a person cannot inadvertently commit this offence, as they must know that they have breached the conditions or, at the very least, been reckless as to whether they have done so.
- 2.56 The action required for the commission of the offence under the 1987 Act was contravention of any condition of the order. However, as there are some differences in the conditions that the court could impose under the 1987 and the 2008 Acts, there will be differences in the behaviour that will actually constitute a breach.
- 2.57 Intervention orders may include any restrictions or prohibitions that the court views as being necessary or desirable under the circumstances.<sup>77</sup> The *Crimes (Family Violence) Act 1987* (Vic) contained an inclusive list of the types of restrictions that could be imposed.<sup>78</sup> These basically related to prohibiting or restricting the person from:
- approaching the aggrieved family member;
  - accessing premises in which the family member lives, works or frequents even where the person has a proprietary interest in the property;
  - being in a locality nominated by the court;
  - contacting, threatening or intimidating a family member;
  - damaging the property of a family member;
  - causing another person to engage in conduct which the person has been restrained by the court from doing; or
  - holding a licence, permit or authority to possess, carry or use a firearm (and the person could be disqualified from doing so for up to 5 years after the order had ceased and could be ordered to forfeit any such firearms).<sup>79</sup>

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<sup>77</sup> *Crimes (Family Violence) Act 1987* (Vic) s 4(2).

<sup>78</sup> *Crimes (Family Violence) Act 1987* (Vic) s 5.

<sup>79</sup> *Crimes (Family Violence) Act 1987* (Vic) s 5.

- 2.58 The conditions that may be included in a family violence intervention order under the *Family Violence Protection Act 2008* (Vic) include:
- prohibiting the respondent from committing family violence against the protected person; and
  - excluding the respondent from the protected person's residence; and
  - a condition relating to the use of personal property; and
  - prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or specified person;
  - prohibiting the respondent from being within a specified distance of the protected person or a specified place;
  - prohibiting the respondent from causing another person to engage in conduct prohibited by the order;
  - revoking or suspending a weapons approval or weapons exemption in relation to the respondent; and
  - cancelling or suspending the respondent's firearms authority.<sup>80</sup>

## The Maximum Penalty

- 2.59 A person in breach of any of the conditions included in an intervention order imposed under the *Crimes (Family Violence) Act 1987* (Vic) was liable to the following maximum penalty:
- two years' imprisonment and/or 240 penalty units for a first offence; and
  - five years' imprisonment for a subsequent offence.
- 2.60 However, despite the ostensible maximum of five years for a subsequent offence, the highest penalty that any court could impose for a single offence was two years.<sup>81</sup>
- 2.61 Taking this into consideration, as well as sentencing practices for breach of intervention orders and the fact that these cases are most appropriately dealt with in the Magistrates' Court as summary offences,<sup>82</sup> the Council recommended in its 2008 report that the maximum penalty for breaching a family violence intervention order should be two years' imprisonment.<sup>83</sup>
- 2.62 The government adopted this recommendation in the *Family Violence Protection Act 2008* (Vic). The maximum penalty for contravention of a family violence intervention order is two years' imprisonment or a fine of 240 penalty units or both.

<sup>80</sup> *Family Violence Protection Act 2008* (Vic) s 81.

<sup>81</sup> Sentencing Advisory Council (2008), above n 3, 13. However, if a defendant is charged with more than one offence committed at the same time, the court can order cumulation of the sentences imposed in relation to those charges up to a maximum of five years. See *Sentencing Act 1991* (Vic) s 113B. In the Magistrates' Court, an aggregate sentence of up to five years' imprisonment can also be imposed. See *Sentencing Act 1991* (Vic) s 9(2).

<sup>82</sup> There would, for example, be considerable delays were the offences to be indictable and heard in the County Court.

<sup>83</sup> Sentencing Advisory Council (2008), above n 3, 46–47.

## Police Response to Breaches

- 2.63 The purpose of an intervention order is to provide some level of protection to the aggrieved family member.<sup>84</sup> The effectiveness of the order in providing that protection is closely linked to effective policing and prosecution of breaches. Without these the order is little more than 'just a piece of paper'.<sup>85</sup>
- 2.64 There are two stages in the criminal justice response to breaches—the police response (which includes the investigation and decision to charge and/or to proceed with the prosecution) and the court response.
- 2.65 While the focus of this report is on the court response, particularly the sentencing practices, the police response is also relevant. It will determine, to a large extent, the number and type of breach cases that come before the court. The police also decide whether other offences will be charged alongside the breach. Further, the material that police present to the court is of prime importance to the sentencing process.
- 2.66 The VLRC reported that 'many of the people consulted ... had negative experiences with the police response when a breach of an order has occurred'.<sup>86</sup> One of the issues of concern to stakeholders was that police do not regard breaches involving non-physical forms of violence as serious. This misconception is not limited to Victorian police. A study conducted in 1998 in relation to police responses to breaches of apprehended violence orders in New South Wales found that some police members continue to characterise particular behaviour as technical or minor, despite the fact that such behaviour viewed in the context of an abusive relationship can be quite terrifying for the victim.<sup>87</sup> One victim described her view of the situation:
- He says things and other ladies have said this is true for them, too. They might not sound like much to anyone else but because you have been with this person for quite a long time, it has this underlying meaning and something that sounds innocent can be quite threatening.<sup>88</sup>
- 2.67 This research is supported by the more recent work of Douglas, who concluded that 'this minimisation by police and prosecution authorities is common in domestic violence prosecutions'.<sup>89</sup>
- 2.68 The Victorian Police *Code of Practice for the Investigation of Family Violence* specifically provides that 'there is no such lawful term as "technical" or "minor" breach' and that charges should be based on evidence and not a subjective assessment by the particular police member as to the seriousness of the breach.<sup>90</sup>
- 2.69 Since the introduction of the Code in 2004, the VLRC found that there had been some improvement in charging practices; however, there were still some inconsistencies in the police response.<sup>91</sup>

84 VLRC (2006), above n 5, 156.

85 Hayley Katzen, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 *Australian Family Law Journal*, 1, 4.

86 VLRC (2006), above n 5, 156.

87 Katzen (2000), above n 85, 18.

88 Ibid.

89 Douglas (2008), above n 47, 447.

90 Victoria Police (2004), above n 39, [4.6.1], [4.6.3.1].

91 VLRC (2006), above n 5, 156–8.

## Investigation of Breaches of Intervention Orders

### The Police *Code of Practice for the Investigation of Family Violence*

- 2.70 Based on consultations with police officers, it would seem that the aggrieved family member is usually the one to notify police that a breach has occurred. Where appropriate, such as where other offences have been committed at the same time, or 'immediate action is required to protect the aggrieved family member or to protect property',<sup>92</sup> police may exercise their power to arrest the defendant. If there is no immediate risk to persons or property, the police may choose to bring the defendant before the court on charge and summons instead. Whichever course police take, the attending officer is required to complete a Family Violence Report [Form LI7].<sup>93</sup> Police are also required to make a formal referral, which involves providing information about the aggrieved family member to an external family violence service provider.<sup>94</sup>
- 2.71 Once police have identified a breach offence, they must put together a brief of evidence. This will involve taking statements from the aggrieved family member and any other relevant witnesses. It may also involve obtaining the records of any medical treatment received by the victim for inclusion in the brief. Police may also take photographs and notes of injuries suffered by the victim as forensic evidence.<sup>95</sup> The brief is forwarded to a supervisor for authorisation. The supervisor may return it to the investigating officer if he or she considers it incomplete.<sup>96</sup>
- 2.72 The decision as to whether or not to proceed with a prosecution must be based on 'the evidence gathered and not a subjective assessment by the responding police as to the seriousness of the breach'.<sup>97</sup> Depending on whether or not there is sufficient evidence, the defendant may also be charged with other offences, such as an assault or criminal damage.<sup>98</sup> The decision to prosecute is made by a police supervisor, who will recommend the appropriate response. If the disposition is charge and bail, the hearing date for the breach should be listed as soon as practicable after the commission of the alleged offence. Where the defendant is charged and summonsed, the matter should be listed within three months of the alleged breach.<sup>99</sup>
- 2.73 Where the authorising officer decides that there is insufficient evidence to prosecute, the parties should again be referred to the relevant family violence service provider. Further, it may be that the intervention order should be amended to reflect a change in circumstances.<sup>100</sup>

92 Victoria Police (2004), above n 39, [4.6.2.1].

93 Ibid [2.6.1].

94 Ibid [3.2].

95 Ibid [4.3.1.1].

96 Victoria Police Focus Group (Region 4) (1 October 2008).

97 Victoria Police (2004), above n 39, [4.6.3.1].

98 Victoria Police Focus Group (Ballarat) (1 October 2008).

99 Victoria Police (2004), above n 39, [4.6.3.2].

100 Ibid [4.6.3.3].



*Stakeholder perceptions*

- 2.74 The VLRC's findings were reflected in the Council's consultations. Some of those consulted felt that the police response had improved dramatically as a result of the Code.<sup>101</sup> However, others held the view that sentencing may not be an issue in many breach cases because the police often do not charge the offence in the first place.<sup>102</sup> A participant in a meeting with Victoria Legal Aid commented that 'the chief complaint one hears is that police do not take action until there is a long pattern of breaching'.<sup>103</sup> Another participant suggested that police may not intervene because they may be of the view that the matter is not serious enough. They may be waiting for something more serious to happen before they initiate criminal proceedings.<sup>104</sup>
- 2.75 A lawyer from a community legal centre described the police action on breaches as 'pathetic'. She stated that police often will not respond to multiple reports of breaches, unless there is some physical violence and that they do not take psychological intimidation seriously.<sup>105</sup> A worker from a domestic violence service commented that often police will not charge a breach unless there is the corroborative evidence of another witness.<sup>106</sup> One victim said '[t]he intervention order was broken lots of times, but I was told it was his word against mine, as I did not have any witnesses'.<sup>107</sup>

*Evidentiary difficulties*

- 2.76 While victims and service providers may see police as unsympathetic to victims, all the officers interviewed emphasised their frustration at the difficulties in gathering sufficient evidence for breaches of family violence intervention orders. Breaches are particularly hard to prove beyond reasonable doubt in situations where it is the victim's word against that of the alleged offender, hence the preference for corroborating witnesses.<sup>108</sup> One example of this difficulty is where the victim alleges that the defendant made a harassing phone call. While police can access records to establish the phone number from which the call was made, this is not proof that the defendant made the calls himself. Even more difficult to prove are situations where the victim reports that she saw the defendant drive past her home a number of times, but she did not actually see the number plate of the car or the defendant's face.<sup>109</sup>

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101 Court staff at the Family Violence Division of the Magistrates' Court (Heidelberg) (25 August 2008).

102 Community Legal Centre Roundtable (18 September 2008).

103 Meeting with Victoria Legal Aid (24 September 2008).

104 Meeting with Victoria Legal Aid (24 September 2008).

105 Telephone conversation with domestic violence legal service (30 July 2008).

106 Telephone conversation with caseworker from regional domestic violence service provider (6 August 2008).

107 Meeting with Voices of Women for Justice (1 October 2008).

108 Victoria Police Focus Group (Ballarat) (1 October 2008); Telephone conversation with Victoria Police Officer (20 August 2008).

109 Telephone conversation with Victoria Police Officer (20 August 2008).

- 2.77 A further complication arises where there are other witnesses who are reluctant to assist with the investigation. This issue was raised by both the police and victims who noted that potential witnesses, such as neighbours, are rarely willing to provide a statement.<sup>110</sup> As one police officer put it, '[t]he neighbours will ring up that there is a "domestic" next door, but won't give a statement'.<sup>111</sup> Police also described how other family members often do not want to speak to police about an alleged breach.<sup>112</sup>
- 2.78 There are also obvious difficulties where the victim makes a statement of no complaint, particularly where the victim's evidence is the only evidence that the breach occurred.<sup>113</sup> While some police officers said they would proceed without the consent of the victim, without the evidence of the victim there may be insufficient evidence to authorise prosecution.<sup>114</sup>
- 2.79 Many police felt limited in the type of information they could include in the brief of evidence. While it was agreed that a defendant's prior convictions should form part of the brief, police officers thought that they could not include anything on the brief about the original behaviour that led to the imposition of the order. The only information about the intervention order provided would be a copy of the order itself.<sup>115</sup>
- 2.80 These difficulties were acknowledged by victims and family violence services.<sup>116</sup> They are also aware that sometimes the behaviour engaged in by the defendant is very subtle, making it difficult for the police to charge breach of an order. An example that was suggested was where the defendant uses a contact agreement in relation to children as an opportunity to harass the woman.<sup>117</sup> One victim commented:

One of the many examples of my husband's abuse was when he came to my mother's funeral service and was laughing and carrying on with his six brothers in the church. I was told by police, even though there was an intervention order out against him, that the church is a public and safe place and it was not in breach of the intervention order, as everyone has the right to attend church.<sup>118</sup>

110 Meeting with Voices of Women for Justice (1 October 2008); Victoria Police Focus Group (Ballarat) (1 October 2008).

111 Victoria Police Focus Group (Ballarat) (1 October 2008).

112 Victoria Police Focus Group (Ballarat) (1 October 2008).

113 Victoria Police Focus Group (Region 4) (2 October 2008).

114 Victoria Police Focus Group (Ballarat) (1 October 2008); See also Victoria Police (2004), above n 39, [4.2.52].

115 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008).

116 Family Violence Service Providers Roundtable (18 September 2008); Applicant Support Worker, Family Violence Division of the Melbourne Magistrates' Court (August 2008).

117 Family Violence Service Providers Roundtable (18 September 2008).

118 Meeting with Voices of Women for Justice (1 October 2008).

## Prosecution of Breaches

- 2.81 Once a brief of evidence has been authorised, the offender charged and the case listed for hearing, the brief is referred to police prosecutors. Prosecution of breach offences brings its own particular challenges; however, there is some overlap with the difficulties experienced by police at the investigative stage.

### *Reluctant witnesses*

- 2.82 If the defendant does not plead guilty, the prosecutor will be required to run the case as a contested hearing. One of the most difficult obstacles to overcome is where the victim is unwilling to give evidence. Even where a victim has made a statement that is included in the brief, facing the defendant in court and giving evidence against him can be a frightening and stressful experience.<sup>119</sup> It is clearly not the victim's decision as to whether or not to proceed with a breach matter. However, the prosecution is in a difficult position if the only evidence it has is the victim's statement and she does not want to proceed. The victim may claim an exemption from giving evidence on the basis that the defendant is her husband.<sup>120</sup> Others may state in court that they have forgotten what happened. In such cases, where there are no other witnesses or physical evidence, the prosecution is constrained in its ability to proceed with the case.<sup>121</sup>
- 2.83 One police officer stated that police prosecutors withdraw arguably weak cases out of fear that costs would be awarded against them if they lose. He suggested that costs should not be awarded in these cases and that prosecutors should be arguing that they are following the Code in prosecuting these cases.<sup>122</sup>

### *Charge negotiation*

- 2.84 Generally speaking, a plea of guilty may be preferable to a contested hearing as it is an admission of responsibility by the offender and the victim is not exposed to the trauma of giving evidence. In order to secure a plea of guilty, there may be circumstances where the breach charge would be withdrawn in order to secure a conviction on a substantive offence, such as an injury offence.<sup>123</sup> Police officers at Melbourne Prosecutions were of the view that it would be very rare to withdraw a breach charge in order to get a plea to another offence. One prosecutor said that he would never withdraw a breach as it is a completely separate offence and could not be viewed as an alternative to, for example, an assault, because the offending behaviour is breach of a court order.<sup>124</sup>

119 It is expected that the changes to the way victims of family violence can give evidence under the *Family Violence Protection Act 2008* (Vic) will assist in encouraging women to act as witnesses for the prosecution. See *Family Violence Protection Act 2008* (Vic) s 243; *Evidence Act 1958* (Vic) s 37C(2)(b).

120 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008). Under section 400 of the *Crimes Act 1958* (Vic), a judicial officer can grant the accused's wife, husband, mother, father or child an exemption from giving evidence on behalf of the prosecution in particular circumstances. The court must ensure that the social utility of the evidence does not outweigh the 'likelihood of damage to the relationship between the accused and the proposed witness, the harshness of compelling the proposed witness to give evidence' or a combination of the two.

121 Victoria Police Focus Group (Ballarat) (1 October 2008).

122 Victoria Police Focus Group (Region 4) (2 October 2008).

123 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008).

124 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

- 2.85 Another strategy that may be used by the prosecution to secure a guilty plea is where a number of charges of breach of a family violence intervention order are 'rolled up' into one offence. Rolling up charges is a:
- mechanism by which the [prosecution] can present numerous individual charges in a convenient form. It involves a form of drafting that would ordinarily be bad for duplicity, but with the consent of the offender, may be adopted on a plea.<sup>125</sup>
- 2.86 This procedure can encourage a plea of guilty as only one charge of breach of an intervention order will be entered on the defendant's criminal record. However, it presents a difficulty for a magistrate sentencing for a subsequent offence. The sentencer would not be aware that the prior conviction actually represented a number of charges. One of the prosecutors commented that she would never roll-up counts in this manner for that reason; however, there were others who suggested that if the victim did not want to give evidence, it is better to get a plea of guilty to one rolled up count than have all the offences struck out.<sup>126</sup>
- 2.87 Douglas interprets the practice of 'rolled-up counts' as another example of minimisation of harm by police and prosecution authorities.<sup>127</sup> She found that police prosecutors sometimes accepted a plea to one breach charge in exchange for their withdrawing a number of breach charges or other criminal charges. In one case she looked at, a serious assault was charged alongside a breach; however, police proceeded only with the breach and the offender received a conviction but no other penalty.<sup>128</sup> One of the problems with this, Douglas argues, is that the breach offence will often fail to reflect the seriousness of the offending behaviour: '[o]n an ideological level the preference for breach above other kinds of charges may be interpreted as trivialising or minimising what has occurred'.<sup>129</sup>

### *Information presented to the court*

- 2.88 Family violence differs from other types of offending because the history and dynamics of the relationship between the parties can have a significant effect on the offender's level of culpability and the impact of the offence on the victim. However, in the same way that police officers feel constrained about the amount of information that they can include in the brief regarding the background to the offence, some prosecutors were of the view that there is very little material that they are able to put to the court to contextualise the breach.

<sup>125</sup> Judicial College of Victoria, 'Rolled-Up Counts', *Victorian Sentencing Manual* (2005) [9.2.5] <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 20 November 2008.

<sup>126</sup> Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

<sup>127</sup> Douglas (2008), above n 47, 451.

<sup>128</sup> *Ibid* 451. Douglas notes that in this case the defendant had already served six weeks on remand awaiting trial on these offences.

<sup>129</sup> *Ibid* 449.

2.89 One of the prosecutors who was consulted stated that he would never present any information about the context of the offence other than the fact that an order was in place and it was breached on a particular date. While the prosecutors agreed that it would be useful for the magistrate to be aware of the behaviour that led to the imposition of the intervention order, they would not lead that information as evidence because many orders are made by consent without admissions and are therefore not proven.<sup>130</sup> The only information that the court is provided by the prosecution in relation to the history of the defendant is his prior convictions. If there were criminal charges dealt with at the same time that the original order was made, then the court would have some idea of why the order was imposed. If there are no criminal charges, which would seem to be the majority of cases, the magistrate is effectively operating in a vacuum in terms of sentencing for the breach. It was suggested by one of the prosecutors that information about the context of the offending could be provided through a victim impact statement; however, all the police officers consulted agreed that it was very rare to have a victim impact statement in family violence cases.<sup>131</sup> These issues are discussed in detail at [5.16] to [5.65].

## Police Attitudes Towards Breaches

2.90 It is clear that there are procedural hurdles for the police to overcome in bringing breach matters to court, both at the investigation and prosecution stage. The nature of this offence means that there are often significant difficulties in gathering sufficient evidence to charge an offender. This means that many breach complaints will not result in a breach offence being charged or prosecuted. Even where the defendant pleads guilty, prosecutors feel constrained in the type of information they can put before a magistrate.

2.91 However, while the majority of police officers who were consulted were committed to the Code and the protection of victims of family violence, a minority still had some difficulty conceptualising breach of a family violence order as a serious offence. One police officer suggested that women report breaches for 'fairly minor things ... [and] they are using the police for ammunition in family law proceedings'.<sup>132</sup> A senior police officer stated that some junior police need to be reminded that breaches of family violence intervention orders are breaches of court orders and therefore serious in their own right, regardless of the nature of the breach.<sup>133</sup> The structures put in place by the Code may mean that police are required to treat breaches in a particular manner; however, it is likely that some officers simply 'go through the motions', because as one officer put it, '95 per cent of them don't go anywhere'.<sup>134</sup> The likelihood of such cases resulting in a charge or prosecution is low.

<sup>130</sup> Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

<sup>131</sup> Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008); Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

<sup>132</sup> Victoria Police Focus Group (Region 4) (2 October 2008).

<sup>133</sup> Telephone conversation with Victoria Police Officer (20 August 2008).

<sup>134</sup> Victoria Police Focus Group (Region 4) (2 October 2008).

2.92 One of the reasons behind this attitude could be a lack of sufficient training. One police officer commented that while police generally received some training about family violence, much of this is about procedure under the Code and the relevant legislation. There is no training on dealing with victims or 'angry men'.<sup>135</sup> Another police officer considered that an understanding of the context of family violence, such as the cycle of violence, is very important as 'it might change the mind set and [help] people understand what a woman goes through'.<sup>136</sup> Some police expressed the view that this is 'on-the-job' training, something that can only be learned with experience and senior police therefore have a role in guiding and training younger members.<sup>137</sup> A more senior police officer suggested that the training that is offered does not often filter down to the general members who actually attend family violence incidents:

A lot of people that receive training or exposure to family violence aren't operating in the reporting of it. I went to all the conferences, learnt about cycle of violence etc. ... I got all that but I'm not the people dealing with the victims. That is across the state. The people who know the cycles etc. ... aren't the people actually doing the job. The people who have the knowledge don't have the ability to impart it to general duty members.<sup>138</sup>

2.93 In its submission on the draft report, Victoria Police provided the Council with detailed information about the amount of training police receive about family violence. This training includes:

- approximately three and a half days of recruit training, which covers the broader context of family violence and procedural information;
- a half day refresher training as part of the constable course;
- components in the Diploma of Police Supervision and Advanced Diploma of Police Management, completion of which is required for promotion to the ranks of sergeant and senior sergeant; and
- local level training provided by Family Violence Advisors and Regional Training Officers.<sup>139</sup>

2.94 In addition, specialised force wide training is carried out each time new legislation and/or procedures are introduced, such as when the Code was introduced and when the new *Family Violence Protection Act 2008* (Vic) came into force. For example, the new Act commenced operation in December 2008 and, to date, 75 per cent of Victoria Police have received 'comprehensive training covering both old and new ground'.<sup>140</sup>

2.95 The Council recognises Victoria Police's commitment to providing its members with appropriate training about the complexities of family violence, particularly through their response to the new legislation. However, the comments raised in the Council's consultations with general police members would suggest that there may be some areas in which either the delivery and/or the content of police training could be enhanced.

135 Victoria Police Focus Group (Ballarat) (1 October 2008).

136 Victoria Police Focus Group (Ballarat) (1 October 2008).

137 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008).

138 Victoria Police Focus Group (Ballarat) (1 October 2008).

139 Victoria Police (Submission).

140 Victoria Police (Submission).



## Chapter 3: Current Sentencing Practices for Breach of Family Violence Intervention Orders





## Introduction

- 3.1 It is clear that there are a number of obstacles to getting breaches of family violence intervention orders before the court, including under-reporting and procedural difficulties. Where breaches are successfully prosecuted, it is crucial that the sentencing response is appropriate, as this is likely to have a major impact on how breach behaviour is perceived by victims, offenders and the wider community.
- 3.2 In the past, courts did not take offending in the domestic context as seriously as 'traditional' criminal behaviour. The attitude appeared to be that the domestic nature of an assault should be a mitigating factor in sentencing. Warner quotes a Tasmanian judge who said in 1987:
- [t]he fact that the act of violence, unpremeditated and in circumstances of emotional stress was an act by one member of a family of a deteriorating marriage to another is an important factor in sentencing. Our society, recognising the enormous and often overwhelming pressures which lead modern social conditions to impose on the nuclear family, has gone to great lengths to support those families and frame laws and practices which are tolerant, non-judgemental and above all compassionate.<sup>141</sup>
- 3.3 Over recent years, community attitudes have changed<sup>142</sup> and the higher courts have made it clear that family violence 'must be, and must be seen to be, condemned by the courts'.<sup>143</sup>

## Current Sentencing Guidance

- 3.4 Sentencing for family violence, differing as it does from other forms of violence, presents many challenges for the courts. In order to determine whether current sentencing practices for breaches of intervention orders are appropriate, they should be considered in light of relevant sentencing purposes, the sentencing hierarchy and relevant sentencing factors. This chapter presents data on sentencing practices for breaches of intervention orders and discusses the data in light of the sentencing purposes and sentencing hierarchy. The following chapter discusses in detail the sentencing factors that are particularly relevant to breaches of family violence intervention orders.
- 3.5 There is no specific guidance as to how family violence cases in general or breaches of family violence intervention orders in particular should be treated by the courts, other than general statements from the higher courts such as the one quoted above. The *Sentencing Act 1991* (Vic) offers some general sentencing guidance which is to be applied to all offences sentenced in Victoria. Despite the complexity of family violence offences, there is no guidance for courts over and above these general guidelines.

141 *Tracey* (Unreported, Criminal Court of Appeal Tasmania, 24 July 1987, Nettleford J) cited in Kate Warner, 'Sentencing the Violent Spouse' (1996) 3(2) *Psychiatry, Psychology and Law*, 107, 107.

142 Victorian Health Promotion Foundation (2006), above n 13, 18–19.

143 *R v Robertson* [2005] VSCA 190 (Unreported, Maxwell P, Callaway and Chernov JJA, 3 August 2005), [13].

## Sentencing Purposes

- 3.6 Section 5(1) of the *Sentencing Act 1991* (Vic) sets out the only purposes for which a sentence can be imposed in Victoria:
- just punishment;
  - deterrence;
  - rehabilitation;
  - denunciation; and
  - community protection.
- 3.7 Section 5(1)(f) of the *Sentencing Act 1991* (Vic) provides that a sentencer can impose a sentence for a combination of more than one of these purposes. This will be particularly relevant in relation to sentencing for breaches of family violence intervention orders, where there will often be a number of conflicting purposes for which a sentence may be imposed.

### *Sentencing purposes and family violence*

- 3.8 The conflicting sentencing purposes relevant to sentencing for family violence have been described as 'guideposts that point in different directions'.<sup>144</sup> It is difficult to distinguish sentencing for breaches of family violence orders from other family violence offences. The same purposes and factors will generally be relevant for breaches of family violence intervention orders and other offences committed in the context of family violence. Further, breaches are often charged alongside other substantive offences.
- 3.9 Table 1 shows the number and percentage of people sentenced for the ten most common offences that were sentenced alongside breaches of family violence intervention orders between July 2004 and June 2007. The last column sets out the average number of offences sentenced per person. For example, 746 of the total 4,273 people (17.5 per cent) also received sentences for unlawful assault. On average they were sentenced for 1.31 charges of unlawful assault. The first row indicates that the average number of charges of breach of a family violence intervention order sentenced per person was 2.02.
- 3.10 It should be noted that while these offences were sentenced at the same time as the offence of breach of a family violence intervention order, this does not necessarily mean that both offences were actually committed on the same day or involved the same victim. The offences may have just been sentenced as part of the same case as a matter of expediency. In fact, the analysis presented below suggests that offences within the same case often relate to separate offending dates (that is, not necessarily the breach date).<sup>145</sup>

<sup>144</sup> Douglas (2007), above n 26, 230.

<sup>145</sup> See discussion below about the difference between multiple offences sentenced as part of the same case and offences committed on the same date.

**Table 1:** The number and percentage of people sentenced for the principal offence of breach of a family violence intervention order by the most common offences that were sentenced and the average number of those offences that were sentenced, 2004–05 to 2006–07

	Offence	Number	Percentage	Average
1	Breach of intervention order	4,273	100.0	2.02
2	Unlawful assault	746	17.5	1.31
3	Criminal damage	710	16.6	1.45
4	Fail to appear on bail	469	11.0	1.61
5	Causing injury	463	10.8	1.29
6	Theft	395	9.2	2.79
7	Make threat to kill	319	7.5	1.44
8	Assault police	271	6.3	1.67
9	Drive while disqualified	212	5.0	1.86
10	Possession of a drug of dependence	182	4.3	1.26
	<b>People sentenced</b>	<b>4,273</b>	<b>100.0</b>	<b>4.47</b>

3.11 Further complicating matters, these figures do not reflect the full picture, as in some cases, a substantive charge of assault or threat to kill may have been withdrawn in order to secure a conviction on the lesser breach offence.<sup>146</sup> So while the only harm necessary to commit the offence is breach of the conditions of the order, there may be further behaviour that forms part of the facts on which the offender is sentenced. This requires a delicate balancing act by the courts, as while relevant conduct may be taken into account when sentencing for the breach, 'care must be taken when considering circumstances which might have formed the basis for a separately charged offence'.<sup>147</sup>

3.12 The Victorian Court of Appeal in *R v Cotham*<sup>148</sup> emphasised the importance of specific and general deterrence in imposing penalties on particular offenders who have breached intervention orders:

Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated.<sup>149</sup>

<sup>146</sup> See discussion of charge negotiation in Chapter 2.

<sup>147</sup> Judicial College of Victoria, 'Uncharged Acts', (2005) [9.2.3] <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 28 August 2008.

<sup>148</sup> [1998] VSCA 111 (Unreported, Brooking, Phillips and Charles JJA, 17 November 1998).

<sup>149</sup> *Ibid* [14].

## Sentencing Practices for Breach of Intervention Orders

- 3.13 However, it has been suggested that 'the effectiveness of the criminal law is found wanting because magistrates and judges do not hand out harsh punishments so that specific deterrence does not work'.<sup>150</sup> This criticism presupposes that specific deterrence is actually achieved through harsh punishment. It may be that an approach focussing on imprisonment does not 'create real safety because you can never hold everybody in jail forever. Often perpetrators re-emerge with more anger and are then a potential danger'.<sup>151</sup>
- 3.14 It has also been suggested that the logic of deterrence, which assumes rational calculations on the part of the offender, 'is strained in the context of domestic violence'.<sup>152</sup> This is based on a view that rational calculations may not be possible during a violent assault, or for offenders whose patterns of behaviour are deeply entrenched. However, there is a danger that characterising the use of violence in this way supports an outdated view that men's violence towards women is the result of a lack of control.<sup>153</sup> The VLRC denies this assertion, arguing that men who claim to have lost control are simply trying to shift blame for their offences onto their victims. Many abusive men use violence in a very rational and calculated manner to manipulate their victims.<sup>154</sup>
- 3.15 A punitive approach, which places more emphasis on punishment and deterrence, may come at the cost of other purposes of sentencing, such as protection of the community, which, in the context of breaching an intervention order, could also be conceived as the protection of the victim. According to some researchers, this goal can be linked to rehabilitation of the offender, which may achieve the long-term protection of the victim.<sup>155</sup> However, others are of the view that rehabilitation for family violence offenders requires a coercive context, and should be combined with seemingly opposed sentencing purposes—such as punishment and deterrence for example—through the use of a mandated rehabilitation course.<sup>156</sup>
- 3.16 For the specific offence of breaching family violence intervention orders, the purpose of sentencing is closely linked to the need for continued compliance with the order. According to the United Kingdom Sentencing Guidelines Council:
- In all cases the order will have been made to protect an individual from harm and action in response to breach should have as its primary aim the importance of ensuring that the order is complied with and that it achieves the protection that it was intended to achieve ... [w]hen sentencing for a breach of an order, the main aim should be to achieve future compliance with that order where that is realistic.<sup>157</sup>
- 3.17 This does not mean that other sentencing purposes are irrelevant, but that the focus should be on ensuring the continued protection of the victim.<sup>158</sup>

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150 Alexander (2002), above n 9, 54.

151 Stephanie Coward-Yaskiw, 'Restorative Justice' (2002) 15(4) *Horizons*, 22, 24.

152 Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, 'Presentation at the 1995 Conference on Criminal Justice Research and Evaluation', National Institute of Justice Research Report (1996), 30.

153 Telephone consultation with a representative from men's behavioural change program (19 September 2008).

154 VLRC (2006), above n 5, 27–8.

155 Douglas (2007), above n 26, 233.

156 Ruth Lewis, 'Making Justice Work: Effective Legal Interventions for Domestic Violence' (2004) 44 *British Journal of Criminology*, 204, 221.

157 Sentencing Guidelines Council [UK], *Breach of a Protective Order: Definitive Guideline* (2006) 4.

158 Douglas (2007), above n 26, 233.

- 3.18 If the penalties imposed for breaches of family violence intervention orders are perceived as ineffective, this may affect police attitudes and practices, as well as the behaviour of victims and defendants. Katzen argues that failure to sanction breaches appropriately undermines the aggrieved family member's sense of security, discourages subsequent reporting and gives the impression that the order is 'just a piece of paper'.<sup>159</sup> Some participants in the police focus groups commented that victims might be more likely to return to the relationship if the court does not issue an appropriate sanction:

If the person doesn't get a sentence of any substance they [the victim] go back to that relationship. Sentences that reflect the crime will empower the victim.<sup>160</sup>

How extremely hard for these people [victims] to come into court and have all this stuff aired and then thinking they have done the right thing, they're going to stop it from happening, and then seeing nothing happening, they often go back to that violence cycle. You know he's not in jail, she rings him up, they get back together and the cycle starts all over again. So if they see the courts not taking the matter seriously then they don't take it seriously.<sup>161</sup>

- 3.19 The effectiveness of family violence intervention orders in protecting the victim by 'stopping the unwanted behaviour' depends on the 'threat of the consequences for breach'.<sup>162</sup> If prosecution of breaches is patchy and penalties upon successful prosecution are perceived as light, then arguably there may be little impact on defendants.<sup>163</sup>

## Sentencing Hierarchy

- 3.20 The sentencing hierarchy in the *Sentencing Act 1991* (Vic) is the legislative expression of the principle of parsimony at common law.<sup>164</sup> The principle provides that 'a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.<sup>165</sup> Section 5(4)–(7) of the *Sentencing Act 1991* (Vic) gives practical significance to this rule by requiring that the sentencer consider the efficacy of each sanction in fulfilling the relevant sentencing purposes before moving up to the next, more serious sanction available. For example, section 5(6) states that 'a court must not impose a community-based order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine'.
- 3.21 It should be noted, however, that this does not require the court expressly to 'consider and reject every sanction from the bottom of the hierarchy to the top before imposing a sentence of imprisonment'.<sup>166</sup> Rather, it is sufficient that it is clear from the sentencing remarks that the judicial officer has turned his or her mind to the alternative sanctions available prior to the imposition of the sentence.<sup>167</sup> This is somewhat difficult in relation to offences dealt with in the Magistrates' Court as there are no published sentencing remarks from which to glean the intentions of the sentencer.

<sup>159</sup> Katzen (2000), above n 85, 3–4.

<sup>160</sup> Victoria Police Focus Group (Ballarat) (1 October 2008).

<sup>161</sup> Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

<sup>162</sup> Douglas (2008), above n 47, 444.

<sup>163</sup> Katzen (2000), above n 85, 4; Eastale (2001), above n 9, 113.

<sup>164</sup> Judicial College of Victoria, 'Sentencing Act 1991 s 5', *Victorian Sentencing Manual* (2005) [6.3.1.2] <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 20 November 2008; Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (1999, 2nd ed) 186.

<sup>165</sup> *Sentencing Act 1991* (Vic) s 5(3).

<sup>166</sup> Fox and Freiberg (1999), above n 164, 188.

<sup>167</sup> *Ibid.*

## Sentencing Factors

- 3.22 In sentencing an offender, there are a number of considerations that the sentencer must take into account, which are set out in section 5(2) of the *Sentencing Act 1991* (Vic):
- (a) the maximum penalty prescribed for the offence;
  - (b) current sentencing practices;
  - (c) the nature and gravity of the offence;
  - (d) the offender's culpability and degree of responsibility for the offence;
  - (daa) the impact of the offence on any victim of the offence;
  - (da) the personal circumstances of any victim of the offence;
  - (db) any injury, loss or damage resulting directly from the offence;
  - (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
  - (f) the offender's previous character; and
  - (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.
- 3.23 It is clear from subsection (g) that this is not intended to be an exhaustive list. There is no guidance as to the weight that should be given to each factor. This will largely depend on the individual circumstances of the case and is left to the discretion of the sentencing judge or magistrate.
- 3.24 In some cases where a substantive offence is committed in breach of an intervention order, it may be that the breach is not charged but is considered an aggravating circumstance of the commission of the substantive offence. For example, in *R v Yasso*, the offender was convicted of murdering his wife who had taken an intervention order out against him. The court commented that, in addition to this being a 'very grave offence', '[t]hat it was committed in breach of an intervention order was itself a significant aggravating circumstance'.<sup>168</sup>

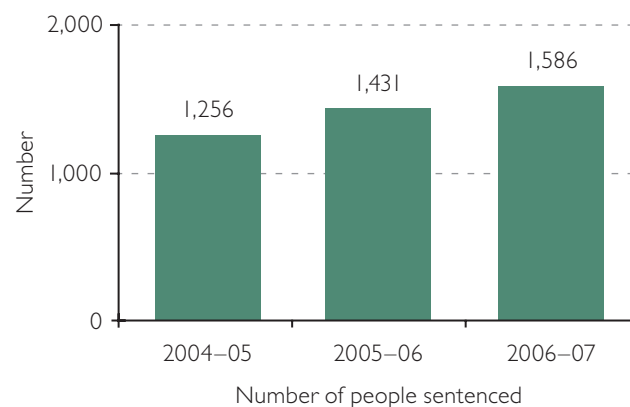
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<sup>168</sup> [2007] VSCA 306 (Unreported, Maxwell P, Redlich JA, Habersberger AJA, 14 December 2007) [60]. This practice was referred to in the Magistrates' Court of Victoria submission to the Sentencing Advisory Council's report on the maximum penalty for breaching an intervention order; Sentencing Advisory Council (2008), above n 3.

## Overview of Sentencing Practices for Breach of Family Violence Intervention Orders

- 3.25 Ninety-nine per cent of breach of intervention orders charged under section 22 of the *Crimes (Family Violence) Act 1987* (Vic) over the period 2004 to 2007 were dealt with in the Magistrates' Court. This is because breach of a family violence intervention order is a summary offence and such offences are heard in the Magistrates' Court. As the offence remains a summary offence under the 2008 Act, breaches will continue to be heard largely in the Magistrates' Court. These matters will only be heard in the County Court in very limited circumstances. The first is where an offender has been convicted of a more serious indictable offence and is willing to plead guilty to the summary offence at the same time. Secondly, a summary offence may be dealt with in the County Court if the defendant appeals the sentence he or she received for a summary offence in the Magistrates' Court.<sup>169</sup>
- 3.26 Between July 2004 and June 2007, 4,273 people were sentenced for the offence of breach of a family violence intervention order in the Magistrates' Court. As Figure 8 shows, the number of people dealt with by the courts for this offence increased steadily each year from 1,256 people between July 2004 and June 2005 to 1,586 between July 2006 and June 2007.

**Figure 8:** The number of people sentenced for breach of a family violence intervention order in the Magistrates' Court, 2004–05 to 2006–07



### Offender Profile

- 3.27 Over the three years from July 2004 to June 2007, 92 per cent of defendants sentenced for breach of a family violence intervention order in the Magistrates' Court were male. The average age of defendants sentenced for this offence was 34 years and 10 months. The profile was slightly different for the very small percentage of offenders dealt with in the County Court. A similar percentage of defendants were male (92.7 per cent); however, the average age of defendants was slightly higher at 37 years.

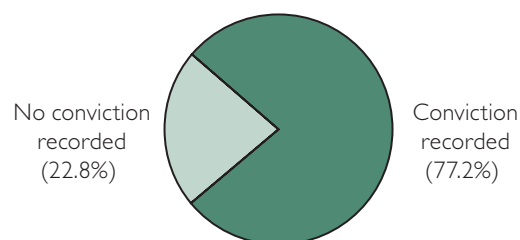
<sup>169</sup> An offender has the right to appeal against his or her sentence imposed in the Magistrates' Court. The appeal is heard in the County Court and is determined after a re-hearing of the matter. See *Magistrates' Court Act 1989* (Vic) ss 83, 85.



## Record of Conviction

- 3.28 Before examining the sanctions imposed for breaches of family violence intervention orders in more detail, it is important to note the relevance of the recording of a conviction as part of the sentencing process. When sentencing an offender to the most serious types of sanctions (such as imprisonment, a wholly or partially suspended sentence or an intensive correction order) the court must record a conviction.<sup>170</sup>
- 3.29 However, when a court sentences an offender to a community-based order, a fine or an adjourned undertaking, the court may decide whether or not to record a conviction.<sup>171</sup> In exercising this discretion, the court must have regard to all of the circumstances of the case, including the nature of the offence, the character and past history of the offender and the impact that recording a conviction would have on the offender's economic or social wellbeing or on his or her employment prospects.<sup>172</sup>
- 3.30 The relevance of the recording of a conviction to the purposes of sentencing was discussed by Freiberg:
- The permanence of a conviction and its continuing impact on an offender's life can satisfy several of the sentencing objectives set out in the *Sentencing Act 1991 (Vic)*. As well as any sentencing order imposed, the fact of conviction can operate as a powerful punishment for the offence and as long lasting denunciation of the offender's conduct, as a deterrent to his or her future behaviour or that of others who contemplate committing offences. The permanence of conviction may in some cases protect the community from future offending by alerting the community to an offender's past criminal behaviour.<sup>173</sup>
- 3.31 As illustrated by Figure 9, of the 1,586 defendants sentenced for breach of a family violence intervention order from July 2006 to June 2007, 77.2 per cent had a conviction recorded (1,224 people).<sup>174</sup> This is high in comparison with general offences heard in the Magistrates' Court, where 56.6 per cent have a conviction recorded against them.

**Figure 9:** The percentage of people sentenced for breach of a family violence intervention order by whether or not a conviction was recorded, 2006–07



- 3.32 The responses to the Council's Magistrates' Court Survey provided some reasons as to why there is such a high rate of conviction for this offence generally. A number of magistrates were of the view that a conviction is often warranted for a breach of intervention order as it is a breach of a

<sup>170</sup> *Sentencing Act 1991 (Vic)* s 7(1).

<sup>171</sup> *Sentencing Act 1991 (Vic)* s 7(1).

<sup>172</sup> *Sentencing Act 1991 (Vic)* s 8(1).

<sup>173</sup> Arie Freiberg, 'Issues Paper: Spent Convictions' (2001), unpublished.

<sup>174</sup> Only those who had a conviction recorded against the principal proven offence in the case are counted. Information on conviction is not available for sentences imposed in 2004–05 and 2005–06.

court order and therefore inherently serious.<sup>175</sup> One magistrate commented that 'it is in effect a contempt of court when someone breaches an order and so [this offence is] more likely to attract a conviction'.<sup>176</sup> Another magistrate described this type of offending in the following way:

The offender has breached a court order, so is deemed, usually, to have acted in circumstances where the offending is a continuation of conduct which has already been condemned by the court. Further the conduct is unlikely to have been 'spur of the moment', succumbing to temptation, or committed in ignorance of the criminality of the conduct, or relatively trifling.<sup>177</sup>

- 3.33 Other magistrates were of the view that a conviction is often imposed because the breach occurs in circumstances where the order was designed to protect the aggrieved family member.<sup>178</sup> Two magistrates thought that a conviction plays a role in denouncing the criminal conduct,<sup>179</sup> with one of these commenting that a conviction may be used as 'a way of denouncing the conduct when there is so little available otherwise'.<sup>180</sup> The other magistrate also was of the view that a conviction may function as a general deterrent.<sup>181</sup>
- 3.34 In the Council's wider consultations, there were different perceptions as to the impact of a conviction. Family violence service providers suggested that some women do not want to report breaches of orders for fear that the recording of a conviction against the offender would have a negative impact on his employment. Any loss of employment could have a significant impact on the victim and her children through the loss of household income. This is particularly relevant in cases where the victim wants the violence to stop but wishes to maintain the relationship.<sup>182</sup>
- 3.35 Some defence lawyers and family violence service providers who were consulted were of the view that if defendants were aware that they could receive a conviction for breaching an intervention order, this may act as a deterrent. Defendants should be fully aware of the possibility of conviction on contravention of the order as courts are required to explain the order, including the 'consequences and penalties' that may flow from breach.<sup>183</sup>
- 3.36 However, it was conceded that whether or not a conviction acted as a deterrent was largely dependent on the defendant's criminal history; if he has an extensive criminal history, he is unlikely to be particularly concerned by the prospect of another conviction.<sup>184</sup> If the defendant is very young and has no prior convictions, then the imposition of a conviction may be much more significant.<sup>185</sup> It should be noted that it is Victoria Police policy to release criminal history information on the basis of findings of guilt, including findings of guilt without conviction.<sup>186</sup> This means that the practical difference between conviction and non-conviction may be negligible for employment purposes.

175 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 1, 2, 6, 8, 9 and 13.

176 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

177 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 3.

178 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 5 and 12.

179 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 10 and 13.

180 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10.

181 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 13.

182 Family Violence Service Providers Roundtable (18 September 2008). This was also a concern for victims in applying for intervention orders in the first place. They may not be clear as to the distinction between civil and criminal orders and may be of the view that the imposition of an intervention order may have a conviction attached to it.

183 *Family Violence Protection Act 2008* (Vic) s 96(1)(d).

184 Family Violence Service Providers Roundtable (18 September 2008); Meeting with Victoria Legal Aid (24 September 2008).

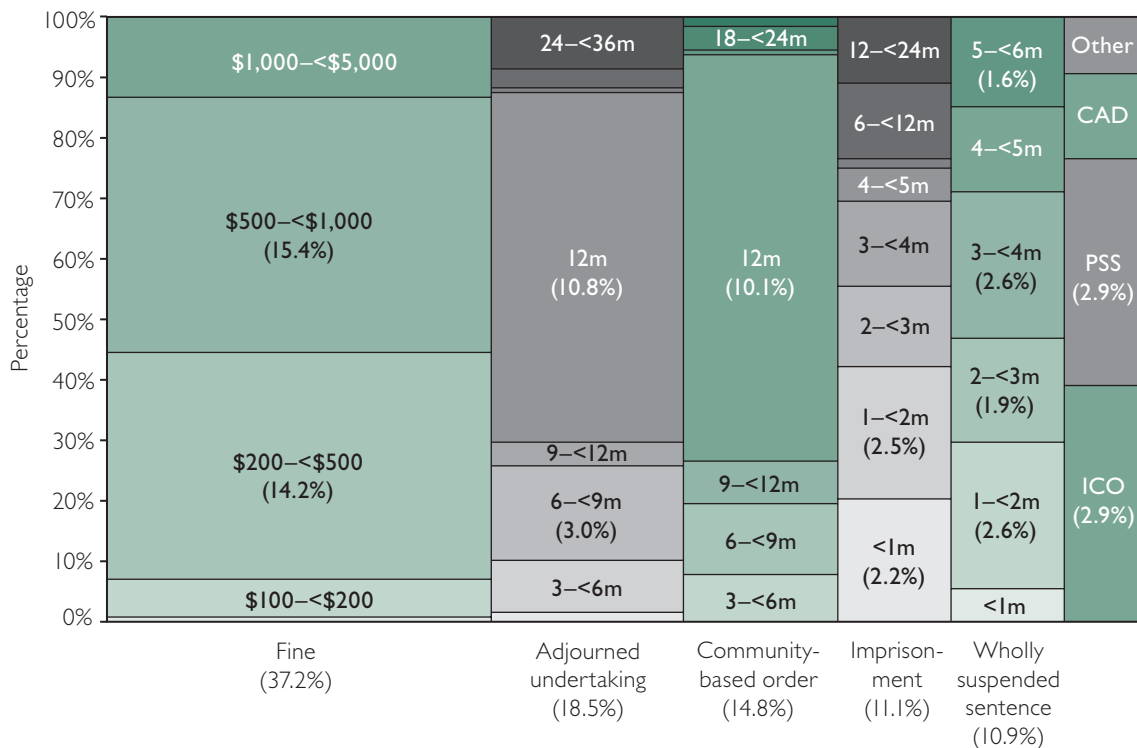
185 Meeting with Victoria Legal Aid (24 September 2008).

186 Victoria Police, *National Police Certificates Information Sheet* (2009).

### Sentencing Outcomes<sup>187</sup>

3.37 Figure 10 presents both the sentencing outcomes and the quanta for those outcomes for people sentenced for breach between July 2004 and June 2007. The most common sentence imposed for breach of an intervention order during this period was a fine (37.2 per cent) followed by an adjourned undertaking (18.5 per cent). The most common sentence was a fine of \$500 to \$1,000. The right most column of the graph presents the least common sentencing outcomes without showing the quantum information.

**Figure 10:** Sentencing Map: The percentage of people sentenced for breach of a family violence intervention order by sentencing outcomes and sentencing quanta in the Magistrates' Court, 2004–05 to 2006–07



Note: ICO refers to intensive correction order, PSS refers to partially suspended sentence and CAD refers to convicted and discharged (*Sentencing Act 1991* (Vic) s 73). 'Other' includes youth justice centre order, hospital security order, combined custody and treatment order, drug treatment order and dismissed (*Sentencing Act 1991* (Vic) s 76).

187 Details about the Council's methodology, data sources and data sets can be found in Appendix 2.

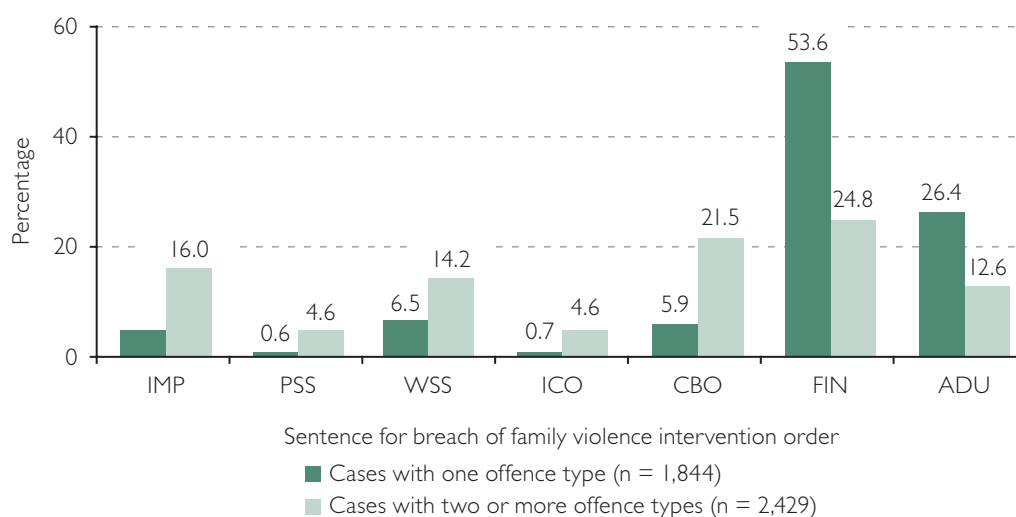
## Other Offences Sentenced Alongside Breaches

- 3.38 The above data are based on the most severe sentence attached to the breach of intervention order in each case. This is not the complete picture of sentencing for this offence as the majority of cases of breach of a family violence intervention order (57.8 per cent) had two or more offence types that were dealt with at the same time.
- 3.39 However, where the court sentences a number of offences as part of the same case on a particular date, this does not necessarily mean that there is any link between those offences. As a matter of expediency, magistrates will often sentence offenders at the one time for a number of unrelated charges committed over a period of time. For example, an offender may be sentenced on 1 October for a charge of unlawful assault committed on 23 August, two thefts committed on 3 September and a breach of a family violence intervention order committed on 15 September.
- 3.40 In order to explore the relationship between breaches and other offences more fully, the effect on the sentence for breach, where there was an additional offence that occurred on the same date as the breach, was examined. An example of this would be where there was a charge of unlawful assault and a charge of breach both committed on the same date. While the data do not guarantee that the unlawful assault and the breach arose out of the same circumstances or were against the same victim, it is more likely that there is a connection between these charges than those described above.

### *Multiple offence types sentenced in the same case*

- 3.41 Figure 11 shows the sentence distribution for breaches where no other offence types were sentenced in the case and the distribution for breaches where other offence types were involved. This may be seen as a more accurate representation of breach sentences than that shown in the Sentencing Map because here the effect of other offence types is controlled for.

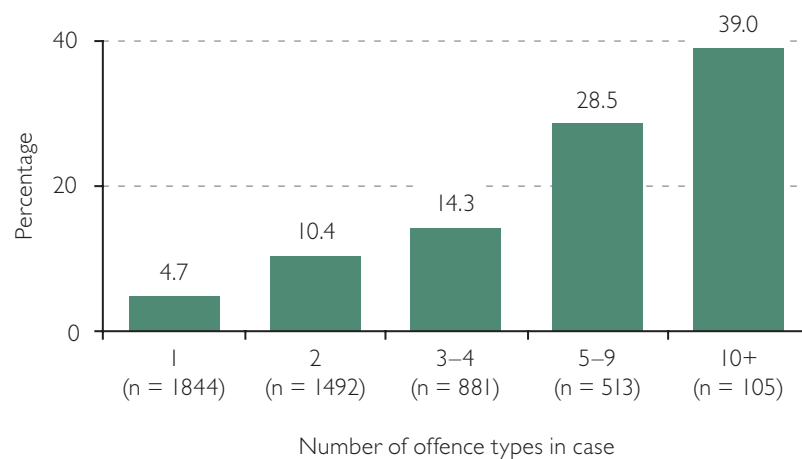
**Figure 11:** Percentage of defendants sentenced for breach of a family violence intervention order by sentence type and number of offences in case



## Sentencing Practices for Breach of Intervention Orders

- 3.42 The sentence imposed for the breach of intervention order appears to have been affected by the existence of multiple charges sentenced on the same date (Figure 11). More serious sentences were imposed in cases with multiple offence types. The incidence of fines and adjourned undertakings was substantially higher where there was no other offence dealt with at the same time. Over half of the breaches, where there were no other offences, received a fine (53.6 per cent) compared with one quarter (26.4 per cent) where there were multiple charges.
- 3.43 The effect of the number of offence types within a case on the breach sentence is better illustrated by the steady increase in the percentage of defendants who received a sentence of imprisonment according to the number of offence types in a case (Figure 12). Where there were 10 or more offence types in a case, defendants were nearly 10 times more likely to receive imprisonment (39.0 per cent) for the breach than cases with only the breach offence (4.7 per cent).

**Figure 12:** Percentage of defendants sentenced for breach of a family violence intervention order who received imprisonment by number of offence types in case, 2004–05 to 2006–07

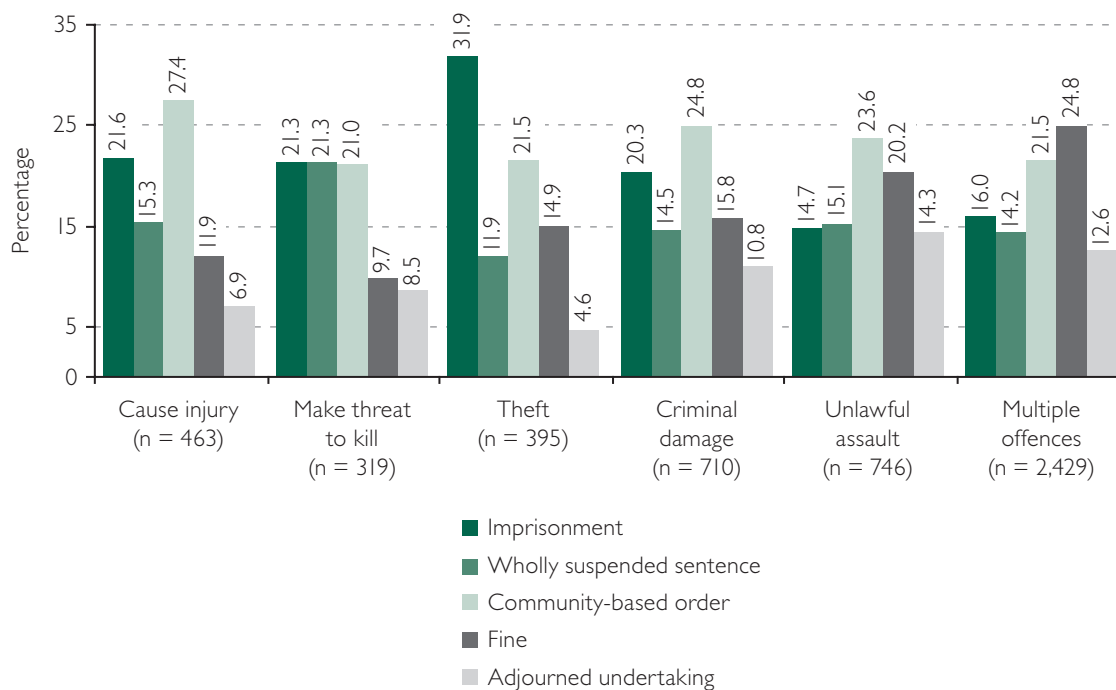


#### *Particular offences sentenced in the same case*

- 3.44 The type of offence sentenced at the same time also appeared to have an effect on the sentences imposed for breach.
- 3.45 Figure 13 shows the sentence distribution for breaches according to five of the most common other offence types within breach cases (that is, offence types for which a defendant was sentenced on the same date). The last bar in the graph is for comparative purposes as it shows the breach sentence distribution for cases with multiple offence types. It is important to note in this analysis that the co-occurring offence type stated may not be the only other offence type in the case (previous analysis showed that the 35.1 per cent of breach cases involved three or more offence types).
- 3.46 This graph shows that a community-based order was the most common sentence for the breach where a case included the offence of causing injury intentionally or recklessly (27.4 per cent), criminal damage (24.8 per cent) and unlawful assault (23.6 per cent). Imprisonment was the most common sentence for breaches when there was a theft in the case (31.9 per cent). For threat to kill, the sentence distribution was even across the three sentence types of imprisonment, wholly suspended and community-based orders. Fines were much less common for breaches in cases involving these offence types than they were for multiple offences (24.8 per cent), being used in 9.7 per cent of cases involving making a threat to kill and 11.9 per cent of cases involving causing injury intentionally or recklessly.

3.47 Further investigation into cases in which there was a charge of theft sentenced alongside the breach of an intervention order revealed that such cases had a higher average number of offence types compared with other breach-offence combinations. For instance, the average number of offence types in theft breach cases was 6.9, compared with 5.0 for criminal damage breach cases and 4.8 for cause injury breach cases. As was shown in Figure 12, the number of offence types appears to have a direct effect on the breach sentence. Thus more serious sanctions imposed for breaches with a theft are likely, due to the increased criminality associated with a greater number of offences.

Figure 13: Percentage of defendants sentenced for a breach by sentence for the breach and selected other offence types in the breach case, 2004–05 to 2006–07

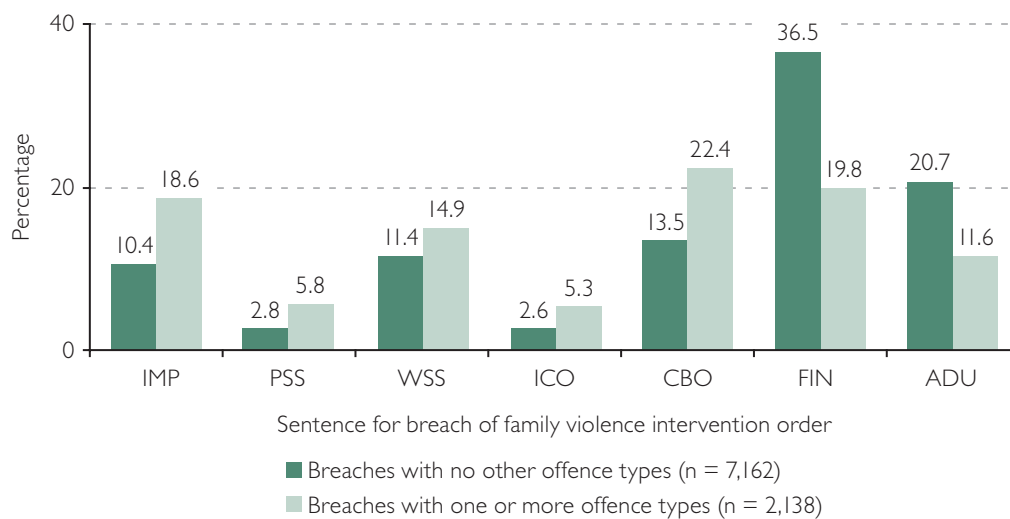


3.48 Sentences for breach of family violence intervention orders appear to be affected by the other offences that are sentenced on the same date. However, as discussed above, where the court deals with a number of sentences on the same day, this does not necessarily mean that there is any link between those offences. The fact that the percentage of fines and adjourned undertakings imposed for the breach charge decrease substantially when there are other charges dealt with at the same time may reflect the court's response to the offender's general level of criminality, rather than anything particular about the breach itself or the circumstances in which it occurred.

### Multiple offence types committed on the same date

- 3.49 The effect of other offences on sentencing for breaches was explored further by examining the role of offences committed on the same day (as opposed to simply sentenced on the same day). Only 29.9 per cent of breach of intervention order charges occurred on the same day as a charge for another offence (this is nearly half of the 57.8 per cent of breach of intervention order cases that had multiple offence types). The most common co-occurring offences were unlawful assault (8.4 per cent) and property damage (7.5 per cent).
- 3.50 Figure 14 shows the percentage of breach of intervention order offences that received each major sentence type according to the number of offences committed on the breach date. It is clear that the more severe sentences were more likely to be imposed where there were multiple offences on the breach date. Imprisonment, partially suspended sentences, wholly suspended sentences, intensive correction orders and community-based orders were more likely to be imposed when there were multiple offences on the breach date, whereas fines and adjourned undertakings were more likely where the offence date contained only the breach.

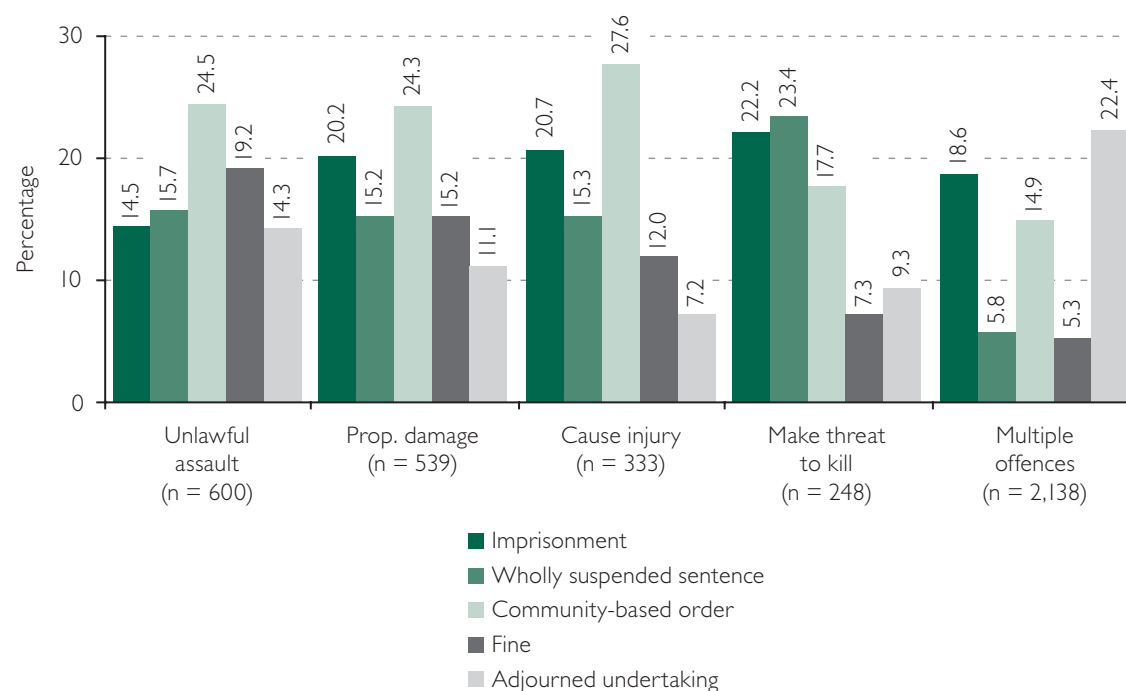
**Figure 14:** Percentage of breach offences by sentence type for breach and number of offence types on breach date



### Particular offences committed on the same date

- 3.51 Sentencing for breaches also varied according to the *type* of offence committed on the breach date.
- 3.52 Figure 15 shows sentencing for breaches of intervention orders according to the four most common other proven offence types charged on the breach date. In terms of severity, breaches that were committed on the same day as a charge of making a threat to kill were sentenced more severely than the other three offence types. The most common sentence where there was a make threat to kill offence was wholly suspended sentence (23.4 per cent) followed by imprisonment (22.2 per cent). In contrast, the most common sentence for each of the other co-occurring offence types was a community-based order. Fines were most common for breach of intervention orders that included an unlawful assault (19.2 per cent) and lowest where there was also a make threat to kill (7.3 per cent).

Figure 15: Percentage of breach offences by sentence type and other offences on breach date



- 3.53 From this analysis, it is clear that where there are other offences on the same date, the courts are more likely to impose a higher sanction. This is logical as the behaviour on that particular date was sufficient to warrant multiple charges, which reflects a higher level of criminality.
- 3.54 Compared to the analysis at the case level, it would appear that the effect of other offences committed on the same date have an even greater effect on the breach sentence than offences simply heard at the same hearing.
- 3.55 Data contained in this latter section are more relevant than those in the previous section (multiple offences sentenced in the same case), given the greater likelihood of a connection between a breach and other offences committed on the same day. Thus, in the next section, where particular sanctions are examined in detail, these data are used rather than data relating to offences sentenced in the same case.

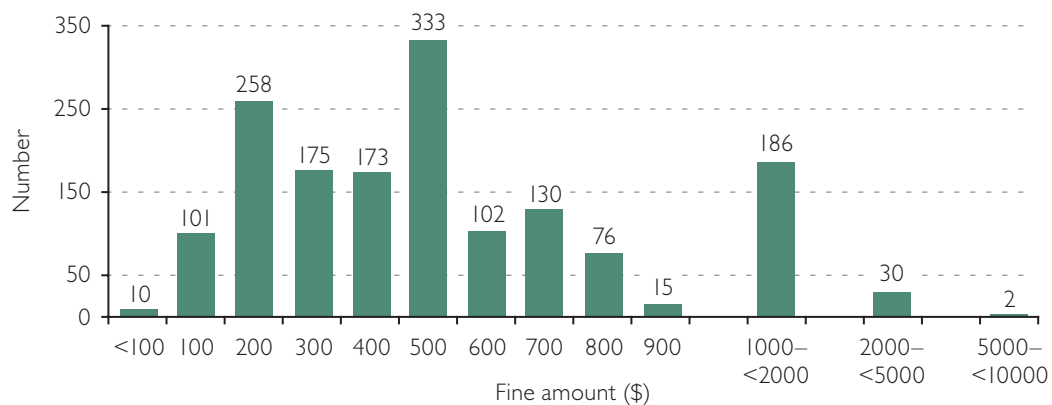


## Specific Sanctions

### Fines

- 3.56 The most common sentence imposed on offenders who breached a family violence intervention order was a fine. Between July 2004 and June 2007, 1,591 people received a fine for breach of a family violence intervention order. This represented 37.2 per cent of all people sentenced for this offence.
- 3.57 Figure 16 shows the number of people who received a fine for breach of a family violence intervention order by the amount of the fine. While the amounts ranged from \$50 to \$5,000, the median was \$500 (meaning that half were below \$500 and half were above \$500).

**Figure 16:** The number of people who received a fine by the amount of the fine, 2004–05 to 2006–07



- 3.58 One magistrate suggested that the predominance of fines as a sentencing option for breach of family violence intervention orders may be due to a large number of *ex parte* hearings—hearings held in the absence of the defendant—as a fine may be considered the most appropriate sanction in these circumstances.<sup>188</sup>
- 3.59 In order to assess the contribution of *ex parte* hearings, the Council examined the prevalence of *ex parte* hearings in breach of intervention order cases from July 2004 to June 2007. *Ex parte* hearings comprised just 2.6 per cent of the 4,273 breach of intervention order cases, and of the 1,591 fines only 116 or 7.3 per cent were imposed in an *ex parte* hearing. This suggests that *ex parte* hearings had minimal overall impact on the level of fines. It should be noted, however, that of the 125 *ex parte* hearings for this offence, 92.8 per cent resulted in a fine. So, while *ex parte* hearings generally resulted in a fine, the relatively small number of these hearings means that the overall impact on the sentence distribution was minimal.
- 3.60 There was a much higher percentage of convictions recorded with the imposition of a fine for this offence than for all offences sentenced in the Magistrates' Court. For the year July 2006 to June 2007, a conviction was recorded for 77 per cent of the people who received a fine for breaching an intervention order. This is higher than the percentage of people who had a conviction recorded in addition to a fine being imposed for all offences sentenced in the Magistrates' Court (56.6 per cent) over this period.

<sup>188</sup> Meeting with Magistrates (July 2008).

### *Other offences and the imposition of fines*

- 3.61 The Council's examination of breaches that were committed on the same day as another offence revealed that the percentage of people who had fines imposed was 19.8 per cent, considerably lower than the 37.2 per cent overall. Offenders were slightly less likely to have a fine imposed where these offences were committed on the same day: 19.2 per cent where an unlawful assault was committed on the same day and 12.0 per cent where the offence of causing injury intentionally or recklessly occurred on the same day.

### *Practical problems with fines*

- 3.62 Despite the prevalence of fines imposed for this offence, much of the family violence literature suggests that they are generally an inappropriate sanction for breaches of intervention orders.<sup>189</sup> One of the main problems with the use of fines is that it may be the victim who ends up paying (or contributing to) the fine. This concern was raised by the New South Wales Law Reform Commission.<sup>190</sup> Further, Douglas argues that the money used to pay for the fines may otherwise have been used for child support payments. In addition, she points out that the offender may exert pressure or engage in further violence against the victim in order to secure payment of the fine.<sup>191</sup>
- 3.63 This view was shared by a number of people consulted by the Council. The Women's Legal Service argued that 'the commonality of this disposition is very concerning as it indirectly punishes the victim'.<sup>192</sup> The Service advised that they 'often represent women in family law matters where the apportionment of debt is at issue and where much of the debt has been accrued through unpaid fines of one sort or another'.<sup>193</sup>
- 3.64 One police prosecutor said, 'I don't think fines are very appropriate for these kinds of matters. Often everyone ... gets punished other than the offender; the family and the kids will be punished'.<sup>194</sup> One of the magistrates who was consulted agreed that it is often the household that pays the fine. In this magistrate's view, a sentence is more effective where it actually targets the offender.<sup>195</sup>
- 3.65 A participant in the Community Legal Centres Roundtable argued that women may already have enormous debt due to existing family law property processes and therefore the imposition of a fine may exacerbate their financial difficulties.

<sup>189</sup> For example, see Douglas (2007), above n 26, 227.

<sup>190</sup> New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No. 103 (2003), [10.27].

<sup>191</sup> Douglas (2007), above n 26, 227.

<sup>192</sup> Women's Legal Service (Submission).

<sup>193</sup> Women's Legal Service (Submission).

<sup>194</sup> Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

<sup>195</sup> Meeting with Magistrate (September 2008).

*Fines and the purposes of sentencing*

- 3.66 Fines have also been criticised by researchers as failing to address adequately the purposes of sentencing. Douglas argues that fines have very little effect in terms of rehabilitation, community protection or denunciation. She is also of the view that the 'relatively low' amount of most of the fines imposed means that they do not work as an effective deterrent.<sup>196</sup> The New South Wales Law Reform Commission also suggested that fines may 'trivialise the nature of the breach'.<sup>197</sup>
- 3.67 The responses to the magistrates' survey provide some insight into how magistrates view fines as a vehicle for achieving the purposes of sentencing. While one magistrate was of the view that 'fines often achieve the right balance in relation to sentencing purposes based on the allegations before the court',<sup>198</sup> most of those who responded to the survey felt that fines offered limited scope to address the various sentencing purposes. One magistrate commented, 'I rarely impose a fine—it is often a meaningless sentence in these instances'.<sup>199</sup>
- 3.68 Three magistrates responded that the only sentencing purpose fulfilled by a fine is punishment.<sup>200</sup> Another magistrate suggested that while the imposition of a fine may punish the offender:
- the fines are usually low, so that the punishment value is limited. Perpetrators can just pay to harass their victim! I don't think fines do anything to denounce the conduct, protect the community or rehabilitate the offenders.<sup>201</sup>
- 3.69 Two magistrates thought that specific deterrence, punishment and denunciation could all be satisfied through the imposition of a fine.<sup>202</sup> Another suggested that a fine could be considered a deterrent because of the financial impact.<sup>203</sup> One participant in the Family Violence Service Providers Roundtable supported this view and suggested that in these hard economic times, a fine may be a significant punishment.
- 3.70 Some of those who were consulted suggested that it would depend on the offender as to whether or not fines act as a deterrent.<sup>204</sup> It is arguable that a defendant may not see a fine as punishment or deterrence because there is no requirement to change their behaviour.<sup>205</sup> This is especially significant considering the large number of fines that go unpaid. A participant in the Community Legal Centres Roundtable gave an example of an offender who had \$30,000 worth of fines outstanding, with no capacity to pay them, but was given another fine for breaching an intervention order. It was suggested that unless the defendant's solicitor raises the issue of capacity to pay, magistrates would generally remain unaware of this situation when imposing a sanction.<sup>206</sup>

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196 Douglas (2007), above n 26.

197 New South Wales Law Reform Commission, above n 190, [10.27].

198 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11.

199 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 6.

200 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 4, 12 and 13.

201 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10.

202 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 3 and 9.

203 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 5.

204 Telephone conversation with family violence service provider (17 September 2008).

205 Community Legal Centres Roundtable (18 September 2008); Victoria Police Focus Group (Melbourne Prosecutors) (Melbourne) (8 October 2008).

206 Community Legal Centres Roundtable (18 September 2008).

- 3.71 Many of the police officers who were consulted felt that fines were not appropriate sanctions for this offence. Many offenders do not pay the fine<sup>207</sup> and in other cases maintenance payments to the victim may be affected by the payment of a fine.<sup>208</sup> Some offenders tell police that they do not care about being given a fine as they have no intention of paying it.<sup>209</sup> In cases where fines are paid, police advise that offenders often seek an installment order whereby they can pay in small installments of, for example, five dollars a week, which police did not consider sufficient punishment.<sup>210</sup> Similarly, a participant in the Community Legal Centres Roundtable thought that 'very low fines can bring the law into disrepute'.<sup>211</sup> One victim described the \$300 fine received by her husband for breach as a 'slap on the wrist'.<sup>212</sup>
- 3.72 Some of those who were consulted were of the view that whether a fine is appropriate or not depends on the circumstances of the offence. Some VLA lawyers suggested that there are many occasions where a fine and conviction is appropriate—for example, where the breach behaviour does not tie back to the original behaviour leading to the intervention order. An example given was where a defendant sent a birthday card to his child.<sup>213</sup>
- 3.73 Some magistrates who responded to the survey felt that a fine may be an appropriate sentence for the breach of family violence intervention order only in very particular circumstances. For example, one magistrate commented that there may be some situations in which a fine was appropriate, such as where the conduct involved is '[being] within the exclusion zone, sending "please can we get back together" type letters or breaches which hover between annoying and harassment'.<sup>214</sup> However, if the behaviour were more serious, this magistrate would be 'perfectly happy to impose tougher sanctions'.<sup>215</sup> Similarly, a magistrate suggested that the imposition of a fine may:
- reflect that the breach is at the lower end of seriousness or that the [aggrieved family member] was complicit or otherwise partly responsible for the breach i.e. encouraged the defendant to resume co-habitation. It may also be the first time the IVO was breached, so serves as a warning to [the] defendant not to breach again.<sup>216</sup>
- 3.74 Another magistrate who was consulted did not think that fines were generally an appropriate sanction for breaching family violence intervention orders but she agreed that there were limited circumstances in which a fine would be suitable. Such situations would be where the relationship had broken down and the defendant had done something less serious on the scale of offending behaviour. However, the magistrate made it clear that even where the breach may seem less serious, it is important to have an idea of the impact of the behaviour on the victim, which is usually only discernible through some understanding of the history between the parties.<sup>217</sup> Unfortunately, magistrates are not always provided with sufficient material to have a proper understanding of this history. Many magistrates who responded to the Council's survey felt they had insufficient material on which to sentence.<sup>218</sup>

207 Victoria Police Focus Group (Melbourne Prosecutors) (Melbourne) (8 October 2008).

208 Victoria Police Focus Group (Region 4) (Melbourne) (2 October 2008).

209 Victoria Police Focus Group (Ballarat) (1 October 2008).

210 Victoria Police Focus Group (Ballarat) (1 October 2008).

211 Community Legal Centre Roundtable (18 September 2008).

212 Meeting with Voices of Women for Justice (1 October 2008).

213 Meeting with Victoria Legal Aid (24 September 2008).

214 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

215 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

216 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 2.

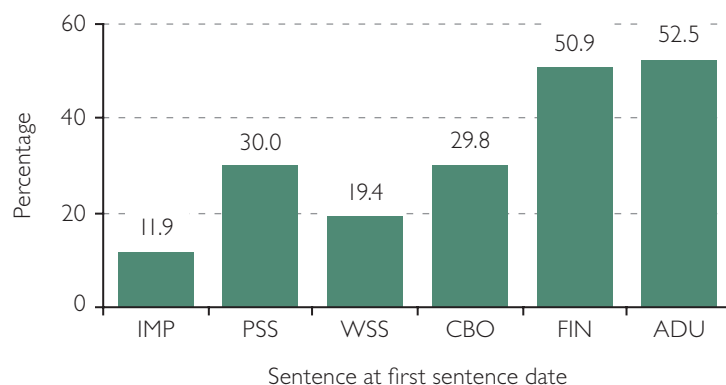
217 Meeting with Magistrate (September 2008).

218 This issue is discussed in detail in the next chapter. See paragraph [5.17].

### *Fines imposed for successive breach offences*

- 3.75 The sentence imposed for an offence will usually depend largely on the circumstances of the offence itself, part of which will include whether or not the offender had committed similar offences before. This is particularly relevant for breaches of intervention orders where a subsequent offence is likely to be against the same victim.
- 3.76 Melbourne police prosecutors were of the view that a fine may be appropriate for a first breach offence, but where there are ongoing breaches, the sanction should be more serious.<sup>219</sup> The frustration at seeing offenders receive this sanction repeatedly was reflected in the comments of two police officers who thought that, while a fine could be imposed for a first offence, the court's discretion should be limited by legislation so that this sanction is not available for a second offence.<sup>220</sup>
- 3.77 In order to determine the number of offenders receiving fines for subsequent breaches, the Council looked at people sentenced for breach of a family violence intervention order on more than one occasion from July 2004 to June 2007. Five hundred and twenty-six people were sentenced on two or more separate dates. It should be noted that the first time that an offender was sentenced for this offence within the time period is not necessarily the first time that he or she was sentenced for breach of a family violence intervention order; it is only the first time they were sentenced in the available dataset.<sup>221</sup>
- 3.78 The Council found that 50.9 per cent of people who received a fine at the first sentence date received another fine at the second sentence date (see Figure 17). The average fine amount increased slightly (by 13.3 per cent) from \$553.50 to \$627.10. Just under 10 per cent (9.5 per cent) received an adjourned undertaking at the second sentence date. Thus, at the second sentence date, 60.4 per cent of people received another fine (albeit on average a slightly higher fine) or a lesser sanction.

**Figure 17:** Percentage of defendants who received selected sentence types at their first sentence date and who received a fine at their second sentence date, 2004–05 to 2006–07



219 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

220 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

221 Of all people in the dataset who had two or more breach of intervention order sentence dates, 43.4 per cent committed their second breach offence prior to the sentence date for their first breach offence. Appendix 3 contains a statistical analysis of the level of recidivism for breach of family violence intervention orders over a two-year time frame.

- 3.79 Many defendants who received a sanction greater than a fine for the first offence sentenced in the dataset received a fine for the second offence sentenced. For example, as Figure 17 shows, of the people who received a community-based order at the first sentence date, 29.8 per cent received a fine at the second sentence date. Even more striking, 19.4 per cent of people who received a wholly suspended sentence on the first offence date and 11.9 per cent of people who received a sentence of imprisonment on the first offence date received a fine on the next offence date.

### Conclusion

- 3.80 Fines are the most common disposition for the offence of breaching an intervention order. This is particularly evident when sentencing practices for this offence are compared with other offences dealt with in the Magistrates' Court. Fines are used widely despite the potential for this sanction to punish the victim as well as the offender, and despite its inability to provide any level of rehabilitation or protection of the victim. Fines are less likely to be imposed where another offence was committed on the same day as a breach of an intervention order; however, most breaches are dealt with on their own. Further, it should not be assumed that a breach on its own is a lesser offence which does not require a sanction higher than a fine.
- 3.81 The high percentage of fines could partly be attributed to the use of the sentencing hierarchy. As discussed above, in following the hierarchy, the court is required to start at the bottom and not impose a sentence higher in the hierarchy unless it is of the view that the purpose or purposes for which the sentence is being imposed cannot be achieved by a lower sanction.<sup>222</sup>
- 3.82 The high rate of imposition of another fine or a sanction lower in the hierarchy (that is, an adjourned undertaking) for subsequent breach offences could be because the subsequent breaches were less serious in nature than the previous breaches. However, the fact that a person has a prior conviction for breach in a situation where the second breach is most likely to be against the same victim increases the harm caused by that offending and should therefore, in most cases, lead to the imposition of a higher sanction. It could be argued that a second fine, with an average increase of 13.3 per cent in the amount of the fine, is a higher sanction, but it would be difficult to suggest that such an increase served to achieve the purposes of sentencing in any meaningful way.
- 3.83 In light of the widespread use of this disposition, particularly for repeat offenders, Douglas has sympathy for the view expressed by some victims that their abusers 'paid the court to hit them'. She concludes that the overuse of fines 'suggests a magisterial culture minimising or trivialising the seriousness of breaches of domestic violence'; the approach also suggests a 'lack of understanding of the context of domestic violence'.<sup>223</sup>

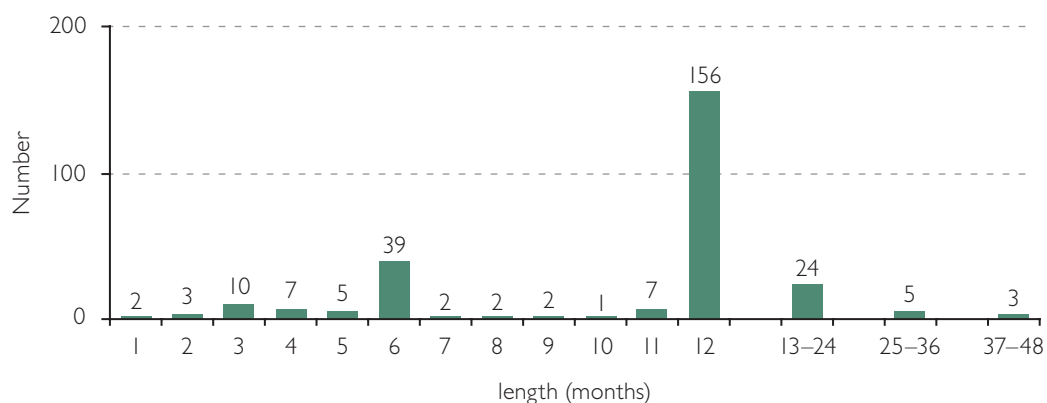
<sup>222</sup> *Sentencing Act 1991* (Vic) 5(3)-(7). See paragraphs [3.20] to [3.21].

<sup>223</sup> Douglas (2007), above n 26, 227.

## Adjourned Undertakings

- 3.84 The second most common sentence imposed for breaching a family violence intervention order was an adjourned undertaking. Between July 2004 and June 2007, 791 people received an adjourned undertaking for breach of a family violence intervention order. This represented 18.5 per cent of all people sentenced for this offence.
- 3.85 An adjourned undertaking allows a court to adjourn the hearing of the matter for a period of time (up to five years). During that period the offender is required to comply with the conditions of the order. This includes a condition that the offender is of good behaviour during the relevant period. The court may also attach special conditions to the order, such as a direction that the offender attend counselling.<sup>224</sup> One magistrate advised that she regularly attaches attendance at a men's behavioural change program as a condition to adjourned undertakings.
- 3.86 At the expiry of the adjournment period, if the court is satisfied that the offender has complied with the conditions of the undertaking, it must discharge the person (where the undertaking was with conviction) or dismiss the charge (where the undertaking was without conviction). If the offender fails to comply with any condition of the adjournment order and does not have a reasonable excuse for the failure to comply, he or she is guilty of an offence.<sup>225</sup> At the hearing for failure to comply, the court can vary, confirm or cancel the adjournment order and deal with the offender for the offence/s in respect of which it made the order.<sup>226</sup> In deciding how to deal with the offender for breach of the undertaking, the court must take into account the extent to which the person had complied with the order before its cancellation.<sup>227</sup>
- 3.87 The length of adjourned undertakings imposed during the relevant period ranged from one month to four years (see Figure 18). The median length was one year (meaning that half were shorter than one year and half were longer than one year).
- 3.88 In the period from July 2006 to June 2007, 25.9 per cent of people who received an adjourned undertaking also had a conviction recorded. This is higher than the conviction rate for all defendants in the Magistrates' Court who received adjourned undertakings (16 per cent).

**Figure 18:** The number of people who received an adjourned undertaking by the length of order, 2006–07



<sup>224</sup> *Sentencing Act 1991* (Vic) s 72–75.

<sup>225</sup> *Sentencing Act 1991* (Vic) s 79(1).

<sup>226</sup> *Sentencing Act 1991* (Vic) s 79(4).

<sup>227</sup> *Sentencing Act 1991* (Vic) s 79(5).

### *Other offences and the imposition of adjourned undertakings*

3.89 Where the breach was the only offence charged on a particular date, 11.9 per cent of offenders received an adjourned undertaking. An adjourned undertaking was imposed in 14.3 per cent of cases where there was an unlawful assault committed on the same date and 7.2 per cent of cases where there was also a charge of causing injury recklessly or intentionally on the same day. The finding that adjourned undertakings are more likely to be imposed for a breach where the offender has committed an unlawful assault on the same day is surprising. Fines became slightly less likely (19.2 per cent compared with 19.8 per cent) where an unlawful assault was committed the same day as the breach.

### *Adjourned undertakings and the purposes of sentencing*

- 3.90 Just as the use of fines has been criticised for trivialising the offence of breach of family violence intervention order, research suggests that an adjourned undertaking without conviction is similarly inappropriate because it does not denounce the conduct, provide any measure of punishment or address the offending behaviour. The requirement to be of good behaviour may have a 'minimal effect on many defendants'.<sup>228</sup>
- 3.91 This concern was raised in the Council's consultations. A participant in the Community Legal Centres Roundtable argued that 'the overuse of adjourned undertakings has the potential to undermine the community's view of the seriousness of these offences'.<sup>229</sup>
- 3.92 This view was supported by the Women's Legal Service who submitted that '[a]djourned undertakings are never an appropriate penalty for a breach of an intervention order [as they] potentially undermine community confidence in the justice system'.<sup>230</sup>
- 3.93 Police were generally very scathing of this sanction for breach of family violence intervention orders, because of the lack of consequences for the offender.<sup>231</sup> A magistrate advised that she would very rarely use an adjourned undertaking as a sanction in a breach matter, as she regarded it as too low in the sentencing hierarchy for this offence.<sup>232</sup>
- 3.94 Some of the magistrates who were consulted suggested that adjourned undertakings may be used so frequently because there is a view that they cannot attach men's behavioural change programs to community-based orders. This view is based on a belief that Community Corrections will not supervise offenders' attendance at programs run by external service providers. As Corrections Victoria do not run any family violence specific programs, magistrates may feel constrained to place an offender on an adjourned undertaking if they wish that the offender attend a behavioural change program, even where the offence warrants a more serious sanction.<sup>233</sup> As one magistrate who responded to the survey put it:

228 Douglas (2007), above n 26, 226.

229 Community Legal Centres Roundtable (18 September 2008).

230 Women's Legal Service (Submission).

231 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008); Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

232 Meeting with Magistrate (September 2008).

233 Meetings with Magistrates, (July and August 2008).



Often the programs attached to community-based orders are not appropriate. There can be issues about programs on adjourned undertakings as well. For example, lack of availability of men's behaviour change services can mean long delays until men are able to begin these programs.<sup>234</sup>

- 3.95 Despite what seems to be the view of a number of Melbourne-based magistrates, Corrections Victoria advised that although they run their own Violence Intervention Program, they also supervise offenders on external family violence specific programs as part of a community-based order.<sup>235</sup> This is apparently a regular occurrence in Ballarat.
- 3.96 Several police officers and Victoria Legal Aid lawyers who were consulted criticised adjourned undertakings with men's behavioural change programs attached because of the lack of supervision of the offender.<sup>236</sup> Community Corrections does not have a role in supervising undertakings and nor do police. The onus is on the offender, once a referral has been made, to make contact with a service provider and to advise the court when he has completed the program. The court will generally only be aware that an offender had not complied with the condition when the undertaking is returned to court.<sup>237</sup> As the median length of orders is 12 months, in many cases it would be a year before the court becomes aware that an offender had not attended a program as directed. At this time, the court could make a referral to Victoria Police to investigate the breach of the undertaking. If, however, the main purpose of the magistrate in imposing the adjourned undertaking with a counselling condition was rehabilitation, it is clear that this objective would not have been achieved.
- 3.97 However, the Magistrates' Court submitted that, depending on the availability of resources, some courts will monitor compliance of offenders on adjourned undertakings where a counselling condition is attached to the order.<sup>238</sup>
- 3.98 One magistrate who was consulted said that the decision as to whether to impose an adjourned undertaking would largely depend on the circumstances. This magistrate gave an example of an offender who received an adjourned undertaking without conviction, but with the condition he attends a men's behavioural change program. The offender was a professional in his second marriage who was very remorseful and had no priors. The breach involved threatening words and there was no physical violence. The offender and the victim had a child and the victim wanted to reconcile. She did not want the offender to lose his job and the money he provided to the family. If the offender breached again, the magistrate advised that she would be likely to impose a suspended sentence.<sup>239</sup>
- 3.99 Another magistrate who responded to the Council's survey suggested that:
- an undertaking might be appropriate in circumstances where the breach is relatively minor, where the victim advocates for the offender, and where there is a need to have the offender 'under the gaze' of the court in future.<sup>240</sup>

234 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11.

235 Email from Corrections Victoria dated 14 October 2008.

236 Meeting with Victoria Legal Aid (24 September 2008).

237 Registrar, Family Violence Division of the Magistrates' Court (Heidelberg), 22 October 2008.

238 Magistrates' Court of Victoria (Submission).

239 Meeting with Magistrate (August 2008).

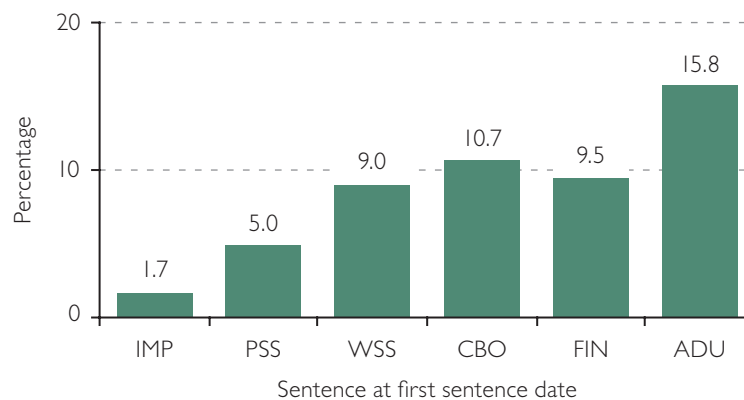
240 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 3.

- 3.100 The Magistrates' Court submission suggested that there is a significant distinction between adjourned undertakings with or without convictions and with and without program conditions.<sup>241</sup> As noted above, the imposition of a conviction may be considered a punishment in its own right, particularly as it may preclude the offender from pursuing particular opportunities in the future (for example, it may prevent the offender from holding certain jobs).
- 3.101 The submission reinforced the view that there are particular situations in which an adjourned undertaking without a conviction or a program condition is the appropriate sentence, such as where:
- A man may have been placed on a deferral of sentence to demonstrate that he is committed to attending a program and the adjourned undertaking reinforces that commitment or he may have completed a program before the court deals with the case.<sup>242</sup>

#### *Adjourned undertakings in successive breach offences*

- 3.102 The Council examined the number of defendants receiving an adjourned undertaking for a breach of an intervention order for the second offence recorded in the period between July 2004 and June 2007. As Figure 19 shows, 15.8 per cent of people who received an adjourned undertaking at the first sentence date also received this sanction for the breach offence on the second date (within this time period). An adjourned undertaking was imposed for the subsequent breach for 9.5 per cent of offenders who received a fine on the first sentence date and 10.7 per cent of offenders who received a community-based order at the first date.

**Figure 19:** Percentage of defendants who received selected sentence types at their first sentence date who received an adjourned undertaking at their second sentence date, 2004–05 to 2006–07



- 3.103 Arguably, an adjourned undertaking without supervision is not an appropriate option for an offender who has already shown disregard for a court order in breaching the intervention order. A police prosecutor pointed out that an adjourned undertaking is unlikely to be an effective sanction for an offender who has already shown that he is willing to break a court order by breaching the intervention order in the first place. He suggested that a sanction that provides some level of deterrence would be more efficacious.<sup>243</sup> This argument has even greater force in relation to second or third breaches of intervention orders.

<sup>241</sup> Magistrates Court of Victoria (Submission).

<sup>242</sup> Magistrates Court of Victoria (Submission).

<sup>243</sup> Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

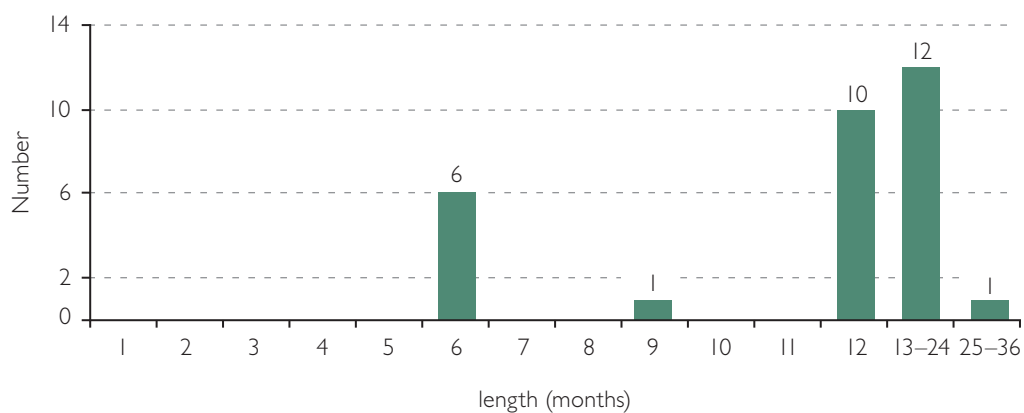
### Conclusion

- 3.104 The Council's consultations suggest that there are only limited circumstances in which an adjourned undertaking will be an appropriate sentence for breach of an intervention order, but 18.5 per cent of offenders convicted of breach received this sentence. This is a substantial proportion when compared with other offences sentenced in the Magistrates' Court.
- 3.105 There is little scope for any of the sentencing purposes to be achieved through the imposition of an adjourned undertaking. The exception is rehabilitation—but only where the court attaches a counselling order. However, it is a flawed vehicle for this purpose where there is no ongoing supervision of the conditions attached to adjourned undertakings. While the Council's consultations revealed that some courts do monitor offenders on adjourned undertakings, this does not seem to be consistent across all courts.
- 3.106 The heavy use of adjourned undertakings for breach of intervention orders carries the danger of sending the wrong message to victims and the community generally—that these matters will not be treated seriously.

### Community-Based Orders

- 3.107 Six hundred and thirty-one people received a community-based order for breach of a family violence intervention order between July 2004 and June 2007. This represented 14.8 per cent of all people sentenced for this offence.
- 3.108 Figure 20 shows the number of people sentenced between July 2006 and June 2007 who received a community-based order for breach of a family violence intervention order by the length of the sentence. While the length of community-based orders ranged from six months to three years, the median was one year (meaning that half were shorter than one year and half were longer than one year).

Figure 20: The number of people who received a community-based order by the length of order, 2006–07



### *Other offences and the imposition of community-based orders*

- 3.109 When looking at offences that occurred on the same date as the breach, the percentage of defendants who received community-based orders increased where there were multiple offences occurring on the same day. A total of 22.4 per cent of offenders received a community-based order where there was an offence type other than breach charged on the same date. This is compared with 13.4 per cent who received a community-based order where the breach was the *only* offence on the day to reach sentencing. The community-based order was also the most common sentence imposed for breach of intervention order when the offence of unlawful assault (24.5 per cent), property damage (24.3 per cent) or causing injury intentionally or recklessly (27.6 per cent) occurred on the same day.

### *Community-based orders and the purposes of sentencing*

- 3.110 Community-based orders, which are supervised by Corrections Victoria and allow for the attachment of counselling programs, may be a more useful sanction than fines or adjourned undertakings. The offender's completion of a men's behavioural change program may offer an opportunity for rehabilitation, which can lead to improved victim protection and safety.<sup>244</sup> Corrections Victoria often assesses offenders under community-based orders for any underlying issues that may need addressing, such as drug and/or alcohol problems. There is research to suggest that a significant number of family violence offenders used alcohol or drugs on the day of the assault, and that there are real benefits to addressing these issues concurrently.<sup>245</sup> Community-based orders also have the advantage of allowing the attachment of conditions for supervised community work as a form of punishment.
- 3.111 As noted above, community-based orders are supervised by Community Corrections and for this reason are perhaps a better option than adjourned undertakings, which are generally unsupervised. If the offender breaches the order through non-attendance, Community Corrections can initiate breach proceedings.
- 3.112 One magistrate who was consulted advised that she often imposes community-based orders in breach matters with a condition that the offender attend an accredited men's behavioural change program.<sup>246</sup> Another magistrate who responded to the Council's survey provided this insight as to when a community-based order would be an appropriate sanction for this offence:
- where an offender requires supervision and/or behaviour modification through assessment/treatment conditions or risk management programs to reduce the risk of further offending. In cases of more serious breaches the offender can be punished by the requirement of unpaid community work. Finally for specific deterrence purposes, it can be made clear that a CBO is the last stop before imprisonment.<sup>247</sup>

244 Douglas (2007), above n 26, 233.

245 D Brookoff *et al*, 'Characteristics of Participants in domestic violence assessment at the scene of domestic violence assault' (1997) 277 *Journal of American Medical Association*, 1369, 1371 cited in Lisa Lightman and Francine Byrne, 'Addressing the Co-occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts' (2005) *Journal of the Center for Families, Children and the Courts* 53, 54.

246 Meeting with Magistrate (September 2008).

247 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11.

- 3.113 As part of the Council's broader consultations, there were different views as to when a community-based order is an appropriate sentence for a breach of an intervention order. Some of the police prosecutors said that they thought a community-based order would be a more appropriate sentence for breaching a family violence intervention order than a fine, but they had rarely, if ever, seen such a sentence imposed. A participant in a meeting with Victoria Legal Aid suggested that in order for an offender to have a community-based order imposed, there would need to be some degree of physical violence or a home invasion.<sup>248</sup>

#### *Community-based orders and successive breach offences*

- 3.114 Between July 2004 and June 2007, 21.4 per cent of defendants who received a community-based order for the first breach of an intervention order offence received the same sanction for the second offence of breach in the same period. An even higher percentage received a fine (29.8 per cent) for the second offence and 13.1 per cent received an adjourned undertaking.
- 3.115 A minority of offenders who received a community-based order for the first offence of breach of a family violence intervention order in the relevant time period received a more serious sanction for the second offence (35.7 per cent). A total of 17.9 per cent received a wholly suspended sentence and 11.9 per cent were sentenced to a term of imprisonment.
- 3.116 Overall, 64.3 per cent of those who received a community-based order at the first sentence date received a sanction equal to or less than a community-based order at the second sentence date. In some cases, this might be because both breaches were committed before the first sentence date.

#### *Conclusion*

- 3.117 A community-based order is not a very common sanction for breach of intervention orders. It is much more likely to be imposed where a breach of intervention order is committed on the same day as other offences. It was the most common sanction for a breach of intervention order where an offender was prosecuted and sentenced for an unlawful assault, property damage or causing injury recklessly or intentionally committed on the same day as the breach.
- 3.118 It would seem as though, at present, a breach on its own is usually not considered serious enough to warrant a sentence at this level of the hierarchy. However, community-based orders provide a unique opportunity to combine punishment with rehabilitative programs. Such a sanction may be particularly appropriate for an offence that requires some intervention to protect the victim in circumstances where a court order has been insufficient to provide that protection.
- 3.119 The Council's consultations revealed that some magistrates who sought to provide for the rehabilitation of the offender would not sentence offenders to community-based orders because of a belief that Corrections Victoria would not supervise men's behavioral change programs. Instead, these magistrates were using adjourned undertakings as a vehicle for these programs. Corrections Victoria advised that they will supervise offenders ordered to complete non-Corrections behavioural change programs. In these circumstances, it may be preferable to attach these programs to community-based orders rather than adjourned undertakings.

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248 Meeting with Victoria Legal Aid (24 September 2008).

## Imprisonment

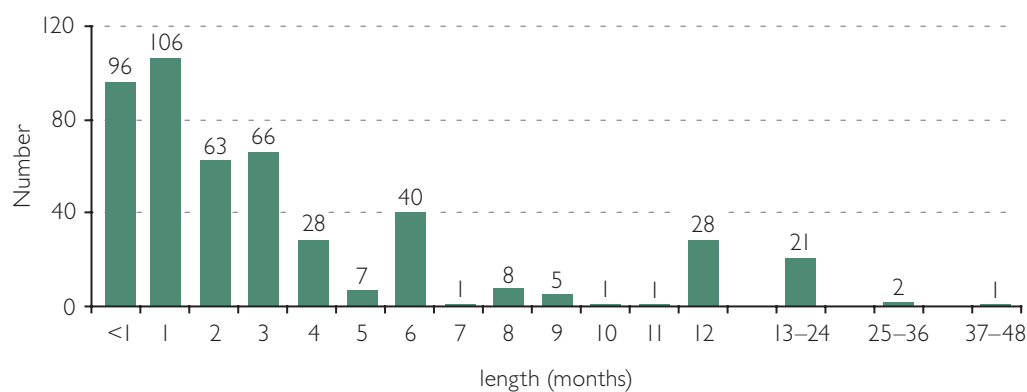
- 3.120 The most serious sanction available in the sentencing hierarchy is imprisonment. Between July 2004 and June 2007, 474 people were sentenced to imprisonment for breach of a family violence intervention order. This represented 11.1 per cent of all people sentenced for this offence.
- 3.121 Figure 21 shows the trends in the number and percentage of people who were sentenced to imprisonment for breach of a family violence intervention order.
- 3.122 Figure 21 also illustrates that there has been a steady increase in the number of people receiving sentences of imprisonment over the three year period from July 2004 to June 2007.

**Figure 21:** The number and percentage of people who were sentenced to imprisonment for breach of a family violence intervention order, 2004–05 to 2006–07



- 3.123 Figure 22 shows the number of people who were sentenced to imprisonment for breach of a family violence intervention order by the length of the sentence. While the length of imprisonment ranged from one day to four years, the median was two months (meaning that half were shorter than two months and half were longer than two months). The most common imprisonment length was one month, imposed on 22.5 per cent of people who received imprisonment.

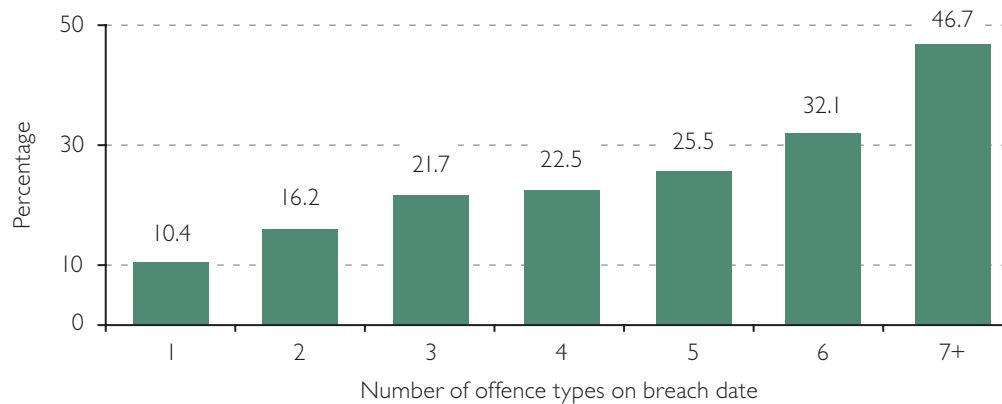
**Figure 22:** The number of people who were sentenced to imprisonment by the length of order, 2004–05 to 2006–07



### *Other offences and the use of imprisonment*

- 3.124 Where a breach of family violence intervention order was sentenced on its own, defendants were much less likely to receive a sentence of imprisonment (4.7 per cent) than where multiple offences were sentenced as part of the same case (16.0 per cent).
- 3.125 Where the breach charge was not the only offence committed on the same day, the percentage of defendants sentenced to imprisonment for the breach was 18.6 per cent, compared to 10.4 per cent where the breach offence was the only offence committed on the relevant date. Figure 23 shows the percentage of breach of intervention order offences that received imprisonment according to the number of offences on the breach date. The percentage of breaches that received imprisonment increased steadily as the number of offences increased, from 10.4 per cent when there was only one offence to 46.7 per cent when there were seven or more offences on the breach date.

**Figure 23:** Percentage of breach of family violence intervention orders that received imprisonment by number of offence types on breach date



- 3.126 When a charge of a breach of an intervention order was committed on the same date as a theft charge, the percentage of defendants who received a sentence of imprisonment for the breach offence increased to 33.6 per cent. Where the other offence type was stalking, 27.4 per cent of offenders received a sentence of imprisonment for the breach. When interpreting these percentages it is important to note that the other offence presented may not be the only other offence in the case.

### *Imprisonment and the purposes of sentencing*

- 3.127 While imprisonment is the most serious sanction that can be imposed on an offender and provides some level of denunciation, punishment and deterrence, it does not necessarily address the behaviour that led to the offending.<sup>249</sup> A term of imprisonment may provide some scope for rehabilitation through programs undertaken while in custody. However, it is unlikely that the short prison sentences being imposed for this offence would provide enough time for the completion of any courses aimed at behavioural change. Another issue is that the prison programs are not targeted at family violence offenders. In addition, there are few links between programs available in prison and services provided in the community.<sup>250</sup> Such links would assist in providing for ongoing rehabilitation of offenders.

<sup>249</sup> Douglas (2007), above n 26, 228.

<sup>250</sup> Meeting with men's behavioural change program service providers (17 September 2008).

- 3.128 Members of Victoria Police took the view that the central concern should be protection of the victim, and that the court should impose a sentence of imprisonment where the victim would otherwise be in danger.<sup>251</sup> However, while imprisonment may be useful for the short-term protection of the victim, it does not provide any means of protection in the long term.<sup>252</sup> One of the men's behavioural change program service providers was of the view that:
- at times prison sentences can make matters more complicated for the family as they manage the repercussions upon release. In addition, prison sentences may only keep the women and children safe temporarily, particularly if the man's behaviour has not been addressed during his incarceration.<sup>253</sup>
- 3.129 One magistrate who was consulted said that prison would be a likely sanction if the offender has prior convictions (particularly for violent offences) and where the victim is very scared and needs protection from the offender. She also noted that an offender would be more likely to receive a sentence of imprisonment where there were other offences involved, which is confirmed by the sentencing practices presented in this report.
- 3.130 A number of magistrates who responded to the Council's survey expressed the view that there were some circumstances in which they would impose a sentence of imprisonment even where there was no physical injury. One magistrate said:
- If mental anguish, fear or fright is not considered physical, then these would be circumstances where I would consider jailing an offender. The worst breach I have had to deal with involved no physical assault but almost caused a mental breakdown when the offender went round the house bashing on the doors and windows for over an hour having cut the phone line first. The aggrieved family member and children were terrified.<sup>254</sup>
- 3.131 Another magistrate noted other factors that were of relevance when considering whether or not to impose a term of imprisonment:
- Multiple breaches can demonstrate a contempt for the court, or a refusal to submit to its authority, or complete lack of respect for the rights of a victim. Further, particularly in cases of long-term intimidation, harassment, or threatening behaviour the adverse psychological effect on victims can be so severe, even without physical violence, that a substantial term of imprisonment is warranted.<sup>255</sup>
- 3.132 Some Victoria Legal Aid defence lawyers agreed that imprisonment is often imposed in cases where the defendant has a history of violence and/or a pattern of breaching behaviour, and particularly where it is the second or subsequent offence against the same victim.<sup>256</sup> However, other lawyers were of the view that these factors will not always lead to a term of imprisonment.<sup>257</sup> Other factors that may be indicative as to whether a custodial sentence will be imposed were that the behaviour involved an 'element of cruelty', a home invasion or where children are involved.<sup>258</sup>

251 Victoria Police Focus Group (Ballarat) (1 October 2008).

252 Douglas (2007), above n 26, 228.

253 Meeting with men's behavioural change program service providers (17 September 2008).

254 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

255 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 3.

256 Meeting with Victoria Legal Aid (24 September 2008); Community Legal Centres Roundtable (18 September 2008).

257 Community Legal Centres Roundtable (18 September 2008).

258 Meeting with Victoria Legal Aid (24 September 2008); Community Legal Centres Roundtable (18 September 2008); Family Violence Service Providers Roundtable (18 September 2008).



- 3.133 Others who were consulted said that it would be very rare to see a sentence of imprisonment imposed for a breach of a family violence intervention order.<sup>259</sup> Many of the police officers consulted had never seen a breach case receive a sentence of imprisonment.
- 3.134 Family violence service providers suggested that the view of victims as to whether or not the offender should receive a sentence of imprisonment would depend, to a large extent, on the circumstances of the victim and her level of safety. Many women just want the violence to stop, while others, whether for the sake of their children's safety or the need for some time to sort their own lives out, feel that the offender should be imprisoned.<sup>260</sup> The Women's Electoral Lobby were of the view that if someone continually breaches an intervention order, they should be imprisoned. If the fines or community-based orders have not worked and the person has continued to breach, then prison is the only option.<sup>261</sup>

#### *Imprisonment for successive breach offences*

- 3.135 Based on family violence literature and the Council's consultations, it could be argued that while imprisonment may have an important role in satisfying various sentencing purposes, it will not always be the appropriate sanction, particularly for first time offenders. Most stakeholders with whom the Council consulted agreed that imprisonment should be considered where there have been multiple offences committed.
- 3.136 However, the data reveal that while people who received imprisonment at the first sentence date most commonly received a subsequent sentence of imprisonment (40.7 per cent), the average length of imprisonment declined from 4.0 to 2.5 months. The next most frequent sanction at the second sentence date was a wholly suspended sentence (25.4 per cent) while just over one tenth (11.9 per cent) received a fine. This means that 59.3 per cent of people who received imprisonment at the first sentence date received a less severe sanction at the second sentence date. Of the 40.7 per cent who received imprisonment again at the second sentence date, their average period of incarceration actually decreased.

#### *Conclusion*

- 3.137 The courts impose imprisonment in only a small percentage of breaches of family violence intervention order cases. The likelihood of imprisonment increased with the number of other offences.
- 3.138 It may be assumed that the 11.1 per cent of defendants who received a sentence of imprisonment committed very serious examples of this offence. While imprisonment will not always be the most appropriate sanction for this offence, as it generally will not assist in addressing the offender's violent behaviour, in some cases it may be the only way to provide immediate protection of the victim. For example, where there have been multiple breaches against the same person, and a severe degree of threat, the only option may be to incarcerate the offender. This sends a powerful deterrent message to the offender and community.

<sup>259</sup> Victoria Police Region 4 Focus Group (2 October 2008); Telephone consultation with Springvale Legal Centre.

<sup>260</sup> Community Legal Centres Roundtable (18 September 2008); Family Violence Service Providers Roundtable (18 September 2008).

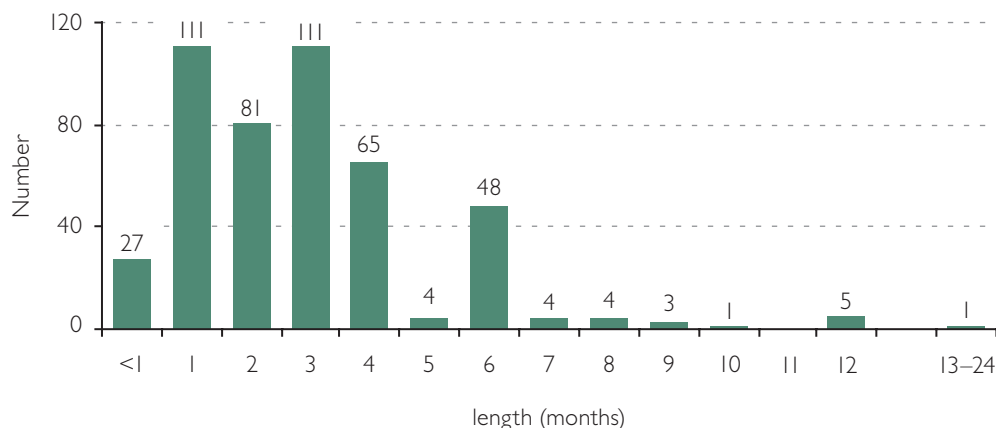
<sup>261</sup> Telephone conversation with Women's Electoral Lobby (17 September 2008).

- 3.139 It is concerning then, that a substantial number of offenders who received imprisonment for their first and second breach actually received a lower sentence for the second breach sentenced. While, as noted earlier, it is difficult to draw conclusions about sentencing without knowing the facts of particular cases and it is possible that the second offence sentenced was not the second offence committed, it could be suggested generally that imposing a shorter sentence for a second offence dilutes the message of denunciation and deterrence.

### Wholly Suspended Sentences<sup>262</sup>

- 3.140 There were 465 people who received a wholly suspended sentence for breach of a family violence intervention order. This represented 10.9 per cent of all people sentenced for this offence.
- 3.141 Figure 24 shows the number of people who received a suspended sentence for breach of a family violence intervention order by the length of the sentence. While the length of wholly suspended sentences ranged from one day to one year and two months, the median was three months (which means that half were shorter than three months and half were longer).

Figure 24: The number of people who received a wholly suspended sentence by the length of the order, 2004–05 to 2006–07



#### Other offences and the imposition of suspended sentences

- 3.142 Where the breach offence was the only offence charged on a particular date, 11.4 per cent of offenders received a suspended sentence. Where there were multiple offences charged on the one date, this percentage rose slightly to 14.9 per cent. The percentage of offenders sentenced to a suspended sentence also varied slightly depending on what other offences were charged alongside the breach. A suspended sentence was the most common sentence imposed for a breach (23.4 per cent) where the offender was also dealt with for the offence of threat to kill. The percentage of offenders who received this sentence for a breach was slightly less where the defendant also committed an offence of unlawful assault (15.7 per cent), property damage (15.2 per cent) or causing injury intentionally or recklessly (15.3 per cent).

262 In this section, 'suspended sentence' refers to wholly suspended sentences. Data on partially suspended sentences have not been included.

*Suspended sentences and the purposes of sentencing*

- 3.143 Suspended sentences occupy an elevated position in the sentencing hierarchy, as they involve the imposition of a term of imprisonment. However, the term of imprisonment is not served in prison. The Council has previously criticised these sanctions on the basis that their substitutional nature is fundamentally flawed, generating confusion and risking the erosion of public confidence in sentencing. This is why the Council has sought to restrict the use of suspended sentences when sentencing for very serious offences and provide a better range of intermediate orders as alternatives.
- 3.144 Some of the magistrates who were consulted were of the view that a suspended sentence is an appropriate sentence for a second or third breach.<sup>263</sup> It was also suggested that some victims may see a suspended sentence as an effective sanction in deterring further breaches because of the threat of imprisonment on re-offending.<sup>264</sup> However, some of the police prosecutors thought that suspended sentences do not operate effectively as a deterrent because some magistrates 'will always come up with exceptional circumstances', and therefore will not order that the defendant serve the original term of imprisonment.<sup>265</sup>
- 3.145 One magistrate noted that a suspended sentence is of limited use as it does not allow any scope for the court to order any rehabilitative programs.<sup>266</sup> A suspended sentence may be useful where the defendant has committed a very serious breach, but he is already undertaking some treatment or rehabilitation and it would be preferable for him to continue with that program. However, where the court feels that a defendant should have some form of intervention and needs to be supervised or monitored, a suspended sentence cannot meet these requirements.
- 3.146 To overcome this problem, some magistrates explained that in cases where there was more than one charge, they would sentence an offender to a suspended sentence and an adjourned undertaking with the condition that he attend a men's behavioural change program.<sup>267</sup> These magistrates suggested that this allowed them to combine the community protection and rehabilitation purposes of sentencing (men's behavioral change program) with the punishment and deterrent purposes of sentencing.<sup>268</sup> It should be noted that this practice does not seem to be widespread as only 5.3 per cent of defendants who received a suspended sentence as part of their total effective sentence in a case which included a charge of breaching a family violence intervention order also received an adjourned undertaking in the period July 2004 to June 2007.

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263 Sentencing Advisory Council, *Survey of Victorian Magistrates* (October 2008), Survey Number 10; Meeting with Magistrate (August 2008).

264 Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008) (Meeting as part of consultation on Sentencing Advisory Council (2008), above n 3).

265 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

266 Sentencing Advisory Council, *Survey of Victorian Magistrates* (October 2008), Survey Number 10.

267 Sentencing Advisory Council, *Survey of Victorian Magistrates* (October 2008), Survey Number 10; Meeting with Magistrates (July 2008).

268 Meeting with Magistrates (July 2008).

### *Suspended sentences for successive breach offences*

- 3.147 Suspended sentences were followed by a broad spread of subsequent sentence types. The most common sentence at the second sentence date was imprisonment (31.3 per cent) followed by fines (19.4 per cent). Adjourned undertakings and suspended sentences each comprised about one tenth of subsequent sentences where a suspended sentence was imposed at the first sentence date. Overall, 58.2 per cent of those who received a wholly suspended sentence at the first sentence date received a sanction equal to or less severe than a suspended sentence at the second sentence date.
- 3.148 Of the defendants who received a term of imprisonment for a breach offence at the first sentence date, 24.4 per cent received a suspended sentence for a subsequent offence in the relevant time period. Of the defendants who were sentenced to a community-based order for the first breach, 17.9 per cent received a suspended sentence for the subsequent breach.

### *Conclusion*

- 3.149 Suspended sentences may provide an opportunity to deter offenders with the prospect of a term of imprisonment if further offences are committed. However, it is significant that these offenders have already demonstrated that they were not deterred from breaching the initial intervention order by the threat of imprisonment for the breach. However, it is possible that the imposition of a suspended sentence will be viewed as another step closer to the door of the prison and therefore it may have greater deterrent force.
- 3.150 The real issue with the use of suspended sentences for this offence is the inability to attach any conditions to the order to rehabilitate the offender and protect the victim. A minority of magistrates seems to be addressing this problem by combining different sanctions, but this is only an option where there are other offences in the same case. Suspended sentences are really only suitable sanctions where the offender does not require any intervention to assist in his or her rehabilitation, and there will be few offences of breach which do not require such intervention.



## Chapter 4: Conditions Attached to Sentencing Orders



## Rehabilitative Conditions

- 4.1 Magistrates can attach a condition to an adjourned undertaking or a community-based order that the offender attend a men's behavioural change program. In addition, under the *Crimes (Family Violence) Act 1987 (Vic)*, the Family Violence Division of the Magistrates' Court had the power, when making a family violence intervention order, to also order the defendant to undergo counselling by a specialist external service provider, under the Pilot Family Violence Intervention Project (FVIP). This power has been retained under the *Family Violence Protection Act 2008 (Vic)*.<sup>269</sup> The FVIP is currently being evaluated.

### Men's Behavioural Programs Available in Victoria

- 4.2 There are currently 33 services across Victoria addressing men's use of violence. The peak body for these services is 'No to Violence'. This organisation has developed minimum standards and guidelines that are followed by federally funded services such as the LifeWorks program. All family violence services funded by the Department of Human Services (DHS) must also meet minimum standards.
- 4.3 Service providers advised the Council that the main aim of the programs addressing men's violence is the safety of women and children. This emphasis on the safety of family violence victims means that partner contact is an important part of the programs offered. The level of support differs depending on the program. The LifeWorks program, for example, offers partners three counselling sessions and a partner contact evening.
- 4.4 The existing programs in Victoria reflect a particular theoretical approach to violence against women. Programs such as the LifeWorks Men's Behaviour Change Program and Plenty Valley Men's Behavioural Change Program view violence against women as a product of gendered social structures. These programs encourage men to take responsibility for their violence and to recognise that they engage in this behaviour to maintain power and control over their partners. These programs offer both group and individual work. However, the service providers who were consulted believe that group work is preferable because it is better to have men's violent behaviour critiqued by other men. It also allows for greater political and psychological education about the structural nature of men's violence against women. These issues may not be covered in a one-on-one session, where the participant's individual needs drive the content of the sessions to a large extent.
- 4.5 The cost and duration of the program differs depending on the service provider. The Lifeworks program consists of 24 hour-long sessions and costs \$25 per session or \$20 concession. The Plenty Valley program also encompasses 24 hour-long sessions and costs \$12 per session or \$6 concession.

<sup>269</sup> *Family Violence Protection Act 2008 (Vic)* pt 5.



## Effectiveness of Men's Behavioural Change Programs

- 4.6 It is difficult to assess the effectiveness of men's behavioural change programs in preventing recidivist offending.
- 4.7 Researchers have begun to recognise that the characteristics of the perpetrator may influence the effectiveness of criminal justice interventions. Holtzworth-Munroe and Stuart identified three subtypes of perpetrators:
- family only, whose violence (least severe and frequent of the three groups) is generally restricted to family members and not associated with psychopathology or personality disorder;
  - dysphoric/borderline, who engage in frequent moderate to severe violence including psychological and sexual violence and may engage in some extra-familial violence. They may have a personality disorder and are likely to be dysphoric (mood disordered) and emotionally volatile; and
  - generally violent/antisocial, who also engage in frequent moderate to severe violence including psychological and sexual violence, as well as frequent extra-familial violence. They are the most likely to have an antisocial personality disorder or psychopathy.<sup>270</sup>
- 4.8 Only those in the first group are likely to respond favourably to criminal justice interventions and perpetrator programs. Those most in need of treatment are the ones who are most likely to drop out of treatment.<sup>271</sup>
- 4.9 Some offenders may have other issues that may reduce the efficacy of behavioural change programs. One magistrate commented that there were cases in which she would have ordered the offender to attend such a program but she felt that the offenders had to deal with their drug and/or alcohol problems first.<sup>272</sup>
- 4.10 The men's behavioural change program providers suggested that behaviour may change as a result of completing the program, but what is really needed is attitudinal change and that is more difficult to achieve given the ingrained attitudes of some of these offenders. They suggested that the physical violence will often diminish, but emotional and/or psychological abuse may sometimes escalate. Often the difficulty is in challenging offenders' perceptions about what violence actually is. This is particularly challenging considering that many people in the wider community do not necessarily accept that non-physical violence is still violence. Further, the community is often willing to provide men with excuses for non-physical violence.<sup>273</sup>
- 4.11 A representative from a men's behavioural change group challenged the basis on which these programs are generally evaluated for effectiveness. Her view is that, if the programs are evaluated solely in terms of recidivism of offenders, it is not conclusive that they prevent re-offending. However, if the goal is the protection of women and children, a successful outcome may be supporting a woman through the partner contact component of the scheme to reach the point where she feels confident enough to leave a relationship.<sup>274</sup>

270 Amy Holtzworth-Munroe and Gregory L. Stuart, 'Typologies of Male Batterers: Three Subtypes and the Differences Among Them' (1994) 116 *Psychological Bulletin* 476.

271 Jennifer Rooney and R. Karl Hanson, 'Predicting Attrition from Treatment Programs for Abusive Men' (2001) 16(2) *Journal of Family Violence* 131, 147–8.

272 Meeting with Magistrate (August 2008).

273 Meeting with men's behavioural change group service providers (17 September 2008).

274 Telephone consultation with a representative from a men's behavioural change program (19 September 2008).

- 4.12 The Council's consultations revealed that perceptions of the efficacy of these programs are mixed. A prominent view seemed to be that, as one magistrate put it: 'the jury is still out but they [the programs] are all we have for the time being to specifically address family violence'.<sup>275</sup> Another magistrate suggested that there was 'low anecdotal incidence of repeat offending after counselling, so arguably the course is effective'.<sup>276</sup> The magistrate then qualified that statement by noting that 'unless someone informs the court of the defendant having previously done the course, it is difficult to know whether they have'.<sup>277</sup>
- 4.13 One magistrate said quite frankly that they had 'no idea' whether the programs worked or not as 'they have not been evaluated'.<sup>278</sup> While this magistrate went on to say that the present programs 'are better than nothing', the magistrate 'preferred the problem behaviour clinic at Forensicare when warranted and [where a] Forensicare report recommends it'.<sup>279</sup>
- 4.14 Some magistrates were more positive about the use of men's behavioural change programs. One magistrate said that she was receiving feedback that the programs were useful.<sup>280</sup> Another spoke very highly of the programs in her area, suggesting that 'these programs really do give the men some insight and do get results'.<sup>281</sup> This optimism was shared by a participant in the Community Legal Centres Roundtable who said that 'the feedback from men is that these courses are quite enlightening and worthwhile, despite the fact they may resent attending at the start'.<sup>282</sup> A Victoria Legal Aid lawyer suggested that the men's behavioural change programs in Ballarat 'are well-liked, successful and that defendants appear happy enough to participate'.<sup>283</sup>
- 4.15 Others who were consulted were more equivocal in their support for the use of men's behavioural change programs. A family violence service provider said that 'the best you could say about them is that some programs work for some men some of the time'.<sup>284</sup> A participant in a meeting with Victoria Legal Aid commented that 'some defendants have found the programs useful and they shift their attitudes, but for others they are not so useful'.<sup>285</sup>
- 4.16 Many Victoria Police officers were critical of men's behavioural change programs, suggesting that offenders 'turn up drunk half the time. They get to meet a whole heap of other angry blokes and go to the pub afterwards'.<sup>286</sup> Another criticism was that group therapy allowed offenders to reinforce their negative attitudes:
- [v]ictims say the blokes are actually worse after they do it. They discuss how to get away with it. They sit there and talk and compare stories. They feed off each other.<sup>287</sup>

275 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11; See also Survey Numbers 2, 6 and 10.

276 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 2.

277 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 2.

278 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 6.

279 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 6.

280 Meeting with Magistrate (August 2008).

281 Meeting with Magistrate (September 2008).

282 Community Legal Centre Roundtable (18 September 2008).

283 Meeting with Victoria Legal Aid (24 September 2008).

284 Family Violence Service Providers Roundtable (18 September 2008).

285 Meeting with Victoria Legal Aid (24 September 2008).

286 Victoria Police Focus Group (Ballarat) (1 October 2008).

287 Victoria Police Focus Group (Ballarat) (1 October 2008).

- 4.17 However, other police officers thought that the programs were 'facilitated to try and mitigate that'.<sup>288</sup> A police prosecutor thought the programs were, at the very least, a step in the right direction for offenders:

I think the referrals are really good because sometimes they can get insight from those programs, even in the smallest way. We used to have a cup, you would put a cup on the table and this was done just to show a different perspective because some people can't see another person's perspective. The cup is on the table and the handle is [on] my side and you say to the other person, 'Does your cup have a handle?' and he said 'no' and when you turn the cup around and ... they are able to see that another person's perspective can be different to theirs ... they have at least put one foot towards that journey of having insight into what's going on.<sup>289</sup>

## Voluntary Versus Mandatory Programs

- 4.18 A comprehensive audit published in 1998 by the National Campaign Against Violence and Crime (NCAVAC) Unit<sup>290</sup> found that Australian perpetrator programs had developed in an 'ad hoc' way. Some of the problems identified were poor integration of voluntary and mandatory programs, an often unsupportive professional and political environment, inconsistent program development and little evaluation of programs due partly to methodological difficulties.<sup>291</sup> Further, service delivery at the time of the study remained small scale in comparison with the number of family violence matters coming before the courts.
- 4.19 The NCAVAC study also found much resistance to the idea of court mandated, as opposed to voluntary, programs. Laing suggests that this may be due to the idea that only men who voluntarily attend programs will be motivated to change.<sup>292</sup> Laing cites studies, however, that have shown that mandated treatment programs can be more effective than voluntary programs due to their much lower attrition rates. Dobash and Gondolf found that voluntary participants were almost twice as likely to drop out as the mandated participants (61 per cent compared with 33 per cent) and re-assaulted their partners at a significantly higher rate at the 15 month follow-up (44 per cent compared with 29 per cent).<sup>293</sup> However, others argue that the evaluation research suggests that voluntary treatment programs for abusers are the most effective.<sup>294</sup>
- 4.20 Representatives from Victorian-based men's behavioural change programs with whom the Council consulted did not believe that the completion rates were that different for court mandated as

288 Victoria Police Focus Group (Ballarat) (1 October 2008).

289 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

290 National Campaign Against Violence and Crime Unit, Commonwealth Attorney-General's Department, *Ending Domestic Violence? Programs for Perpetrators*, Summary Volume (1998).

291 On the issue of evaluation, Jeffrey Fagan, in a paper for the US National Institute of Justice, commented that most studies are not useful for gauging the success or otherwise of 'batterer treatment' programs because they have no comparison group, and many have only short follow-up periods. The paper concluded: 'There is little conclusive evidence of either deterrent or protective effects of legal sanctions or treatment interventions for domestic violence'. Fagan (1995), above n 152, 25.

292 Dr Lesley Laing, *Responding to Men who Perpetrate Domestic Violence: Controversies, Interventions and Challenges*, Issues Paper 7, Australia Domestic and Family Violence Clearinghouse (2002) 16.

293 Russell P Dobash et al., 'A Research Evaluation of British Programmes for Violent Men' (1999) 28(2) *Journal of Social Policy* 205 and Edward Gondolf, *Batterer Intervention Systems: Issues, Outcomes and Recommendations* (2002) cited in Laing (2002), above n 292, 12 and 16. A study by Dutton et al. found that mandated clients did just as well as voluntary participants: Donald Dutton et al., 'Wife assault treatment and criminal recidivism: An eleven year follow-up' (1997) *Journal of Offender Therapy and Comparative Criminology*, 41, 9–23.

294 Portwood and Heaney (2007), above n 270, 237, 245.

opposed to voluntary participants.<sup>295</sup> One of the representatives mentioned that very few men are *internally* motivated to participate in these programs; there is always some external pressure, whether that be from the court or from the men's partners. The reported drop-out rate was between 20 per cent to 50 per cent and the most critical time was thought to be the first three sessions, although for the longer programs (20 weeks), some participants may cease attending towards the end. The optimal mix for mandated/voluntary clients was considered to be from 30/70 to 50/50.

## Practical Issues

- 4.21 An issue that arose consistently in consultations was the limited availability of the men's behavioural change programs.<sup>296</sup> This is a particular problem in rural and regional areas; however, even the metropolitan programs have significant waiting lists.<sup>297</sup> For example, as of September 2008, the LifeWorks program had thirteen people on a waiting list in the city, twenty-three in Werribee and there was a five month wait for a place.<sup>298</sup> The Police *Code of Practice* has placed increased pressure on the programs, as police are required to refer men to a service provider when they attend a family violence incident, regardless of whatever other action they may take. Some men's behavioural change service providers said that they had received increased funding from the state government for assessment, however not the concomitant funding for running extra programs.<sup>299</sup>
- 4.22 Not all the courts may be fully cognisant of the current lack of places in men's behavioural change programs. The men's behavioural change service providers described situations in which offenders have been ordered to attend a course as a condition of their sentence, but have been unable to find a place in a program before the sentence completion date.
- 4.23 Offenders may be unable to access a program because they have particular needs, such as a disability or poor English skills, and the programs are not funded to cater for such individual needs.
- 4.24 Some magistrates may not have a good understanding of the course that they are ordering offenders to complete. There are magistrates who have ordered that an offender attend a particular number of sessions without any knowledge as to how many sessions are available in a program in a given area. Other magistrates have ordered offenders to contact the Men's Referral Service as a condition of their sentence. This service is anonymous and therefore cannot provide a record to the court confirming that the defendant made contact. Further, all such an order requires is that the offender makes contact with the service. There is no onus to actually commit to any counselling. A representative from a men's behavioural program suggested that a better option would be if magistrates ordered an offender to attend an assessment session. Confirmation of this attendance and details of the assessment could then be provided to the court, which could then make a counselling order if appropriate.<sup>300</sup>

295 Meeting with men's behavioural change group service providers (17 September 2008).

296 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 1, 2, 10, 11 and 13; Meeting with Victoria Legal Aid; Community Legal Centre Roundtable (18 September 2008); Family Violence Service Provider Roundtable (18 September 2008).

297 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10; Meeting with men's behavioural program group (17 September 2008).

298 Meeting with men's behavioural program group (17 September 2008). It should be noted that these numbers fluctuate over time.

299 Meeting with men's behavioural program group (17 September 2008).

300 Telephone consultation with a representative from a men's behavioural program (19 September 2008).

## Sentencing Practices for Breach of Intervention Orders

- 4.25 Another issue raised by service providers is that there is no formal mechanism for making referrals to the men's behaviour change programs. It was suggested that men often turn up to their services saying that the court has ordered them to complete a program, but there is no paperwork or other notification from the court. This is also a problem when the referral comes from Corrections Victoria. The lack of communication between criminal justice agencies and men's behavioural program service providers makes it difficult for the services to advise and report on whether or not the program has been completed successfully.<sup>301</sup>
- 4.26 There are also issues with the content of available programs. For example, the Magistrates' Court suggested that men's behavioural change programs may be more successful where family violence is addressed at the same time as other underlying issues experienced by the offender.<sup>302</sup>
- 4.27 There is research to suggest that a significant number of family violence offenders use alcohol or drugs when committing family violence offences, and that there are significant benefits to addressing these issues concurrently.<sup>303</sup> According to the Magistrates' Court submission, this is supported by anecdotal evidence of the success of particular men's behavioural change programs in Victoria, such as the program run by the Ballarat Child and Family Services. The Court commented that one of the strengths of this program is that the service provider can 'also address mental health, homelessness and drug and alcohol issues in the significant number of cases where those issues are associated with family violence'.<sup>304</sup>

## Men's Behavioural Change Programs Attached to Sentencing Orders

- 4.28 The magistrates consulted by the Council advised that they currently attach conditions directing offenders to attend men's behavioural change programs to sentencing orders. This occurs most commonly with adjourned undertakings, although they may also be attached to community-based orders. This is similar to the practice of attaching a condition to a sentencing order directing that an offender participate in a drug and/or alcohol treatment program.
- 4.29 There were mixed views expressed in the Council's consultations as to whether men's behaviour change programs should be attached to sentencing orders in this way. The programs were not designed to be used as sanctions. Some of those consulted were of the view that it would be preferable for perpetrators of family violence to attend such programs when an intervention order is first imposed.<sup>305</sup> This is the philosophy behind the Family Violence Intervention Project, which allows magistrates in the Family Violence Division of the Magistrates' Court to make a counselling order at the same time that an intervention order is imposed.

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301 Telephone consultation with a representative from men's behavioural program (19 September 2008).

302 Magistrates Court of Victoria (Submission).

303 Lisa Lightman and Francine Byrne, 'Addressing the Co-occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts' (2005) *Journal of the Center for Families, Children and the Courts* 53, 54.

304 Magistrates Court of Victoria (Submission).

305 For example, Victorian Aboriginal Legal Service Co-operative (Submission).

- 4.30 The men's behavioural change service providers felt very strongly that their programs must never be used as diversion from the criminal justice system. They argued that there must be serious consequences for family violence offenders. Therefore, their programs are an 'add-on not a replacement' for criminal justice responses.<sup>306</sup>
- 4.31 One magistrate who responded to the Council's survey was of the view that many men's behavioural change programs in their current form were not appropriate as sanctions because:  
they will not provide reports on an offender's progress because they do not regard monitoring and reporting on a defendant's progress as therapeutic. If such programs are to be part of the sentencing regime they would probably need to be set up specifically for that purpose.<sup>307</sup>
- 4.32 However, a representative from a men's behavioural change program argued that service providers would not feel there was a conflict in reporting on whether or not an offender was completing the program because, as discussed earlier, their primary responsibility is to ensure the safety of the victim. If an offender is not attending the program as ordered, this may place the victim in danger. However, this stakeholder felt that there should be protocols put in place between the courts, Corrections Victoria and the relevant services so that the service providers are aware of their obligations and know who to contact when the offender is not attending counselling.<sup>308</sup>
- 4.33 Some family violence service providers supported the use of men's behavioural change programs as sanctions; however, they stressed that it was important that there was an appropriate penalty for not completing the course.<sup>309</sup>
- 4.34 The Women's Legal Service are generally supportive of the use of men's behavioural change programs as 'part of a comprehensive inter-agency response to family violence'. However, they are also of the view that there will need to be 'higher standards ... better accreditation and evaluation processes in place in order for these programs to be effective'.<sup>310</sup>
- 4.35 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that there should be 'Indigenous specific programs developed by or in conjunction with the Indigenous community'.<sup>311</sup> The service also highlighted the importance of the judiciary and court staff having up to date, accurate information about men's behavioural change programs and receiving training about these programs.
- 4.36 The Victorian Aboriginal Legal Service strongly supported the recommendation that the government should fund 'the development and delivery of a Statewide men's behavioural change program'. They were also of the view that a culturally appropriate model should be developed for use with Indigenous men.

306 Meeting with men's behavioural program group service providers (17 September 2008).

307 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11.

308 Telephone consultation with a representative from a men's behavioural program (19 September 2008).

309 Family Violence Service Providers Roundtable (18 September 2008).

310 Women's Legal Service (Submission).

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

*Judicial supervision*

4.37 A number of magistrates who responded to the survey were of the opinion that some level of judicial supervision of defendants ordered to complete men's behavioural change programs would be useful.<sup>312</sup> One magistrate suggested that making attendance at a program a condition of a community-based order would be sufficient to ensure that the defendant was properly supervised.<sup>313</sup> Another magistrate commented:

In extreme cases maybe it would be appropriate to have the degree of supervision which the Drug Court has over its offenders. It may be an approach of last resort and the only way in a difficult case to effect change and protection for the victim. Generally, it is the role of professionals to deliver and supervise the participants, not ours.<sup>314</sup>

4.38 The Magistrates' Court of Victoria suggested that some courts do monitor offender's compliance with adjourned undertakings where a condition to attend a men's behavioural program is also imposed:

If, for example, an order is made for a defendant to complete a program within a certain period, he/she will be required to provide proof of completion before a particular date. The court will diarise that date and follow-up with the defendant or the informant if there is no evidence of compliance. Breach proceedings are initiated if the order is not complied with.<sup>315</sup>

**Programs Offered by Corrections Victoria**

4.39 Community Corrections Officers or clinicians can refer offenders convicted of family violence offences to men's behavioural change programs where appropriate. In addition, Corrections Victoria offers a Violence Intervention Program (VIP), which is available in the community and in prison. The program was developed to 'assist people who have been convicted of violent offending reduce their risk of violent re-offending'.<sup>316</sup> There are moderate and high intensity versions of the program. Offenders are assigned to the more appropriate program based on the level of their risk of violent re-offending.

4.40 These programs are group-based and cover modules such as 'life pathways, offence process, pro-social thinking, managing emotions, victim empathy and self-management'.<sup>317</sup>

4.41 The VIP is directed at general violent offending; therefore, they differ from the men's behavioural change programs, which are specifically tailored for males who are violent in the home. In keeping with this, the VIP is focused on the individual, while the men's behavioural change programs emphasise the structural, socio-political context in which violence against women occurs.

4.42 At present, Corrections Victoria does not offer family violence specific courses. To determine suitability for either the Moderate or High Intensity Violence Intervention Program, Corrections Victoria clinicians will conduct a thorough clinical assessment of each offender referred to the program. Through these assessments, clinicians have found that the violent offending patterns of

312 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Numbers 2, 4, 5, 6, 7, 9, 10 and 11.

313 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

314 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 12.

315 Magistrates Court of Victoria (Submission).

316 Email from Corrections Victoria dated 14 October 2008.

317 Ibid.

offenders who are referred to these programs are quite varied, with some offenders having family violence issues. According to Clinical Services at Corrections Victoria, the general VIP programs are capable of addressing the diverse factors that lead to violent behaviour, and therefore, some offenders with family violence issues may be deemed suitable for the programs through the assessment process.<sup>318</sup>

- 4.43 Anecdotally, Clinical Services at Corrections Victoria found that those offenders who do have a record of family violence offending and participate in the generalist programs often express misogynist views, and other offenders without family violence issues shy away from challenging these views in the group. Given this, and the fact that the current violence programs are now established within the correctional system, Clinical Services have advised that they are now looking at whether or not they should separate out offenders with specific violent offending patterns and tailor current programs to specific groups, such as those who have offended in the context of family violence.<sup>319</sup>
- 4.44 In scoping the need for specialist programs and as part of the continuous improvement of their current programs, Clinical Services will be looking to establish a Consultation Party involving Men's Behaviour Change Program providers, Forensicare and other relevant stakeholders. The aims of this Party will be to enable liaison, consultation and communication with stakeholders in order to specifically explore any overlaps and differences between the socio-political perspectives adopted by men's behavioural change programs and the individual, cognitive-behavioural perspectives of Corrections Victoria programs in order to establish the most appropriate and effective family violence program.<sup>320</sup>

## Forensicare Problem Behaviour Clinic

- 4.45 Since 2001, Forensicare has operated a 'Stalkers' Clinic' and a 'Threateners' Clinic', which were recently amalgamated into the Problem Behaviour Clinic. The flow of referrals has been constant, and the clinics conduct about four to five assessments per week. This specialist clinic is based on a problem behaviour model, which:
- examines the individual components of complex problem behaviours to enhance our understanding and treatment, while also accepting that such behaviours cannot be isolated from the context in which they occur.<sup>321</sup>
- 4.46 According to Professor James Ogloff, the Problem Behaviour Clinic already accepts a number of family violence offenders into its programs.<sup>322</sup> The Clinic has considered the possibility of developing a program specifically for family violence offenders; however, this would depend upon the availability of funding.

318 Email dated 27 February 2009 from practitioners in the Clinical Services Unit, Corrections Victoria.

319 Ibid.

320 Ibid.

321 Lisa Warren *et al.*, 'The Problem Behaviour Model: The Development of a Stalkers Clinic and a Threateners Clinic', (2005) 23 *Behavioural Sciences and the Law*, 387, 389.

322 A project currently underway at Forensicare on the association between threats to kill and intervention orders examined a sample of all adults convicted of threat to kill in the years 1993 and 1994. It has found that 56.9 per cent of these adults were the defendant in at least one family violence intervention order and 23.8 per cent had been convicted of breaching a family violence intervention order: James Ogloff *et al.*, 'A study of psychiatric symptoms and psychiatric histories of people detained in police cells (Unpublished manuscript, Centre for Forensic Behavioural Science, Monash University, 2008).



## The Council's View

- 4.47 There is little evidence at present as to whether the men's behavioural change programs currently used in Victoria are effective in preventing recidivism. The current view seems to be that such programs are 'better than nothing' in addressing family violence. At the very least, men's behavioural change programs provide some level of intervention and force offenders to examine some of the attitudes behind their violent behaviour. There may also be some positive benefits in linking victims with service providers through the partner/spousal contact component of the courses.
- 4.48 It will be easier to assess the potential effectiveness of men's behavioural change programs as sanctions once the results of the FVIP evaluation are released.<sup>323</sup> Men's behavioural change programs are currently being attached to sentencing orders; however, it is clear that the services cannot cope with demand. Further, the men's behavioural change program attached to the Family Violence Division was established to be used alongside civil intervention orders. The program was not designed to be used as a condition attached to a criminal sanction, and the lack of communication channels between courts, Corrections Victoria and the providers means that monitoring offenders' participation is difficult.
- 4.49 In order to improve this situation, the Council is of the view that the government should consider funding the development and delivery of a statewide community-based program designed for people found guilty of family violence offences. The program will need to be appropriately funded so as to ensure ready access for offenders in terms of timeliness and individual needs. Service providers delivering the program should be formally accredited and adhere to prescribed practice standards, including standards relating to risk assessment of offenders, partner/spouse support and monitoring and reporting procedures. In order to establish the effectiveness of the program, a comprehensive evaluation should be undertaken.
- 4.50 Further, formal protocols should be set up between the courts, Corrections Victoria and the service provider/s to ensure that offender participation is closely supervised and that the courts receive up-to-date information about the courses operating in their areas.
- 4.51 This may be a lengthy process. The Council recognises the current difficulties faced by magistrates in obtaining up-to-date information about the men's behavioural change services available in their area. To assist in this process, the Council is working with Corrections Victoria and the Judicial College of Victoria to improve the provision of information to magistrates about what programs are available.
- 4.52 One of the other key issues identified in consultations is the lack of supervision in cases in which men's behavioural change programs have been attached to sentencing orders, particularly adjourned undertakings. This will remain an issue until there is a framework to ensure consistency in program delivery across the state.
- 4.53 The Magistrates' Court submitted that some courts already have procedures in place to ensure that offenders comply with their sentencing orders. It is the Council's view that such procedures should be adopted across the Magistrates' Court to ensure consistency of practice, at least until the establishment of a statewide offender program specifically designed for use with sentencing orders. Putting in place monitoring strategies may also result in increasing the potential for adjourned undertakings to have some real rehabilitative effect for offenders.

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<sup>323</sup> The evaluation relates specifically to the counselling orders made at the same time that the intervention orders are imposed, rather than to the use of these programs attached to criminal sanctions.

## RECOMMENDATION 1

- 1.1 The government should consider funding the development and delivery of a statewide men's behavioural change program specifically designed for offenders found guilty of offences in the context of family violence. Such a program should include:
- a formal evidence-based accreditation process for service providers;
  - prescribed practice standards, including standards relating to risk assessment of offenders, partner/spouse support and monitoring and reporting procedures;
  - formal protocols between courts, Corrections Victoria and service provider/s; and
  - comprehensive evaluation of the program.
- 1.2 Until such time that this program is implemented, courts should ensure that they have procedures in place to monitor compliance of offenders who have been ordered to attend men's behavioural change programs as part of an adjourned undertaking.

## Protective Conditions

- 4.54 The primary purpose in sentencing for breach of a family violence intervention order should be to achieve compliance with the order or any future orders to ensure the safety and protection of the victim. However, there are cases where an offender is sentenced for breach of an intervention order, but the order itself has expired. This means that, even though the offender has been sentenced, the victim is no longer prevented from being approached or contacted by the offender because there is no intervention order in place.

## Longer Orders

- 4.55 This is particularly an issue as the majority of orders made under the *Crimes (Family Violence) Act 1987* (Vic) were for a duration of less than 12 months.<sup>324</sup> If an offender breaches a family violence intervention order towards the end of the order, it is often the case that the order expires before the breach is dealt with by the court.
- 4.56 The new *Family Violence Protection Act 2008* (Vic) includes some criteria that must be considered by the court when determining the length of the order to be imposed. The court must take into account:
- (a) that the safety of the protected person is paramount; and
  - (b) any assessment by the applicant of the level and duration of the risk from the respondent; and
  - (c) if the applicant is not the protected person (for example, where a police officer is the applicant), the protected person's views, including the protected person's assessment of the level and duration of the risk from the respondent.<sup>325</sup>

<sup>324</sup> See paragraph [2.47].

<sup>325</sup> *Family Violence Protection Act 2008* (Vic) s 97(2).

- 4.57 These criteria were included in the legislation as a response to the VLRC's finding that there was a 'wide variation in the length of the orders made and nothing to guide the court when making this decision'.<sup>326</sup> In order to further assist the court in determining the appropriate length for orders, the application form for family violence intervention orders now includes a question asking the affected family member how long they would like the order to last.<sup>327</sup> This change was also in response to a VLRC recommendation.<sup>328</sup>
- 4.58 These measures may mean that courts impose longer orders based on the protected person's assessment of risk from the respondent. However, it is too early to know whether or not consideration of these factors will have this effect.

### A New Order?

- 4.59 If orders are not long enough to ensure that victims are protected beyond the sentencing date, it may be that an application is needed for a new family violence intervention order. Although victims can apply for another order, they may not be aware that this is possible. It would require going back to court and making another application, which could be quite onerous for some victims who have just been through the criminal process.
- 4.60 One option would be for an extension of an existing order or an application for a new order to be sought at the same time as the sentence for the breach by the police prosecutor. In order to have the breach and the intervention order itself dealt with together, an application would have to be made by the informant for the extension of the existing order or for a new intervention order prior to the hearing date. This would require the informant to consider the status of the intervention order when preparing a brief of evidence.
- 4.61 If the order is soon to expire, the informant could make an application for an extension. If the order has already expired, he or she could then consider whether an application should be made for a new order. Such consideration should include an examination of the available evidence, including consultation with the victim.
- 4.62 If the application is made at the time charges are filed for a breach matter, it is possible to ensure that the defendant and any other relevant person have prior notice that the application will be dealt with at the same time as the breach.

### Protective Conditions

- 4.63 As an alternative to making a new family violence intervention order, the court should consider whether or not other mechanisms are required to ensure the continued safety of the victim. The courts could attach a condition to the sentencing order in similar terms to an intervention order, for example, prohibiting the offender from contacting, approaching or harassing the victim.

<sup>326</sup> Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic), cl 97.

<sup>327</sup> Magistrates' Court of Victoria, *Information for Application for an Intervention Order: Form FVAI* (December 2008).

<sup>328</sup> Prior to the VLRC report, this question was only included in the application form for family violence intervention orders at the Family Violence Division of the Magistrates' Court. The VLRC recommended that this question be included on application forms at all venues of the Magistrates' Court in Victoria. (See VLRC (2006), above n 5, 312 (Recommendation 105)).

## Current law

4.64 At present, the courts have the ability to attach 'other' conditions not expressly listed in the *Sentencing Act 1991* (Vic) to particular sentencing orders. For adjourned undertakings, an offender must observe 'any special conditions imposed by the court'.<sup>329</sup> There is no express provision limiting the type of conditions the court can impose. When making a community-based order, the court is empowered to attach any condition 'the court considers necessary or desirable, other than one about the making of restitution or the payment of compensation, costs or damages'.<sup>330</sup> Utilising these provisions, courts already have the power to impose some type of restraining condition as part of a sentence.

## Issues

- 4.65 Courts may be reluctant to use this power in such a way. One reason for this reticence may be that imposing such conditions may be perceived as breaching the Victorian Charter of Human Rights and Responsibilities.
- 4.66 Under the Charter, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way compatible with human rights'.<sup>331</sup>
- 4.67 Imposing conditions which limit a person's freedom of movement and/or association could be considered incompatible with human rights, particularly as such rights are included in the Charter itself.<sup>332</sup>
- 4.68 The Charter recognises that rights are not absolute and specifically allows for human rights to be subject to reasonable limitations 'as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.<sup>333</sup> The Charter also provides some criteria to be taken into account when determining what amounts to a reasonable limitation. There are some instances where the use of restrictive conditions may be justifiable on the basis that they are imposed for a specific purpose and are the least restrictive alternative for achieving that particular purpose.<sup>334</sup>
- 4.69 Imposing conditions confining the movements of an offender for the ongoing protection of the victim could be seen as a reasonable limitation on the rights to freedom of movement and association under the Victorian Charter.

329 *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).

330 *Sentencing Act 1991* (Vic) s 38(1)(g).

331 *Charter of Human Rights and Responsibilities 2006* (Vic) s 32.

332 *Charter of Human Rights and Responsibilities 2006* (Vic) ss 12, 16.

333 *Charter of Human Rights and Responsibilities 2006* (Vic) s 7.

334 The Council discussed the use of restrictive conditions as part of an intensive corrections order in its *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report Part 2*. See page 134.

## Sentencing Practices for Breach of Intervention Orders

- 4.70 Another reason that courts may be reluctant to attach such conditions is that they may be considered 'oppressive, uncertain, unnecessary, undesirable or impossible of fulfilment'.<sup>335</sup> In *R v Sanerive*,<sup>336</sup> the Court of Appeal criticised conditions attached to a community-based order that were 'manifestly excessive burdens so unreasonable as to be likely to result in breach' including 'obligations which could not be fairly expected of [the offender] or of persons placed in a like position'.<sup>337</sup>
- 4.71 However, conditions could be crafted by the court in such a way that they do not pose an unreasonable burden on the offender. The conditions could be similar to the conditions of a family violence intervention order and imposed in circumstances where the magistrate is satisfied that the respondent is likely to commit family violence against the victim.
- 4.72 One limitation of this approach is that these conditions could only be attached to certain sentencing orders. For example, a court could not attach non-association or place restriction conditions to a term of imprisonment or a fine.
- 4.73 If the condition is attached to an adjourned undertaking, as previously discussed in this report, there is little scrutiny of these orders. However, if a breach is identified, the offender can be brought before the court. The court is empowered to vary, confirm or cancel the undertaking. If the undertaking is cancelled, the court can deal with the offender for the original offence as though he or she had just been found guilty of the offence. In addition, the court can impose up to a level 10 fine.<sup>338</sup>
- 4.74 Community-based orders are administered by Corrections Victoria and there is some discretion as to how such breaches are dealt with. Breaching the conditions of an order does not necessarily lead to the offender being charged with the offence of breach. Whether or not formal breach proceedings take place will depend on the nature and circumstances of the breach. While in some cases it may be appropriate for breach proceedings to be initiated immediately, in many situations breaches are dealt with administratively through informal discussions with the offender and the issuing of formal cautions and warnings.<sup>339</sup> Where the offender is charged with breaching a community-based order, the court has the same powers as described for breach of an adjourned undertaking.<sup>340</sup>

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335 Fox and Friberg (1999), above n 158, 619.

336 *R v Alexander Allen Peter Sanerive* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal) Southwell, Ormiston and McDonald JJ, 23 June 1995).

337 Ibid 31.

338 *Sentencing Act 1991* (Vic) s 79(4).

339 Corrections Victoria, Community Correctional Services, *Offender Management Manual* (Version 1.3, April 2007) 2/4.9.

340 *Sentencing Act 1991* (Vic) s 47(3A)

## The Council's view

- 4.75 The Council acknowledges the potential risk to victims that arises where, at the time of sentencing for breach of an intervention order, the original order is no longer in force. Even though the offender has been sentenced for the breach, some sentences will not necessarily protect the victim from further unwanted contact or harassment by the offender, which may arise directly from the breach process. The overriding consideration in these cases is how best to provide for the ongoing protection of the victim.
- 4.76 One way the Council has identified to deal with this issue is for the courts to impose family violence intervention orders for more than one year at first instance, in recognition of the fact that the risk will not always abate over the first year. This may be encouraged by the factors the court now has to consider when imposing an order under the *Family Violence Protection Act 2008* (Vic). However, there will be situations where the level of risk increases after the order has been imposed in a manner that was not foreseeable by the courts.
- 4.77 The risk of harm to a victim may only be identified once a breach has occurred. Therefore, the Council considers that police informants should consider the status of the original order and the need for any further application when they prepare a brief of evidence for the breach. The Council is of the view that Victoria Police should consider developing a process which requires informants to take account of whether or not an extension or an application for a new order is required when investigating the breach. Such a process could be included in the *Police Code of Practice* for the Investigation of Family Violence.
- 4.78 Even where such a procedure is in place, there still may be situations where there is no order or application for a new order in place at the time of sentence. If in such cases the court is considering imposing an adjourned undertaking or a community-based order, the court may consider it appropriate to attach protective conditions similar to those attached to an intervention order, to the sentencing order, for example, a condition prohibiting the offender from contacting or approaching the victim for a specified period.

### RECOMMENDATION 2

Victoria Police should consider establishing a process which ensures that when preparing a brief of evidence for a breach of a family violence intervention order, consideration is given to whether, in order to protect the victim from further violence, there is a need for an application:

- to extend the original order; or
- for a new family violence intervention order.

If an application for an extension or for a new order is required, the application should be made at the same time proceedings are initiated for the breach so that both matters can be dealt with by the court at the same time.



Chapter 5:  
Sentencing Factors Particularly  
Relevant to Breach of Family Violence  
Intervention Orders





## Introduction

- 5.1 Given the particular complexities of family violence, sentencing for breach offences is not as straightforward as sentencing for other types of offences. It appears from the data that magistrates may not always be striking the right balance. The data show a predominance of sanctions at the lower end of the sentencing hierarchy, with a particular emphasis on fines. This is so, even for subsequent breach offences. A comparison with sanctions for other offences revealed that fines and adjourned undertakings are used more frequently for breaches.
- 5.2 Many of those who were consulted expressed concern that current sentencing practices for breach of intervention orders do not reflect the perceived seriousness of the crime. Stakeholders queried the appropriateness and effectiveness of the widespread use of fines and adjourned undertakings as sanctions for these offences. Police in particular expressed much frustration that their hard work in preparing breach matters for prosecution was often in vain, when the end result more often than not is 'some minor punishment'<sup>341</sup> or 'no real sanction whatsoever'.<sup>342</sup> These perceptions lead to a general lack of enthusiasm for working on breach of intervention order cases: 'The last thing people want to do is go to domestics'.<sup>343</sup> Easteal suggests that if police perceive sanctions for breach to be very lenient, they may be less willing to invest the time required to proceed with prosecutions for breach.<sup>344</sup>
- 5.3 There are a number of possible explanations for the predominance of low-order sanctions for breaches, one of which may be that magistrates are not able to assess properly the seriousness of breaches due to a lack of information about the context of the offending. This issue was touched upon in Chapter 2 and is examined in more detail below. Another possible reason is the general dearth of guidance for magistrates in sentencing these complex matters.
- 5.4 As discussed in Chapter 3, magistrates have access to only minimal guidance about sentencing for breach of family violence intervention orders, because very few cases are dealt with in the Court of Appeal. This means that few authoritative precedents are created and published. Under the *Sentencing Act 1991* (Vic) magistrates must take a number of considerations into account when sentencing:
- the sentencing hierarchy;
  - the purposes of sentencing; and
  - sentencing factors.

341 Victoria Police Focus Group (Ballarat) (1 October 2008). Police in the Victoria Police Focus Group (Region 4) (2 October 2008) and Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008) were of a similar opinion.

342 Victoria Police Focus Group (Region 4) (2 October 2008). This group was particularly scathing about the effectiveness of adjourned undertakings as sanctions for breach matters, as was the Ballarat group. One person in the Ballarat Focus Group commented for example that adjourned undertakings are 'not worth the paper they're written on' and a 'complete waste of time'.

343 Victoria Police Focus Group (Ballarat) (1 October 2008). Melbourne police prosecutors were of a similar view.

344 Easteal (2001), above n 9, 113.

5.5 This chapter examines the sentencing factors that may be particularly relevant to breaches. It draws on the valuable work undertaken by the UK Sentencing Guidelines Council on domestic violence and breach of protective orders. The factors have been grouped according to whether they relate to the victim or the offender. The UK Council has used this approach rather than listing aggravating and mitigating factors. This methodology is preferred because it follows section 5 of the *Sentencing Act 1991* (Vic) to some extent and avoids the difficulty of classifying sentencing factors as either aggravating or mitigating. As Fox and Freiberg argue:

it is artificial, misleading and possibly an error in principle to isolate certain factors and label them as always either aggravating or mitigating the circumstances of the offence and, consequently, its penalty.<sup>345</sup>

## Factors Relating to the Victim

### Nature of the Breach and Its Impact on the Victim

5.6 The nature of the breach and its impact on the victim are arguably the most important factors for magistrates to take into account in sentencing breaches of family violence intervention orders. In order to assess the impact of a breach on a particular victim, magistrates will need a good understanding of the dynamics of family violence generally, as well as sufficient information about the background and context to the breach.

#### *Impact on the victim of physical and non-physical abuse*

5.7 A family violence intervention order is breached when any of the restrictions or prohibitions<sup>346</sup> attached to the order is contravened. Conduct which can amount to a breach covers a wide range of harm and potential harm to the aggrieved family member, including physical and non-physical abuse.

5.8 Research on the impact of non-physical abuse in a domestic context shows that such abuse can have serious long-term effects on the victim, in some cases, 'more devastating' than the effect of physical abuse.<sup>347</sup> This type of abuse can be difficult to identify, as it leaves no physical injury. Non-physical abuse can be anywhere on a continuum from negative comments, to what has been described as 'resembling psychological torture'.<sup>348</sup>

5.9 There is disagreement as to what constitutes non-physical abuse. In its most serious form, it can be conceptualised as 'an ongoing process of hostile verbal and non-verbal behaviour, which over time has the effect of eroding or destroying the target person's psychological sense of self'.<sup>349</sup> Actual physical harm is often accompanied by non-physical abuse, the effects of which may linger long after physical wounds have healed. For example, women who are victims of emotional abuse are more likely to have problems with illness and experience 'reduced self-esteem, decreased confidence and a sense of shame',<sup>350</sup> which can lead to compromised social and psychological

345 Fox and Freiberg (1999), above n 164, 182.

346 *Crimes (Family Violence) Act 1987* (Vic) s 4(2), 22; *Family Violence Protection Act 2008* (Vic) s 81.

347 Laurie McKinnon, *Hurting Without Hitting: Non-Physical Contact Forms of Abuse*, Australian Domestic and Family Violence Clearing House, Stakeholder Paper 4 (2008) 2.

348 *Ibid* 1.

349 *Ibid* 9.

350 *Ibid* 6.

functioning.<sup>351</sup> The *Family Violence Protection Act 2008* (Vic) specifically includes emotionally or psychologically abusive, threatening, coercive, controlling and dominating behaviour in its definition of family violence.<sup>352</sup>

5.10 Even where breaches are constituted by behaviour that may not be ordinarily classified as criminal, for example repeatedly driving past the victim's house, such breaches still have the potential to cause 'acute fear and distress' to the aggrieved person.<sup>353</sup> The UK Sentencing Guidelines Council's guideline for breach of a protective order recognises that 'non-violent behaviour and/or indirect conduct' can cause 'a high degree of harm and anxiety'.<sup>354</sup>

5.11 Another issue to consider when assessing the impact of the breach on the victim is whether the offence occurred in the victim's home, or whether the victim felt forced to leave home as a consequence of the offence.<sup>355</sup> Douglas points out that the criminal law often recognises that offences taking place in the victim's home involve a greater moral culpability on the part of the offender.<sup>356</sup> As Astbury *et al.* point out:

If the idea of 'home' implies physical and psychological safety and security as well as shelter, then a child, adult or older person affected by domestic violence experiences a hidden 'homelessness'.<sup>357</sup>

5.12 One stakeholder commented that, '[i]f you cannot feel safe in your home, you are in effect homeless and this makes it [the fact that the breach occurred in the victim's home] an aggravating factor'.<sup>358</sup> In the County Court case of *R v Khon Tran*, where the offender broke into his ex-spouse's house in contravention of an intervention order and assaulted her, Judge Gullaci held that:

General deterrence is a significant matter for the court to take into account in sentencing in these types of offences. Those who are minded to breach intervention orders and invade homes of their vulnerable ex-partners must be made aware that the courts will not tolerate such conduct and impose severe penalties in the appropriate circumstances.<sup>359</sup>

Judge Gullaci made similar comments in the 2004 case of *R v Basse*.<sup>360</sup>

5.13 The results of Council consultations largely reflected those of the VLRC, which revealed a perception that courts are not taking so called 'technical breaches' sufficiently seriously.<sup>361</sup> Many stakeholders thought that magistrates' sentencing practices show that they are not taking the impact of breaches—whether non-physically violent or otherwise—seriously enough.

351 Ibid 14.

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

353 The VLRC received a submission describing the experience of a woman who had an intervention order against her husband. The husband sat outside the woman's house in his car and eventually drove away. While at face value this may appear to be a minor breach, it had such a significant impact on this woman's wellbeing and sense of personal safety that she moved into her parent's home. It was six months before she felt comfortable moving back into her own home: VLRC (2006), above n 5, 373.

354 Sentencing Guidelines Council [UK], (2006), above n 157, 5.

355 Ibid 6, 5–6. The UK Sentencing Guidelines Council includes as an aggravating feature for breach offences the fact that the victim was forced to leave home as a consequence of the offence.

356 Heather Douglas, 'Crime in the Intimate Sphere: Prosecutions of Intimate Partner Violence' (2003–2004) 7 *Newcastle Law Review* 79, 95.

357 Jill Astbury *et al.*, 'The impact of domestic violence on individuals', (2000) 173 *Medical Journal of Australia*, 427.

358 Community Legal Centre Roundtable (18 September 2008).

359 *R v Khon Tran* (Unreported, County Court of Victoria, Gullaci J, 29 March 2007), 7. The offender received a three month term of imprisonment for the breach offence, with a total effective sentence of 15 months' imprisonment (including sanctions for aggravated burglary, recklessly causing injury and criminal damage), wholly suspended for a period of three years.

360 *R v Basse* (Unreported, County Court of Victoria, Gullaci J, 21 July 2004) 12.

361 VLRC (2006), above n 5, 373.

5.14 All stakeholders with whom the Council consulted viewed a breach of a family violence intervention order as a serious criminal offence, yet many perceived that magistrates appear to treat these matters less severely than other criminal offences. Several stakeholders compared sentencing practices for breach of intervention orders with driving whilst disqualified offences, commenting that despite the perception that breach offences are generally more deserving of societal condemnation, courts take the driving offence more seriously.<sup>362</sup> For example, one participant in the Ballarat police focus group commented:

Sentencing is out of whack. You can get a repeat driving whilst disqualified [offender] who is just trying to get to work and who gets more [by way of sentence] than a family violence offender.<sup>363</sup>

5.15 Some stakeholders were concerned that magistrates often appear not to understand the impact that non-physically violent breaches can have on a victim. For example, one police officer commented that magistrates do not appear to understand that receiving multiple phone calls from the perpetrator or having him drive past her house three or four times a day could be very upsetting for some victims.<sup>364</sup> On the sentencing behaviour of magistrates in breach matters, a participant in the Ballarat focus group commented, 'they talk big and act small'.<sup>365</sup>

#### *Context of the breach/original behaviour*

5.16 Magistrates must take into account the impact of breach behaviour on victims when sentencing.<sup>366</sup> In order for magistrates to be in a position to understand the nature of the breach and its impact on a particular victim in a case, they must have sufficient evidence about the background and context of the offence before them, particularly in relation to the original behaviour that led to the imposition of the order. However, it appears that for various reasons magistrates rarely receive sufficient information about the historical context of the breach. From the Council's consultations there appears to be a great deal of confusion about what information can and should be made available to magistrates in this regard.

5.17 Several of the magistrates expressed the view that information about the offender's original behaviour and the context of the offence would be useful in sentencing breaches.<sup>367</sup> It would place the offence within the context of the ongoing relationship between the parties. Ten of the thirteen magistrates who returned completed surveys felt that not enough information is provided to them at sentencing of breaches and that more information, for example about the context

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362 It should be noted here that courts are constrained by the current sentencing regime for driving whilst disqualified offences. The Council has examined this issue in a separate report: Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (2009).

363 Victoria Police Focus Group (Ballarat) (1 October 2008). It should be noted, however, that driving while disqualified carries a mandatory term of imprisonment for not less than one month and not more than two years for a subsequent offence. See *Road Safety Act 1986* (Vic) s 30. It is one of the few Victorian offences which has a mandatory penalty.

364 Telephone conversation with Victoria Police Officer (20 August 2008). In this regard, note the discussion on evidentiary difficulties in paragraphs 2.76 to 2.80 above.

365 Victoria Police Focus Group (Ballarat) (1 October 2008).

366 *Sentencing Act 1991* (Vic) s 5(2)(daa).

367 The VLRC reported that consideration of behaviour that led to the imposition of a family violence order could be very useful in assisting the court in assessing the impact of the breach on the victim. VLRC (2006), above n 5, 374.

of the breach or its impact, would be useful.<sup>368</sup> One said they would like to see more thorough preparation by both prosecution and defence.<sup>369</sup> Comments from the survey included:

- Where offences have occurred in a family violence context there should be a specific sentencing factor that must be taken into account of 'the history, context and dynamic of the family violence between the victim and the perpetrator' or something like that.<sup>370</sup>
- It would help to know what the original behaviour was which led to the order being made. That would be very useful in my view.<sup>371</sup>
- Often what is missing is information about the context in which a breach occurs, e.g. the summary may allege one incident that is harassing in nature but fail to place it in the context of many other incidents of harassment.<sup>372</sup>
- The police summaries tend not to fully reflect the history or dynamics of the family violence. Accordingly the incident often appears out of context and may appear less serious than it actually is.<sup>373</sup>

5.18 According to family violence service providers who were consulted, most victims would like magistrates to consider the context of the breach.<sup>374</sup>

5.19 However, some magistrates, most defence lawyers and most police prosecutors consulted by the Council were of the opinion that evidence about original behaviour and other contextual material would not in most circumstances be admissible in breach matters.<sup>375</sup> A group of Melbourne-based police prosecutors stated that they would very rarely if ever present information to magistrates on the background and context of the charged breach, and would 'never' provide details about the behaviour that led to the imposition of the original intervention order.<sup>376</sup> Their view was that, given the vast majority of family violence intervention orders are imposed by way of consent without admission, the original behaviour is unproven and therefore cannot be presented to the court. Further, magistrates do not tend to ask for such information.<sup>377</sup> The prosecutors were of the view, however, that information about original behaviour would assist magistrates in understanding the breach behaviour in its proper context and therefore in arriving at an appropriate sentence.

5.20 The prosecutors commented as follows:

- Well I guess the difficulty is that there are very strict rules in a criminal matter about what the prosecution can allege and what they can put forward, and I guess it would have to be a prior conviction.
- The informant will probably never list all the information that led up to it [the breach].
- It's just not relevant to them [magistrates] that the incident that leads to the intervention order might be a serious assault.
- It's relevant but if it doesn't form a prior conviction then they [the magistrates] don't want to hear it.<sup>378</sup>

368 Of the other three, one did not respond to the question (Survey 2), one answered 'depends, there is generally enough information' (Survey 6) and the other thought there was enough information provided and if there was not, they would ask for it (Survey 5).

369 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 8.

370 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10.

371 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 9.

372 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 11.

373 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10.

374 Community Legal Centres Roundtable (18 September 2008).

375 See also [2.88] to [2.89] above.

376 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

377 A participant in the Victoria Police Region 4 Focus Group on 2 October 2008 commented that normally magistrates do not want to hear all the background material but are rather only interested in prior convictions.

378 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

- 5.21 Participants in a focus group with police members from Region 4 were also of the belief that the informant may only refer to the particular breach incident in question. In terms of past behaviour, they would not include this in the brief unless it related to a prior conviction. If background material on the offender's conduct is included in the victim's statement, they thought that the defence could challenge it.<sup>379</sup>
- 5.22 A participant in the Melbourne Prosecutors Focus Group thought it would be useful to be able to tell the court about the history of the current matter, in order for the magistrate to see it in context. This participant gave an example of a victim who had had boiling water thrown over her face by the offender, a serious matter in itself. However, in this case, there had been 'about thirty' previous breaches, but the victim had not wished to proceed with any of these. As the police prosecutor commented:
- When it takes someone thirty goes to go to court and get away from someone, it would be nice to be able to tell the court what has been happening, this is how we got here.<sup>380</sup>
- 5.23 Defence lawyers identified the general legal principle that an offender cannot be sentenced for behaviour that has not led to a conviction. Similarly to the prosecutors, several stated that as the vast majority of intervention orders are by way of consent without admission, none of the behaviour leading to the order is proven and cannot therefore be alleged at the breach proceedings. It is for these reasons that information about the original behaviour is not often provided to magistrates. Often defence lawyers themselves have no details about the original behaviour on hand at the breach hearing. Some participants thought that only when there is a link with the current (breach) behaviour *and* the original behaviour is 'not too aggravating' that it should be considered by the sentencing magistrate.<sup>381</sup> One defence lawyer argued that the original behaviour could be said to be broadly relevant to the breach of intervention order because it is a breach of a court order, that is, contempt of court. Thus, there is a necessary link with the original behaviour. However, this participant cautioned that the original behaviour should not necessarily affect the sanction.<sup>382</sup>
- 5.24 A few magistrates were of the opinion that information about the original behaviour and other contextual material cannot (legally) be considered. For example:
- I would never inquire as to the factual circumstances of the original order being made and this information is not part of the prosecution summary—nor would I expect it to be.<sup>383</sup>
- Original behaviour. Ordinarily this cannot be taken into account except by consent. How can a Court 'get in' the facts set out in a Complaint when the defendant does not appear to defend the complaint or an order is made without admission or a denial. How can the original behaviour be presented to a Court when there is a raft of allegations and the standard of proof is on the balance of probabilities? Sentencing facts ordinarily need to be admitted or proven beyond reasonable doubt.<sup>384</sup>
- 5.25 Police prosecutors and most magistrates (as well as victims) agree that information about the original behaviour and other contextual material would be useful when sentencing breaches. However, prosecutors are under the impression that such material is inadmissible, or alternatively that magistrates are not interested in it, and are therefore not including it in the evidence they present to the court.<sup>385</sup>

379 Victoria Police Focus Group (Region 4) (2 October 2008).

380 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

381 Meeting with Victoria Legal Aid (24 September 2008).

382 Meeting with Victoria Legal Aid (24 September 2008).

383 Sentencing Advisory Council, Survey of Victorian Magistrates (October 2008), Survey Number 13.

384 Sentencing Advisory Council, Survey of Victorian Magistrates (October 2008), Survey Number 13.

385 Discussion of police and police prosecutors' beliefs about what can be included in briefs is also in Chapter 2 at paragraphs [2.79] and [2.88] to [2.89].

*The current law—can courts consider original behaviour and evidence relating to the context of the breach?*

5.26 There is authority to say that a court may take into account the context of the offending when sentencing. The Victorian Court of Appeal in *R v Dunne*<sup>386</sup> held that it is appropriate to take into account the context of the offending in order to obtain a truer picture of the nature and degree of the offences charged. Although not directly on point—the case concerned an offender who had pleaded guilty to 31 child sexual offences in exchange for the prosecution withdrawing numerous others—the main principle is clearly applicable to breach of intervention order matters:

[I]n the determination of the appropriate and just effective sentence for the 31 counts, the fact of the commission of numerous other offences during the same period was relevant and admissible: it enabled a more realistic assessment to be made of the nature, degree and true significance of the criminality involved in the 31 offences and of the level of the appellant's personal responsibility. It showed, too, that they were not the offences of a person of otherwise good character ... To have regard to this 'context' is not to sentence the appellant for the uncharged acts.<sup>387</sup>

5.27 The *Victorian Sentencing Manual* states that a 'sentencer may refer to uncharged acts so as to provide context for the offences on the presentment, or in other words, so as to have regard to the full circumstances of the offence'.<sup>388</sup> Further, 'while having regard to uncharged offences in this way may lead to an increased sentence for an offender, it does not amount to punishing the offender for that conduct'. The *Sentencing Manual* cites a number of cases in support of this proposition.<sup>389</sup>

5.28 However, *R v De Simoni*<sup>390</sup> makes clear that, in taking into account the context of the offending, the court must take care not to punish an offender for an offence of which he has not been convicted.<sup>391</sup>

*The UK approach*

5.29 The *UK Guideline for Breach of a Protective Order* advises that the original conduct for which the order was imposed is relevant:

in so far as it allows a judgement to be made on the level of harm caused to the victim by the breach and the extent to which that harm was intended by the offender.<sup>392</sup>

386 [2003] VSCA 150 (Unreported, Batt, Vincent JJA and Cummins AJA, 24 September 2003).

387 Ibid [17] (Batt JA with whom Vincent JJA and Cummins AJA concurred). The appellant in *Dunne* subsequently sought special leave to appeal to the High Court but was unsuccessful: Transcript of Proceedings, *Dunne v The Queen* (High Court of Australia, Gummow and Hayne JJ, 22 February 2005). It should be noted that in *Dunne*, both sides agreed that the total number of assaults committed by the appellant numbered in the hundreds. Therefore, this authority may be of less weight in cases where there is no agreement on the facts constituting the background.

388 Judicial College of Victoria (2005), above n 125, [9.2.3.4].

389 *R v Rankin* [2001] VSCA 158 (Unreported, Winneke P, Vincent JA and O'Bryan AJA, 5 September 2001); *R v Dunne* [2003] VSCA 150 (Unreported Batt, Vincent JJA and Cummins AJA, 24 September 2003); *R v Reiner* (1974) 8 SASR 102 (Bray CJ), *R v H* (1980) 3 A Crim R 53, *R v C* (1982) 6 A Crim R 128, *J (Jnr) v R* (1989) 41 A Crim R 466 and *R v Godfrey* (1993) 69 A Crim R 318. Judicial College of Victoria (2005), above n 125, [9.2.3.4].

390 *R v De Simoni* (1981) 147 CLR 383.

391 Ibid. Mason and Murphy JJ agreed with Gibbs CJ. As Gibbs CJ held: '[T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence' (at 389).

392 Sentencing Guidelines Council [UK] (2006), above n 157, 4.



5.30 This is in order to contextualise the breach in a situation where the behaviour that led to the breach may seem innocuous in isolation, but when viewed in relation to the original conduct it may, in fact, have a significant impact on the victim. Similarly to the Australian authorities, however, the *Guideline* warns that care should be taken to ensure that the sentence is imposed for the breach alone and not for the original behaviour that led to the order being imposed.<sup>393</sup>

### *Victim impact statements*

5.31 Victim impact statements may be a useful mechanism by which the prosecution can present information about the context of the breach and its impact on the victim. However, victim impact statements are rarely prepared for breach of family violence intervention order proceedings. The police focus groups told the Council that although victim impact statements can be valuable, they can also expose the victim to cross-examination, so must be used with caution. Other reasons advanced by police for their infrequent use are that:

- Some victims are ambivalent about going to court and may therefore not be enthusiastic about making a victim impact statement (as one officer commented, 'how do you get that [a victim impact statement] from someone when she has been beaten to a pulp but by the time it is at court they are back together?').<sup>394</sup>
- Most of the information that would be contained in a victim impact statement is already in the victim's statement.<sup>395</sup>
- Constraints on police time and resources prevent them from assisting victims with victim impact statements for these (and other summary) matters.<sup>396</sup>
- Some police informants have the attitude that 'this is just a breach of intervention order so why bother'.<sup>397</sup>

5.32 As discussed above, most magistrates involved in the Council's survey indicated that there is generally insufficient information available to them at sentencing hearings for breaches. Some magistrates were of the view that victim impact statements would be 'extremely useful'<sup>398</sup> or 'of great benefit'<sup>399</sup> in sentencing breaches. One magistrate wrote:

We rarely get victim impact statements. Also the police summaries tend not to fully reflect the history or dynamics of the family violence. Accordingly the incident often appears out of context and may appear less serious than it actually is. For example, a perpetrator driving past the victim's work may not appear that serious but when considered in terms of the history of the violence it may be significant and have a significant impact on the victim.<sup>400</sup>

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393 Ibid.

394 Victoria Police Focus Group (Ballarat) (1 October 2008).

395 Victoria Police Focus Group (Region 4) (2 October 2008).

396 Victoria Police Focus Group (Region 4) (2 October 2008).

397 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008); Victoria Police Focus Group (Region 4) (2 October 2008).

398 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 1.

399 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 3.

400 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 10.

## Options for improvement

### Provision of information to the court

- 5.33 In the Council's draft report, a draft recommendation was included to the effect that police and police prosecutors should provide magistrates with sufficient information about the context of the breach at sentencing, including details about:
- the circumstances of the breach;
  - the original behaviour that led to the imposition of the order;
  - the history and dynamics of the victim and offender's relationship; and
  - the offender's prior offences and findings of guilt, particularly those relating to the victim in question and/or other family violence offences.
- 5.34 This draft recommendation was intended to respond to concerns expressed to the Council by magistrates that they currently have insufficient material to fully understand the implications of the breach matters before them.
- 5.35 The Council received a number of comments in relation to this draft recommendation. Some of those consulted supported including such a recommendation in the Council's final report. The Women's Legal Service endorsed the draft recommendation, in particular:
- police including 'the history of violence' in the police summary. The provision [of] 'the history of violence' will provide useful information to the court about the context in which breaches have occurred, as well as providing insight into what effect the breaches may have on the victim given the specific nature of past family violence.<sup>401</sup>
- 5.36 Similarly, the Victorian Aboriginal Legal Service supported the draft recommendation and 'agree[d] that when dealing with Family Violence matters appropriate sentencing decisions can only be reached with the [relevant] information'.<sup>402</sup> The Office of Public Prosecutions and the Federation of Legal Centres also supported the draft recommendation.<sup>403</sup> The Voices of Women for Justice expressed the view that appropriate sentencing can only take place where the sentencing court has the benefit of the full circumstances and background of the offence.<sup>404</sup>
- 5.37 Other submissions received by the Council did not support the inclusion of this draft recommendation. The Law Institute of Victoria submitted that 'there is a risk of offenders being sentenced for uncharged acts if the court is to take into account the circumstances leading to the granting of the original order'.<sup>405</sup> This is because many applications for family violence intervention orders include allegations of abuse that have not been tested in court. The majority of family violence intervention orders are made by consent without admissions, without any finding of fact by the court as to the circumstances.<sup>406</sup> As explained by the Magistrates' Court:

401 Women's Legal Service (Submission).

402 Victorian Aboriginal Legal Service Co-operative (Submission).

403 Federation of Community Legal Centres (Submission); Letter from the Office of Public Prosecutions dated 13 February 2009.

404 Telephone conversation with Voices of Women for Justice.

405 Law Institute of Victoria (Submission).

406 Law Institute of Victoria (Submission).

## Sentencing Practices for Breach of Intervention Orders

Although the [original family violence intervention order] application is a readily available record of the allegations that led to the intervention order, many offenders do not agree with its contents either when the order is made or at the time of prosecution. If an application is dealt with by consent it is almost always noted as a consent without admission of the allegations in the application. The prosecution cannot rely upon the consent. Even if an unqualified consent is given, it is a consent in a civil case where the applicant is only required to prove the case on the balance of probabilities. There is no judicial determination of the facts in issue.<sup>407</sup>

- 5.38 Similarly, the Victoria Police 'question[ed] whether it is appropriate for the unproven allegations that led to the making of the family violence intervention order to be raised at sentencing for a subsequent breach'.<sup>408</sup>
- 5.39 An unintended consequence of putting the circumstances that led to the imposition of the original order to the sentencing court is that if respondents become aware of this practice they may be less likely to consent to a family violence intervention order in the first place. This could lead to a greater number of contested applications. As applying for an intervention order can be very difficult for the affected family member, even where the order is made by consent, it would be counterproductive to introduce measures which may increase the likelihood of contested applications and discourage women from applying for intervention orders.
- 5.40 Even if there is no legal impediment to sentencing courts considering the circumstances that led to the imposition of the order, there may be some question as to the availability of such information for police prosecutors to put at the sentencing hearing. According to the Magistrates' Court, police would only have the relevant information where they were involved in the initial application for the family violence intervention order. Under the *Family Violence Protection Act 2008* (Vic), the affected family member can apply for an intervention order herself or the police can do so on her behalf.<sup>409</sup> If the police were not involved in the original intervention order application and have not had ongoing contact about breaches of the order, the only source of information will be the victim herself.
- 5.41 The LIV did not support the idea of relying on the victim's account of the circumstances leading up to the imposition of the breach, particularly if this account is included in a victim impact statement. In its view:
- it is unlikely that an historical account of events leading to the making of the original FVIO which is prepared by a victim would represent a balanced and objective view on which the court could rely ... Where there is no information available to police to corroborate the recollections of the victim ... the court ought not rely on the subjective account prepared by the victim for the purposes of sentencing.<sup>410</sup>
- 5.42 The LIV submitted that if such information were put to the court based on the victim impact statement, it is likely that there would be an increase in the number of contested breach matters. Further, if magistrates sentenced on the 'uncorroborated' version of events put forward by the victim, the LIV was of the view that this would also lead to an increase in appeals.

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407 Magistrates' Court of Victoria (Submission).

408 Victoria Police (Submission).

409 *Family Violence Protection Act 2008* (Vic) s 45. A person other than the affected family member can make an application with the affected family member's consent or where they are the parent or guardian of the affected family member or if granted leave to do so by the court. These provisions are a replication of section 7 of the *Crimes (Family Violence) Act 1987* (Vic).

410 Law Institute of Victoria (Submission).

- 5.43 In circumstances where the police are involved in the initial application, there will be some information available about the circumstances leading to the imposition of the order. However, while the information may be available, it will not necessarily be 'readily accessible, practical and/or appropriate to include'.<sup>411</sup> There are a number of practical issues associated with collating the relevant information, which would, according to Victoria Police, 'impose a significant resource burden ... requiring additional research and preparation time for both the informant and the prosecutor'.<sup>412</sup>
- 5.44 It was suggested by the Law Institute of Victoria that similar difficulties would arise if the prosecution led evidence about the history and dynamics of the relationship between the victim and the offender. While the Law Institute of Victoria accepted generally 'that a magistrate should be provided with all relevant information on the breach to enable the court to determine the appropriate sentencing disposition',<sup>413</sup> it had concerns about how this information would be obtained and presented to the court.
- 5.45 If the historical information included allegations of prior abuse that did not proceed to court, even if the police had access to this information, it would not necessarily be admissible in court. Victoria Police advised the Council that they have information about previous incidents such as:
- intelligence reports;
  - running sheets recording police attendance at family violence incidents; and
  - members' notes of attendance at family violence incidents.<sup>414</sup>
- 5.46 However, this material is not generally in a form that can be easily attached to a brief. As Victoria Police explained in its submission:
- [t]his information is collected and recorded for internal use rather than evidential purposes and is generally not for submission to a court. Using these records for the purposes of gaining contextual information relating to a breach may be inappropriate as:
- Disclosure of such information may jeopardise an ongoing investigation;
  - Running sheets are hard copy documents filed at the station level and exist primarily for record keeping purposes; and
  - Members' notes are generally relied on for the purposes of completing statements, incident/information report or briefs of evidence.<sup>415</sup>
- 5.47 Again, the only source of information about the relationship may be the victim herself. As pointed out by the Magistrates' Court and the Law Institute, any contextual issues raised by the victim are likely to be in dispute, which could lead to more contested hearings for breach matters. It could also lead to more victims being called to give evidence, which carries the risk of re-traumatisation and should therefore be avoided wherever possible.

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411 Victoria Police (Submission).

412 Victoria Police (Submission).

413 Law Institute of Victoria (Submission).

414 Victoria Police (Submission).

415 Victorian Police (Submission).

5.48 It would seem as though there are significant difficulties in increasing the amount of information presented to the court about the original behaviour which led to the imposition of the order and the history and dynamics of the relationship. The practical and legal difficulties in getting this information before the court as well as the possible flow-on effect of increasing the number of contested application and breach hearings, would suggest that the procedure described in the Council's draft recommendation is not a viable option. If one of the goals of the family violence protection regime is to ensure the safety and wellbeing of victims, it would be counterproductive to make recommendations that could expose them to greater difficulties as part of the court process.

### Statutory Guiding Principles

5.49 Another option to provide some context to magistrates when sentencing for breach matters may be the inclusion of statutory guiding principles, such as those found at section 37B of the *Crimes Act 1958* (Vic), in relation to sexual offences. The principles are intended to 'form the basis for the interpretation of particular provisions of the Crimes Act and the Evidence Act relating to sexual offences'.<sup>416</sup> The section provides:

#### 37B Guiding principles

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.<sup>417</sup>

5.50 The Aboriginal Family Violence Prevention and Legal Service and the Federation of Community Legal Centres supported the inclusion of statutory guiding principles in the *Family Violence Protection Act 2008* (Vic).<sup>418</sup> However, the Federation's submission focused on the efficacy of such principles in assisting magistrates in deciding whether or not to make a family violence intervention order in the first place.

5.51 Arguably, the preamble to the *Family Violence Protection Act 2008* (Vic) already provides some general context to the particular complexities of family violence. However, the Federation suggested that, while the preamble is 'of assistance, it does not have the same directive status as Guiding Principles'.<sup>419</sup>

5.52 There were other stakeholders who did not think that guiding principles, such as those in the *Crimes Act 1958* (Vic), would be of much use in sentencing. The Office of Public Prosecutions were of the view that 'the Preamble and Purposes of the *Family Violence Act 2008* give adequate guidance as to the intention of parliament'.<sup>420</sup>

416 Victoria, *Parliamentary Debates*, Legislative Assembly, 2185, 16 November 2005, Rob Hulls (Attorney-General).

417 *Crimes Act 1958* (Vic) s 37B.

418 Federation of Community Legal Centres (Submission); Women's Legal Service (Submission); Aboriginal Family Violence Prevention Legal Service (Submission).

419 Federation of Community Legal Centres (Submission).

420 Letter from the Office of Public Prosecutions dated 13 February 2009.

- 5.53 One of the main difficulties with the adoption of statutory guiding principles is that given their general nature there is little evidence that they would provide any assistance to magistrates when sentencing in a particular case. While they may provide broader context to the issue of family violence, they would not guide a magistrate in the assessment of the seriousness of an offence before the court, other than to indicate that all family violence offences are serious. Similarly, such principles would not assist the court in making a determination as to the impact of the offence on the victim. Anecdotal evidence from legal practitioners suggests that the sexual offences statutory guiding principles are not referred to at sentencing hearings.
- 5.54 It would seem that any general benefit, which may be sought by the inclusion of statutory guiding principles, should already be satisfied by the existing Preamble to the *Family Violence Protection Act 2008* (Vic).

#### *Victim Impact Statements*

- 5.55 Another option is to ensure that all victims are given the opportunity to make a victim impact statement. There will be many victims of family violence who do not wish to do so, particularly given that many are reluctant to have the matter prosecuted in the first place for fear of reprisals from the offender. Accordingly, the absence of a victim impact statement should never be taken to mean that an offence did not have a serious impact on a victim. However, every victim should be advised of their right to make a victim impact statement and referred to the Victim Assistance and Counselling Program for support and assistance in making the statement.
- 5.56 This is not to suggest that victim impact statements should be used as a 'de-facto summary of ... events'.<sup>421</sup> Under the *Sentencing Act 1991* (Vic), victim impact statements should include details as to 'the impact of the offence on the victim, and of any injury, loss or damage suffered by the victim as a direct result of the offence'.<sup>422</sup> In those cases where it is not immediately clear what impact the breach had on a victim, victim impact statements can be properly used to inform the court about how and why particular behaviour affected a victim in a certain way. It will assist the court to better contextualise the relevant behaviour.
- 5.57 Giving the victim an opportunity to make a victim impact statement may create some extra work for the police and a delay in proceedings. However, some of the magistrates who responded to the Council's survey were very clear that they would appreciate the extra information contained in a victim impact statement to assist them in what is a very difficult sentencing process.

#### *A Specialised Approach*

- 5.58 It may be that there are still some steps which could be taken to improve the information available to the court in those cases where it is most needed. Any additional information that can be provided to the court will be particularly useful in cases where the impact of the breach on the victim is not immediately obvious.

<sup>421</sup> Law Institute of Victoria (Submission).

<sup>422</sup> *Sentencing Act 1991* (Vic) s 95B.

## Sentencing Practices for Breach of Intervention Orders

- 5.59 When a breach is accompanied by physical violence or property damage, it is not difficult for the court to assess the impact of the offending on the victim. Cases where there is such tangible harm are regularly dealt with by the criminal justice system. The more difficult cases are those where there is non-physical harm and the breach behaviour may seem innocuous in any other context. It is in these cases that there is a perception, as identified by the Victorian Law Reform Commission, that the sentences imposed do not reflect the impact the offence has had on the victim.
- 5.60 An example of this might be where the affected family member is sent a text message by the defendant and it causes her significant distress. In the normal course of events, sending a text message is a 'harmless' thing to do; however, where the message is sent in contravention of a court order, the act constitutes a criminal offence. Further, if the text message includes words that would seem innocent to an outside observer, it may be difficult to assess what impact the message had on the victim. In a case such as this it is imperative that the court has some details as to why that particular text message had a significant impact on that particular victim.
- 5.61 This is something that police members could be mindful of when taking witness statements from victims in these cases. Where a breach involves conduct that would seem unthreatening in any other context, police should ask the victim to describe the impact of the breach on them and, where possible, to articulate why it had such an impact. As taking statements is part of the normal preparation of a brief of evidence, this should not constitute a significant increase in workload for the police.

*Summary*

- 5.62 Sentencing for family violence offences is a very complex exercise. Individual family violence incidents that come before the court can never really be understood in isolation. However, the criminal justice system is not well equipped to deal with anything other than discrete events, from both a practical and legal standpoint.
- 5.63 While there is authority that uncharged acts can be taken into account in criminal proceedings, the information available to substantiate these acts may not be of sufficient quality to put before the court. A significant increase in the police workload to improve that information is not desirable. Further, it would be detrimental if procedures were introduced which increased the likelihood that a defendant would contest either the initial application for an order or the breach proceedings.
- 5.64 The most useful approach may be to identify what information can be readily provided to the court. There is already scope for victim impact statements to be presented at a sentencing hearing; however, they are not being widely used. This may be due to a reluctance on the part of victims to engage in this process, but it may also be that victims are not aware that they can make such a statement. Police should consistently advise victims of their right to make a victim impact statement and ensure that they receive the support to do so by referring them to the relevant victim services.
- 5.65 Further, in those cases where it is not immediately clear what impact the breach has had on the victim, when preparing the witness statement police should ask victims about the impact of the breach. This information should be included in the statement that forms part of the brief of evidence and in the police summary and will assist magistrates in assessing the seriousness of the offence in that particular case by placing the breach in context.

## Abuse of Power

- 5.66 The courts have observed that in considering the gravity of an offence, the existence of a family relationship between an offender and victim is relevant.
- 5.67 For example, in the case of *R v MFP*,<sup>423</sup> one of the grounds of appeal against sentence was that the trial judge had erred in finding that the offence was aggravated because it occurred in a 'domestic context'. In dismissing this ground along with the other four grounds, Justice Ormiston held:
- I believe the judge was entirely justified in seeing it as a factor to be borne in mind, although in the context of the sentence I do not believe he placed especially heavy weight on it. Moreover, I think it can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish.<sup>424</sup>
- 5.68 In the Tasmanian Court of Appeal case of *R v Parker*,<sup>425</sup> the judge suggested that the domestic context of the assault was a circumstance of aggravation to an assault.<sup>426</sup> This decision followed the principles set out in a Canadian Court of Criminal Appeal case in which the court held that:
- [w]here a man assaults his wife or other female partner, his violence can be accurately characterised as a breach of a position of trust which he occupies. It is an aggravating feature. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situations in which they find themselves, which makes it difficult for them to escape.<sup>427</sup>
- 5.69 The UK Sentencing Guidelines Council referred to an abuse of trust and an abuse of power as aggravating factors.<sup>428</sup> The UK Council described an abuse of trust as a violation of the 'mutual expectation of conduct that shows consideration, honesty, care and responsibility' within a relationship.<sup>429</sup> Abuse of power was described by the UK Council as involving a:
- [r]estrict[ion of] another individual's autonomy ... [t]his involves the exercise of control over an individual by means which may be psychological, physical, sexual, financial or emotional.<sup>430</sup>

423 *R v MFP* [2001] VSCA 96 (Unreported, Ormiston, Callaway and Batt JJA, 15 June 2001). This case related to the sentence handed down to the applicant, who had been on trial for a series of violent offences against his wife at her property in rural Victoria. The applicant offered to plead guilty to a single count of recklessly causing serious injury and this offer was accepted by the Crown. He was sentenced to four years' imprisonment, with a non-parole period of one year.

424 *Ibid* [20] (Ormiston JA). Callaway and Batt JA concurred.

425 *R v Parker* (Unreported, Tasmanian Court of Criminal Appeal, Underwood J, 21 July 1994) cited in Warner (1996), above n 141.

426 *Ibid* 108.

427 *Brown* (1992) 73 CCC (3d) 242, 249 cited in Warner (1996), above n 141, 108.

428 Sentencing Guidelines Council [UK] *Overarching Principles: Domestic Violence Definitive Guideline* (2006) 4; Sentencing Advisory Panel [UK] *Consultation Paper on Domestic Violence and Sentencing* (2004) 12.

429 Sentencing Guidelines Council [UK] (2006), above n 428, 4.

430 *Ibid*.



- 5.70 The UK Council noted that these factors would not be as important in a situation where the victim and the offender had been separated for a long period. However, one submission to the Sentencing Guidelines Council pointed out that 'victims frequently continued to be at risk from elements of controlling behaviour even when they had separated'.<sup>431</sup> A participant in the Family Violence Service Providers Roundtable thought that abuse of trust and power should be an important factor regardless of whether the offender and victim are together or separated.<sup>432</sup>
- 5.71 The Community Legal Centres Roundtable thought that the abuse of trust and power within a family is one of the 'foremost aggravating factors'. Taking it into account as an aggravating factor counters the 'historical tendency to see family violence as private'.<sup>433</sup> The Federation of Community Legal Centres and the Women's Legal Service also supported the inclusion of breach of trust as a factor specifically relevant to this type of offending.<sup>434</sup> One magistrate described family violence offences as ones 'that strike at a person's very being. They involve an enormous breach of trust'.<sup>435</sup>
- 5.72 An example of how an offender can use their intimate knowledge of a victim as a mechanism of control is described in the following comments, taken from a family violence case study:
- Perpetrators of family violence often gain your trust, learn your insecurities and then abuse them. He knew how much my pets meant to me and he would often threaten to harm or kill my three dogs. I couldn't afford to put them in a kennel and I didn't want to leave without them because I knew what could have happened. When I was a teenager, I once returned home to find my pets dead—my father had just let them die. I vowed to never let that happen again.<sup>436</sup>

### Summary

- 5.73 People in family relationships generally have ongoing emotional, legal and financial ties, which can also include the joint care of children. They are therefore in a position to commit a breach that could more seriously affect a family member, not merely physically, but so as to cause mental anguish.

## Presence of Children

### *Effect of violence on children*

- 5.74 The *Family Violence Protection Act 2008* (Vic) acknowledges the serious effect that family violence can have on children. The preamble to the Act recognises that:
- children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing.<sup>437</sup>

431 Sentencing Guidelines Council, *Overarching Principles: Domestic Violence and Breach of a Protective Order: Response to Consultation* (2006) 5.

432 Family Violence Service Providers Roundtable (18 September 2008).

433 Community Legal Centres Roundtable (18 September 2008).

434 FCLC and WLC submission.

435 Meeting with Magistrate (September 2008).

436 Department of Justice, *CASE STUDY: Tilly* (2008) <[www.familyviolence.vic.gov.au/RealStories](http://www.familyviolence.vic.gov.au/RealStories)> at 6 January 2009.

437 *Family Violence Protection Act 2008* (Vic) Preamble.

- 5.75 In addition, the definition of family violence specifically includes 'any behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of 'any of the conduct described in the definition'.<sup>438</sup> The Act provides some examples of what this would constitute, including:
- overhearing threats of physical abuse by one family member towards another family member;
  - seeing or hearing an assault of a family member by another family member;
  - comforting or providing assistance to a family member who has been physically abused by another family member;
  - cleaning up a site after a family member has intentionally damaged another family member's property; and/or
  - being present when police officers attend an incident involving physical abuse of a family member by another family member.<sup>439</sup>
- 5.76 The Australian Bureau of Statistics reports that 34 per cent of women experiencing violence by a current partner and 39 per cent of those by a former partner say that children in their care witnessed the violence.<sup>440</sup> Researchers have identified family violence as having a highly negative impact on children.<sup>441</sup> The VLRC commented that living in a house where such violence occurs would be detrimental in itself—amounting in some cases to a form of child abuse in its own right—even where children do not directly witness the violence.<sup>442</sup>
- 5.77 Research has shown that witnessing the abuse of a parent is extremely traumatic for children. Flood and Fergus argue that witnessing violence against mothers or step-mothers can have profound psychological effects on children, comparable to the effects of being the direct victims of violence.<sup>443</sup> Children exposed to family violence are said to have:
- more health problems;
  - higher levels of depression and anxiety;
  - more attention difficulties;
  - higher rates of internalising and externalising behavioural problems;
  - aggressive behaviour;
  - difficulty sleeping;
  - diminished self esteem; and
  - less social and cognitive competence than children who were not exposed.<sup>444</sup>

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

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

440 Australian Bureau of Statistics, *Personal Safety Survey* (2005), Cat No. 4906.0 cited in Victorian Health Promotion Foundation (2006), above n 13, 14. In the USA, it is estimated (based on national surveys of family violence) that 3.3 to 10 million children per annum are at risk of witnessing various forms of family violence: Portwood and Heaney (2007), above n 270, 237.

441 Paradine and Wilkinson (2004), above n 20, 12; Sentencing Advisory Panel [UK] (2004), above n 428, 13.

442 VLRC (2006), above n 5, 97.

443 Michael Flood and Lara Fergus, *An Assault on Our Future: The Impact of Violence on Young People and Their Relationships* (2008), 8. The authors note that while it is important to recognise exposure to domestic violence as a form of child abuse, it is essential that the 'onus of responsibility for the abuse [remains] on the perpetrator of the violence itself, and not on the women who experience it' (9).

444 John Fantuzzo and Wanda Mohr, 'Prevalence and Effects of Child Exposure to Domestic Violence' (1999) 9(3) *The Future of Children* 21, 26–8; Joy Osofsky, 'The Impact of Violence on Children' (1999) 9(3) *The Future of Children* 33; World Health Organisation, *World Report on Violence and Health* (2002) 103; McKinnon (2008), above n 347, 3.

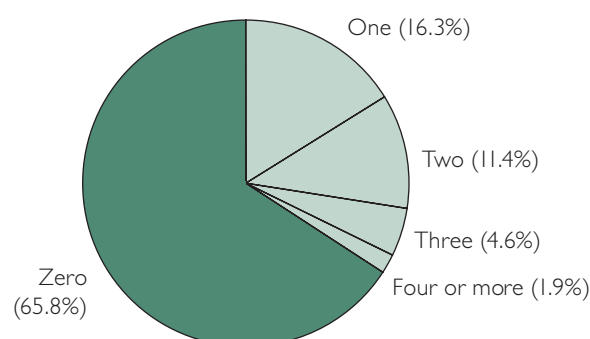
## Sentencing Practices for Breach of Intervention Orders

- 5.78 In addition, there are significant longer term effects. For example, young males who are raised in an environment of family violence are more likely to respond to situations in their own lives with violence, and girls who are raised in such an environment are more likely to become victims of family violence themselves.<sup>445</sup> Researchers report that the impact of exposure in childhood to multiple adverse experiences such as family violence is 'predictive of adverse health outcomes in adult life', such as a four to twelve fold increased risk of depression, drug abuse, alcoholism and attempted suicide.<sup>446</sup>
- 5.79 Heather Douglas comments that children often become 'bargaining tools' in domestic violence matters and such behaviour adds 'another layer of abuse'.<sup>447</sup> Some studies have shown a link between family violence and child abuse, with one estimate being that children living in households where family violence occurs are up to 15 times more likely to suffer child abuse than other children.<sup>448</sup>
- 5.80 There are other immediate effects on children who witness family violence. For example, children may be forced to leave the family home because of violence, being at risk of physical harm themselves, either accidentally or trying to prevent violence against their mother.<sup>449</sup>

*Data*

- 5.81 According to the data examined by the Council, a substantial proportion of aggrieved family members in breach cases were children.<sup>450</sup> At least one child under 18 was included on 43.6 per cent of breaches of intervention orders. Of these, most children were aged under ten years. A child under ten was on the original intervention order for about one third (33.8 per cent) of offenders sentenced for breach of an intervention order (see Figure 25). The likely reason for the high representation of children is the frequency of the scenario in which a parent includes their children as aggrieved family members on the intervention order. However, as discussed above, even if the children may not always have been the direct victims of the family violence, living in an environment in which family violence is occurring is highly detrimental.

**Figure 25:** The percentage of offenders sentenced for breach of a family violence intervention order by number of children under 10 years on original order, 2004–05 to 2006–07



445 Ibid. See also Victorian Health Promotion Foundation (2006), above n 13, 14.

446 Jill Astbury *et al.* (2000), above n 357, 427.

447 Douglas (2008), above n 47, 463.

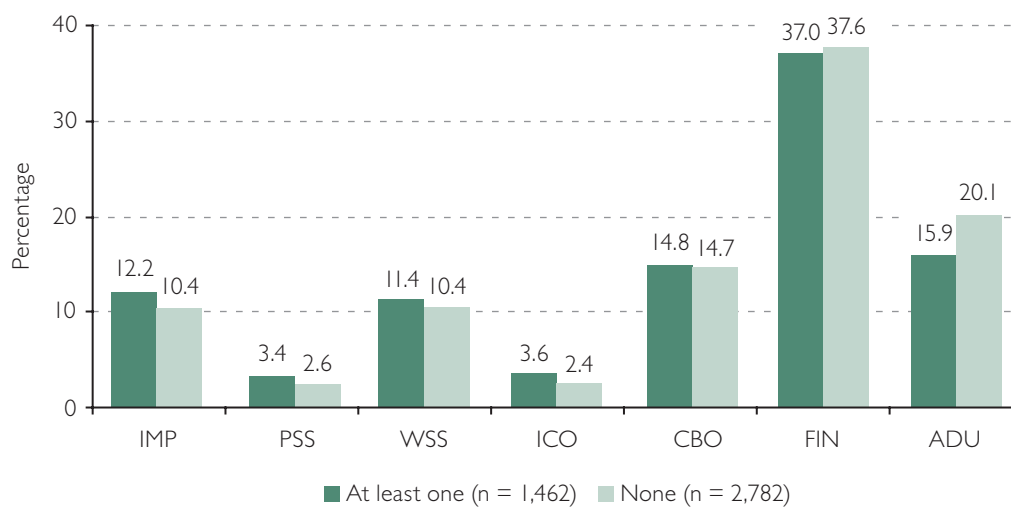
448 Mary McKernan McKay, 'The link between domestic violence and child abuse: assessment and treatment considerations', (1994) 73 *Child Welfare*, 29.

449 Deborah Epstein, 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System' (1999) *Yale Journal of Law and Feminism*, 3, 8–9.

450 Figures 4 and 6 in Chapter 2 indicate the percentage of aggrieved family members who had a family violence intervention order issued by age group and relationship of aggrieved family member for the years 2004–05 to 2006–07.

5.82 Due to the complexity of sentencing decisions and the impossibility of obtaining detailed data on Magistrates' Court decisions, the effect of the presence of children on sentencing is difficult to assess. However, to provide some indication of the possible impact, sentencing practices for breaches where children under 10 years old were included on the original intervention order were examined. Figure 26 shows the percentage of defendants sentenced to the major sentence types according to the presence of children under 10 on their intervention order. The presence of children was associated, but only very weakly, with more severe penalties. Imprisonment, partially suspended sentences, wholly suspended sentences, and intensive correction orders were imposed at slightly higher rates on offenders with a child under 10, whereas fines and particularly adjourned undertakings were slightly more likely to be imposed on offenders with no children under 10 on their intervention orders.

Figure 26: Percentage of defendants sentenced for breach of a family violence intervention order by sentence type and presence of children under 10 years on original intervention order, 2004–05 to 2006–07



### Consultation

5.83 In its June 2008 report, *Breaching Intervention Orders*,<sup>451</sup> the Sentencing Advisory Council considered whether an offence of aggravated breach should be created. While the Council ultimately decided against recommending the creation of an aggravated breach offence, the comments made in consultations are worth considering as to whether or not the presence of children should be an aggravating factor taken into account by the sentencing court.<sup>452</sup>

5.84 A number of people suggested that the presence of a child should be specified in legislation as an aggravating factor. However, others were of the view that including the presence of a child as an element of an aggravated offence would suggest that a breach that was committed against the victim in the absence of a child was somehow less serious.<sup>453</sup>

451 Sentencing Advisory Council (2008), above n 3, 47.

452 Ibid.

453 Ibid 33–4.

- 5.85 The current consultations produced a variety of views about the importance or otherwise of the presence of children as a factor in sentencing breaches. One participant from the Community Legal Centres Roundtable expressed the view that it is an important factor, which magistrates do not currently place much weight on in sentencing breach matters.<sup>454</sup> This participant thought that with the commencement of the 2008 legislation, magistrates may 'start to realise that this is a very important factor'.<sup>455</sup> Others thought that the presence of a child might sometimes not be relevant to the sentencing process, that is, it will not always be an aggravating factor.<sup>456</sup>
- 5.86 In a meeting with a group of magistrates, one magistrate commented that the presence of a child would not be considered an aggravating factor without some evidence of the child being aware of the violence or there being a 'particular impact on the child'.<sup>457</sup> This is arguably contrary to the views of the VLRC and the UK Sentencing Guidelines Council, who recognise that children can be negatively affected by family violence that occurs in their household, even if they do not directly witness it. In terms of an apparent 'impact on the child', magistrates should be aware that some effects may not be immediately apparent, but may be nonetheless serious and long term.
- 5.87 A participant from a victim's advocacy group commented that perpetrators often use children to terrorise their partners, for example by threatening to kill them. Such threats are part of the manipulation and control exercised by family violence perpetrators and can cause such crippling fear that a woman may be less likely to report breach behaviour, which leaves her and her children vulnerable to further violence.<sup>458</sup>
- 5.88 The Federation of Community Legal Centres were of the view that:  
the presence of children should go to an interpretation of a more serious breach where the original order was imposed to protect children. Our support here is on the basis that a multi-factorial approach to assessing breach seriousness should mean that a context where children are not present will not necessarily result in a lesser breach. This therefore avoids a simple equation of breach contexts without the involvement of children as automatically 'less serious'<sup>459</sup>
- 5.89 Victoria Police submitted that it currently collects information as to 'whether children were present at the time of the breach or its aftermath' for inclusion in briefs of evidence.<sup>460</sup>

#### *Other jurisdictions' approach to the presence of children*

- 5.90 Tasmanian courts sentencing an offender for breach are permitted to consider as an aggravating factor in a breach offence the fact that the offender knew or was reckless as to whether a child was present at the premises at the time of the offence or knew that the affected person was pregnant.<sup>461</sup>

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454 Community Legal Centres Roundtable (18 September 2008).

455 Community Legal Centres Roundtable (18 September 2008).

456 Meeting with Victoria Legal Aid (24 September 2008).

457 Meeting with Magistrates (July 2008).

458 Meeting with Voices of Women for Justice (1 October 2008).

459 Federation of Community Legal Centres (Submission).

460 Victoria Police (Submission).

461 *Family Violence Act 2004 (Tas)* s 13(a).

- 5.91 Similarly, in Western Australia, the *Restraining Order Act 1997* (WA) provides that it is an aggravating feature of the offence of breach where a 'child with whom the offender is in a family and domestic relationship is exposed to an act of abuse'.<sup>462</sup>
- 5.92 Some American states have legislated to allow additional charges where family violence is committed in the presence of a child. Some see this as a positive development and a sign that the criminal justice system is taking seriously the impact of family violence on children. However, others see it as imposing further trauma on children by involving them in the criminal justice system, and a devaluation of the family violence offence, as well as placing mothers at risk of being charged with 'failure to protect'.<sup>463</sup>
- 5.93 The presence of children was seen as an aggravating factor by magistrates in the UK study conducted by Gilchrist and Bilsett.<sup>464</sup> However, some magistrates also saw the involvement of children as a reason for leaving the matter to be dealt with under family law rather than criminal law.
- 5.94 The UK Sentencing Guidelines Council included 'impact on children' as an aggravating factor in its guidelines on sentencing for family violence and sentencing for breach of protective orders.<sup>465</sup> They based this on the recognition of the negative effects of family violence on children, whether or not they directly witness such violence. The UK Council also stated that where contact arrangements are used to provide an opportunity for an offender to commit an offence, this will be considered an aggravating factor.<sup>466</sup>

### Summary

- 5.95 There is widespread acknowledgement that exposing children, either directly or indirectly, to family violence has highly detrimental short- and long-term effects. The data show that children are involved in a high percentage of breach matters reaching the sentencing stage. Given that many breaches are not reported to police, and many reported breaches are not prosecuted for various reasons, it is likely that far greater numbers of children are exposed to family violence than the data indicate. The *Family Violence Protection Act 2008* (Vic) acknowledges the serious effect that family violence can have on children.
- 5.96 It is important that magistrates take into account exposure of children to family violence when sentencing for breaches of family violence intervention orders, and that they express appropriate condemnation of it in open court. This may provide some degree of general deterrence and also play an educative role.
- 5.97 Police officers also have a vital role to play. They should be mindful during their investigations to collect evidence about the presence of any children at the time of the breach or its aftermath. This evidence will form an important part of the context of the breach.

<sup>462</sup> *Restraining Order Act 1997* (WA) s 61(4). Magistrates have discretion to decide whether or not any factor is an aggravating factor for the purposes of any offence to be aggravating: s 61(5).

<sup>463</sup> Portwood and Heaney (2007), above n 270, 243. The examples given are the Utah Criminal Code and California Penal Code.

<sup>464</sup> Elizabeth Gilchrist and Jacqueline Blissett, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41(4) *Howard Journal* 348, 358.

<sup>465</sup> Sentencing Guidelines Council [UK] (2006), above n 428, 5; Sentencing Guidelines Council [UK] (2006), above n 157, 6.

<sup>466</sup> *Ibid.*

## Attitude of the Victim

- 5.98 The extent to which sentencers should take into account the attitude of the victim is generally a controversial area of sentencing; however, it is particularly fraught in the case of family violence because of the likelihood of an ongoing relationship between the victim and the accused. Should magistrates give the same weight to a victim's view that a very harsh sentence is appropriate as to a view that a more lenient sentence should be imposed, for example because the victim and the offender have reconciled? Reducing a sentence on the basis of the victim's views would be inconsistent with the principle of general deterrence.<sup>467</sup> It also detracts from the fact that a breach of intervention order is a breach of a court order. There is an additional danger that, if the victim has an active role in the sentencing process, the perpetrator will blame the victim for the outcome and the violence may escalate.<sup>468</sup>
- 5.99 Further, it is impossible for sentencers to be confident that the victim 'knows best'. As Jane Ursel comments:
- The incredible importance of respecting the victim and giving her a voice in the system has at times had tragic consequences. We can count the number of homicides that have been a result of judges respecting the woman's assessment that she is not in danger and that she supports her husband's bail request.<sup>469</sup>
- 5.100 In the Court of Appeal case of *R v Sa*,<sup>470</sup> Eames J said in considering the weight to be given to the victim's desire for lenience:
- One reason why courts do not allow the wishes of the victim to determine the sentence to be imposed is that the victim might not always be able to assess what is in his or her own best interest. For example, when considering what weight to give to factors of general and specific deterrence in a case of a woman assaulted by her partner a sentencing judge would be minded to have regard to the imperatives which might motivate a battered wife to plead for leniency towards her attacker. In such circumstances the sentencing judge might be cautious about giving undue weight to such a plea for leniency.<sup>471</sup>
- 5.101 Warner has suggested that in Australia, the extent to which the sentencing court can take into account the wishes of the victim is not entirely clear. After an analysis of a number of Court of Appeal cases, she concluded that there is no set rule.<sup>472</sup> She refers to a case where the Tasmanian Court of Criminal Appeal dismissed an appeal where the appellant had argued that the magistrate gave insufficient weight to the views of the victim in imposing a nine-month custodial sentence. The court held that the Magistrate had not erred:
- in concluding that despite the victim's wishes the offence was so grave and so serious and the need for deterrence so significant, that he could not refrain from imprisonment to suit the wishes of the victim.<sup>473</sup>
- 5.102 However, the WA Court of Appeal reached a different outcome in the case of *R v H*.<sup>474</sup> The offender had committed three serious sexual assaults against the victim. The victim and the

467 Warner (1996), above n 141, 112.

468 Anna Stewart, 'Domestic Violence: Deterring Perpetrators', Paper presented at the 3rd National Outlook Symposium on Crime in Australia, Mapping the Boundaries of Australia's Criminal Justice System convened by the Australian Institute of Criminology (Canberra, March 1999), 6. See also Warner (1996), above n 141 and Sentencing Advisory Panel [UK] (2004), above n 428, 11.

469 Jane Ursel, 'The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study', (1996-97) 8 *Current Issues in Criminal Justice*, 263, 274.

470 *R v Sa* [2004] VSCA 182 (Unreported, Callaway, Buchanan and Eames, JJA, 7 October 2004).

471 *Ibid* [39].

472 Warner (1996), above n 141, 109.

473 *Coulthard v Kennedy* (1992) 60 A Crim R 417. See discussion in Warner (1996), above n 141, 110.

474 (1995) 81 A Crim R 88 cited in Warner (1996), above n 141, 110.

offender were in an ongoing relationship and the victim stated that she had forgiven the offender. The court sentenced the offender to two years and 11 months' imprisonment on each count to be served concurrently. The sentence was appealed on the basis that the court did not give enough weight to the victim's views. The appeal was allowed by a majority of the court and the sentence reduced to a probation order. Justice Kennedy saw the issue as one of hardship to the offender's family—in this case the victim—and felt that this justified the imposition of a non-custodial sentence.<sup>475</sup> Chief Justice Malcolm felt that the wishes of the victim were a significant consideration and in this case maintaining the family unit acted as a mitigating factor.<sup>476</sup>

- 5.103 In the Victorian County Court case of *R v Bardsley*<sup>477</sup> the offender pleaded guilty to two counts of false imprisonment, one count of threat to kill and one of breaching an intervention order. The victims of these offences were his parents. The offender's father wrote to the judge advising that his son had not approached the family home since the incident in question and urging that his son not be incarcerated. Judge Gaynor commented in her sentencing remarks that '[t]his has a significant effect on my decision to accede to your counsel's request that you be placed on a further community-based order'.<sup>478</sup>
- 5.104 There are higher court cases that suggest that the attitude of the victim to the sentence is generally irrelevant.<sup>479</sup> As Justice Howie observed in *R v Palu*:
- A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences. Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.<sup>480</sup>
- 5.105 However, there are other cases that hold that material suggesting the victim has forgiven the offender may indicate that the effects of the offence have not been long-lasting, which will have a mitigating effect on the sentence.<sup>481</sup>

### *The UK approach*

- 5.106 In the United Kingdom, researchers found that the state of the relationship between the offender and the victim is a factor that influences the sentencing of family violence offenders.<sup>482</sup> In cases where couples were still together, there was less likelihood of a conviction being imposed. Dinovitzer and Dawson discuss research which found that, in cases in which the victim suffered serious injuries, offenders in intact relationships were more likely to receive a sentence of imprisonment; however, they received shorter sentences than offenders who were not in intact relationships.<sup>483</sup>

475 Warner (1996), above n 141, 110.

476 Ibid 110–11.

477 (Unreported, County Court of Victoria, Gaynor J, 16 September 2002).

478 Ibid 7.

479 *R v Pritchard* (1973) 57 Cr App R 492; *R v Palu* (2002) 134 A Crim R 174.

480 *R v Palu* (2002) 134 A Crim R 174 [37] (citations omitted).

481 *R v Skura* [2004] VSCA 53 (Unreported, Buchanan, Eames JJA and Smith AJA, 7 April 2004) [48].

482 Antonia Cretney and Gwynn Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36(2) *Howard Journal* 146, 153.

483 Ronit Dinovitzer and Myrna Dawson, 'Family-Based Justice in the Sentencing of Domestic Violence' (2007) 47 *British Journal of Criminology* 655, 658.



- 5.107 Cretney and Davis found that magistrates' justifications for reduced penalties in these circumstances referred to the question of hardship. If magistrates believed that the parties were still in a relationship, they did not wish to impose penalties that would affect the victim as well as the offender—either as a financial burden or in the separation and stigma of a custodial sentence.<sup>484</sup>
- 5.108 Such an approach has been criticised on the basis that courts are placing more importance on keeping the family unit together than on the protection of women and children. Warner suggests that 'cases of domestic violence ... do not seem to be appropriate cases for courts to be espousing the virtues of family life'.<sup>485</sup> While the criminal justice system must be mindful not to ignore the wishes of victims, allowing the victim's desire to 'keep the family together' to be determinative in the sentencing process will expose the system to the criticism that 'judges seek to uphold an idealised construction of the family that minimises the context of serious and violent injury'.<sup>486</sup> This issue is particularly pertinent in family violence cases, where the sentencer cannot be sure that the perpetrator has not pressured the victim into making a plea for mercy.
- 5.109 The UK Sentencing Guidelines Council was of the view that a sentence should be imposed based on the seriousness of the offence and not the wishes of the victim. They saw this as particularly relevant in relation to domestic violence because:
- the victim should not feel responsible for the sentence imposed;
  - there is a risk that the victim will be subject to threats or at the very least, put into fear by the offender if they do not express a wish for a lenient sentence; and
  - the risk of such threats will increase if there is a general belief that the severity of the sentence is in some part based on the wishes of the victim.<sup>487</sup>
- 5.110 It should be noted, however, that the UK Sentencing Guidelines Council acknowledged that there may be very limited circumstances in which the court may give effect to the wishes of the victim for a more lenient sentence in the interests of continuing the relationship between the parties. In such a case:
- [t]he court must, however, be confident that such a wish is genuine, and that giving effect to it will not expose the victim to a real risk of further violence. Critical conditions are likely to be the seriousness of the offence and the history of the relationship.<sup>488</sup>

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484 Cretney and Davis (1997), above n 482, 153.

485 Warner (1996), above n 141, 112.

486 Ibid.

487 Sentencing Guidelines Council [UK] (2006), above n 428, 6.

488 Ibid.

### Consultation

- 5.111 Many of the police officers who were consulted expressed frustration that victims often wish to withdraw breach and accompanying charges.<sup>489</sup> Some victims are living with the offender again by the time the breach hearing occurs and no longer wish to proceed, even though the breach incident may have involved physical violence. A participant in the Ballarat police focus group mentioned a case where the victim did not want to proceed, despite the fact that there was an attempted murder charge alongside the breach. Another participant said that police will generally not proceed with charges against a victim's wishes, unless there has been a serious injury. As one person stated, '[i]t depends on the evidence. If you have no physical evidence or witnesses then you are bound by the victim's decision'. These responses support Douglas's argument, that '[r]esearch suggests that when women seek to prevent criminal prosecutions, police are likely to support them'.<sup>490</sup>
- 5.112 None of the groups who were consulted thought that the views of the victim on the sanction should be determinative in breach of family violence intervention order matters.<sup>491</sup> A community legal centre representative thought that if magistrates give victims' views too much weight, this could lead to enormous pressure and possibly bullying of victims. Rather, the totality of circumstances should be taken into account.<sup>492</sup> A participant in the Family Violence Service Provider Roundtable suggested that it may be placing too much of a burden on a victim to ask her to give her view as to the sanction, but others felt that magistrates should ask women what they want in terms of sanctions. However, 'support work' would be very important to mitigate the pressure the victim would be exposed to.<sup>493</sup>
- 5.113 Other participants suggested that there is a tension in balancing the importance of giving victims a voice against the possibility of exposing them to further violence and/or pressure from family members. It was put to the Council that some women are glad to have the onus of responsibility removed and to leave the decision to the court.<sup>494</sup>

### Summary

- 5.114 Although prosecutors and courts should not ignore victims' wishes in regards to sentence, they must be extremely cautious in giving weight to the views of victims in breach matters. Given the degree of control and intimidation exerted by many family violence offenders over their victims, there is real potential for victims to succumb to actual or perceived pressure from offenders. As Douglas writes, 'prosecutors need to accommodate women's agency but also her personal danger in a multifaceted consideration of whether and what to charge in each individual case'.<sup>495</sup>
- 5.115 Further, magistrates should consider the issue of how the offender's perceptions may impact on a victim's safety. If, for example, an offender perceives that the victim's wishes played a part in the sentence handed down, this may place the victim at risk of escalated violence.

489 All three police focus groups—Melbourne, Region 4 and Ballarat—were unanimous in their belief that victims often want charges dropped.

490 Douglas (2008), above n 47, 452.

491 For example, Federation of Community Legal Centres (Submission) and Women's Legal Service (Submission).

492 Community Legal Centres Roundtable (18 September 2008).

493 Family Violence Service Providers Roundtable (18 September 2008).

494 Family Violence Service Providers Roundtable (18 September 2008).

495 Douglas (2008), above n 47, 453.

## Contribution of the Victim to the Offence

5.116 Under section 125 of the *Family Violence Protection Act 2008* (Vic), an aggrieved family member cannot be found guilty of aiding and abetting the commission of a summary offence<sup>496</sup> because the person 'encourages, permits or authorises conduct by the respondent that contravenes the family violence intervention order or family violence safety notice'. One of the examples of this type of conduct provided in this section is 'the protected person invites or allows the respondent to have access to the residence or another place in contravention of the family violence intervention order or family violence safety notice'.

### *How courts view victim contribution*

5.117 A court may take into account the contribution of the victim in sentencing. In the Council's survey of Victorian magistrates, one magistrate commented, '[I] think if the victim is initiating contact with the defendant which is the nature of the breach, this is highly relevant'.<sup>497</sup>

5.118 Another magistrate admitted to experiencing difficulties in:  
deciding what impact (if any) an invitation to attend at the 'prohibited premises', or meeting where there is to be no contact, by the AFM [aggrieved family member] should have on sentencing the defendant on a breach.<sup>498</sup>

5.119 In her 2003–04 study of prosecutions of intimate partner violence, Heather Douglas examined thirty cases heard in Queensland.<sup>499</sup> She found that, on many occasions, appellants argued that certain behaviours of the victim should be taken into account in their favour. Judges generally did not state whether or not they found these matters to be favourable to the offender's case.<sup>500</sup> In one of the cases, *R v Von Pein*,<sup>501</sup> the victim hit the offender and then he assaulted her. In another, *R v Ketchup*,<sup>502</sup> the victim was drunk. While the Court of Appeal in each case saw these as 'relevant considerations', they did not adjust the sentence imposed by the court at first instance.<sup>503</sup>

5.120 In a study conducted by the Judicial Commission of New South Wales, magistrates were given vignettes involving breaches of apprehended violence orders and asked to consider the appropriate sentence in each case. In one vignette, 55 per cent of magistrates mentioned that the aggrieved person had let the defendant into the house in a particular scenario and 42 per cent thought this mitigated the breach.<sup>504</sup>

496 Pursuant to s 52 of the *Magistrates' Court Act 1989* (Vic).

497 Sentencing Advisory Council, *Survey of Victorian Magistrates* (October 2008), Survey Number 13.

498 Sentencing Advisory Council, *Survey of Victorian Magistrates* (October 2008), Survey Number 9. A Victoria Legal Aid lawyer with whom the Council consulted recognised the difficulty courts have in assessing the impact of a victim's contribution to a breach: 'If a woman invites the man back, this is still a breach, but very difficult for the courts to weigh up. But this might be reflected in the sentence, particularly where the victim and defendant have reconciled'. Meeting with Victoria Legal Aid Roundtable (24 September 2008).

499 Douglas (2004), above n 356.

500 Ibid 96.

501 *R v Von Pein* [2002] QCA 385 (Unreported, de Jersey CJ, Helman and Jones JJ, 25 September 2002), cited *ibid* 97.

502 *R v Ketchup* [2001] QCA 501 (Unreported, McMurdo P, Davies and Williams JJA, 15 November 2001), cited *ibid* 97.

503 Ibid 97.

504 Judicial Commission of New South Wales, *Apprehended Violence Orders: A Survey of Magistrates*, Monograph Series Number 20 (1999) 68–9.

### UK approach

- 5.121 The UK *Guidelines for Breach of a Protective Order* provides that where an order is breached in circumstances where the victim has contacted the offender, this should be considered a mitigating factor. However, the UK Council is also careful to point out that ‘it is the responsibility of the offender and not the victim to ensure that the order is complied with’.<sup>505</sup> The UK Council also advised the court to look at the ‘history of the relationship and the specific nature of the contact’ in deciding whether the behaviour is mitigating.<sup>506</sup> It should be noted that there was some concern about ‘victim-blaming’ in response to the Sentencing Advisory Panel’s consultation paper in relation to this factor, which led to the inclusion of the italicised wording in the guideline.<sup>507</sup>

### Consultation

- 5.122 Some participants queried the quality of the aggrieved family member’s consent in inviting a perpetrator into the home. It was suggested that there may be cases in which the victim is under some form of duress.<sup>508</sup> Also, such behaviour has to be seen in light of the cycle of violence. The woman may hope that her partner will ‘behave’—in the honeymoon period, for example.<sup>509</sup>
- 5.123 The Federation of Community Legal Centres were of the view that ‘the contribution of the victim to the breach should be very cautiously, if ever, considered as relevant to sentencing’.<sup>510</sup> Similarly, the Women’s Legal Service submitted that:
- While it may seem fair to take the contribution of the victim into account in sentencing for breaches of intervention orders, our experience indicates that there is real danger that this could be inappropriately misused against the victim. It is important to avoid the historical prejudicial attitudes towards family violence in which a victim’s behaviour is seen as ‘provoking the breach’.<sup>511</sup>
- 5.124 One magistrate said that defence lawyers often try to argue that the victim ‘aided and abetted’ the breach, but that such arguments generally held little sway.

### Summary

- 5.125 Clearly, courts may generally take into account the contribution of the victim to any breach of intervention order. However, given the unique dynamics of family violence situations, courts need to be cautious in assessing the degree to which victim behaviour may mitigate the seriousness of the offence. Again, a solid understanding of family violence issues and some detailed knowledge of the context of the particular breach will assist magistrates in this task.

505 Sentencing Guidelines Council [UK] (2006), above n 157, 6.

506 Ibid.

507 Sentencing Guidelines Council [UK] (2006), above n 431, 14.

508 Family Violence Service Providers Roundtable (18 September 2008).

509 Family Violence Service Providers Roundtable (18 September 2008).

510 Federation of Community Legal Centres (Submission).

511 Women’s Legal Centre (Submission).

## Vulnerability of the Victim

- 5.126 The UK Sentencing Advisory Panel identified the vulnerability of the victim as a possible factor for consideration in sentencing for offences occurring in a domestic context.<sup>512</sup> The UK Sentencing Guidelines Council ultimately decided that, where for cultural, religious, language, financial or any other reasons the victim is more vulnerable, particularly where the vulnerability acts to make it more difficult to leave a violent relationship and the offender exploits the vulnerability, a higher penalty is warranted. The Council also took the view that age, disability, pregnancy or having recently given birth could also make a victim more vulnerable. In addition, any steps taken to prevent the victim reporting an incident or obtaining assistance were considered to aggravate the offence.<sup>513</sup>
- 5.127 It is well established that Indigenous women are more likely to experience violence than their non-Indigenous counterparts.<sup>514</sup> The high incidence of violence generally in Indigenous communities is most often attributed to trauma arising from European colonisation of Australia. In its 2008 report *Risk Factors in Indigenous Violent Victimisation*, the Australian Institute of Criminology found that, in Victoria, rates of family violence assault for Indigenous populations were 4.6 times higher, in New South Wales 6.4 times higher, 14 times higher in Queensland and 16.3 times higher in the Northern Territory, than for non-Indigenous populations.<sup>515</sup> It should be noted that, although reporting rates for family violence matters are low across the general population, they may be even lower for Indigenous women, given the traditional mistrust of police within these communities, as well as other barriers to reporting and proceeding with criminal cases faced by women in close-knit, isolated communities.<sup>516</sup> In light of these particular difficulties, it may be that family violence against Indigenous women would be better dealt with through a specialised 'integrated court and support system that works in partnership with Indigenous communities'.<sup>517</sup>
- 5.128 In response to the draft report, the Federation of Community Legal Centres and the Victorian Aboriginal Legal Centre were both supportive of the use of family violence specific restorative justice programs for the Indigenous community. Conversely, the Aboriginal Family Violence Prevention and Legal Service Victoria 'urges extreme caution with regard to a restorative justice response to family violence offending'.<sup>518</sup> This view is based on the experience of the service that:
- most Indigenous women seeking [their] assistance do not want to face the perpetrator in dispute resolution settings and do not want the broader Indigenous community to know the circumstances of the family violence or the action they have taken. Significant power imbalances between perpetrators and women and children together with high levels of victim/survivor trauma, the often serious nature of the offending and ongoing safety concerns are other factors relevant to a restorative justice approach.<sup>519</sup>

512 Sentencing Advisory Panel (2004), above n 428, 12.

513 Sentencing Guidelines Council (2006), above n 157, 5.

514 See for example Victorian Health Promotion Foundation (2006), above n 13, 13.

515 Colleen Bryant and Matthew Willis, *Risk Factors in Indigenous Violent Victimisation*, Technical and Background Paper 30, Australian Institute of Criminology (2008), 21. The AIC derived these rates from police data from NSW, Victoria, Queensland and Northern Territory police. The Victorian Indigenous Family Violence Taskforce, *Final Report* (2003) 4 reported that Indigenous women are eight times more likely to experience family violence than non-Indigenous Australians. See also VLRC (2006), above n 5, 37–38 and 201–205.

516 Douglas (2008), above n 47, 443, cites research that suggests that under-policing in Indigenous communities means a lack of support for women who do report family violence. See also Natalie Plumstead, *Koorie Family Violence List Discussion Paper* (2008) 2.

517 Plumstead (2008), above n 516, 13. This paper discusses a number of examples of programmes developed overseas which could be implemented in Victoria.

518 Aboriginal Family Violence Prevention and Legal Service (Submission).

519 Ibid.

- 5.129 Women from non-English speaking backgrounds<sup>520</sup> and women with disabilities<sup>521</sup> may be especially vulnerable groups in relation to family violence.<sup>522</sup> Some barriers for these women in accessing the justice system are not knowing that what has been done to them is wrong at law, difficulty in accessing information about the process, complex courtroom language and lack of appropriate support throughout the criminal justice process.<sup>523</sup> There may also be considerable pressure from extended families in some communities for women not to report or proceed with criminal proceedings for breach of intervention orders.
- 5.130 If the woman is from a non-English speaking background, she may fear deportation if she does not maintain her marriage, or believe that providing financial support to her family in her country of origin is more important than her own personal needs.<sup>524</sup> This may be particularly significant where the woman does not have permanent residency in Australia. The Melbourne police prosecutors highlighted some of the issues with people from particular communities not understanding Australian law. For example:
- We have a whole new group of people coming through the courts who believe they have the right to assault or mistreat their wife, and they're allowed to punish them within their marriage.<sup>525</sup>
- 5.131 Rural women are another group that may be considered vulnerable in family violence matters.<sup>526</sup> A 2000 literature review referred to research indicating that there is a higher reported rate of family violence in rural and remote areas than metropolitan areas.<sup>527</sup> During the Council's consultations, a Ballarat-based victims' advocacy group told the Council that women who have suffered marital breakdown and family violence may be forced to move to regional areas because they can no longer afford to live in the city; however, this may serve to isolate them from support networks and services and leave them vulnerable to further violence.<sup>528</sup> Even for women who have family and friends in rural areas, perpetrators may attempt to isolate them from these supports by 'defaming [their] character' around town, which can be very effective in a small community.<sup>529</sup>

520 See Susan Rees and Bob Pease, *Refugees Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities* (2006).

521 See generally Chris Jennings, *Triple Disadvantage: Out of Sight, Out of Mind: Violence Against Women with Disabilities Project* (2003); Keran Howe, *A Framework for Influencing Change Responding to Violence Against Women with Disabilities 2007–2009* (2007).

522 See also VLRC (2006), above n 5, 38–41 and 205–212.

523 Ibid.

524 Astbury *et al.* (2000), above n 357, 431.

525 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

526 The VLRC identified rural victims as another disadvantaged group. See VLRC, *Sexual Offences: Law and Procedure Final Report* (2004) 119–120.

527 Women's Services Network, *Domestic Violence in Regional Australia: a Literature Review* (2000).

528 Meeting with Voices of Women for Justice (1 October 2008). See Kerry Carrington, 'Violence and the architecture of rural life' in Elaine Barclay, Joseph F Donnermeyer, John Scott and Russell Hogg (eds), *Crime In Rural Australia* (2007) 88 for a discussion of the hidden nature of family violence in rural Australia.

529 Meeting with Voices of Women for Justice (1 October 2008).

- 5.132 Women may be more vulnerable to family violence during pregnancy. The 1996 Women's Safety Australia survey found that 42 per cent of women who reported that violence had occurred towards them at some time in their lives, were pregnant at the time.<sup>530</sup> In Tasmania, the court may consider the fact that the offender knew, or was reckless as to whether the affected person was pregnant, as an aggravating feature of the breach offence.<sup>531</sup>
- 5.133 Another group that may be particularly vulnerable to family violence is those who are gay, lesbian, bisexual, transgender or intersex. It has been suggested that family violence is a 'hidden issue' in the gay and lesbian community because of the 'lack of recognition' that this type of violence also affects same-sex relationships.<sup>532</sup> While family violence manifests itself in same-sex couples in a similar way to heterosexual couples, there are some forms of abuse which are specific to the gay and lesbian community. This abuse 'arise[s] as a feature of heterosexist and homophobic elements of society' where a person uses these elements as a 'tool to control their partner'.<sup>533</sup> Some examples of such behaviour include:
- threatening to 'out' the victim to their family and/or other members of the community;
  - telling the victim that he or she will lose custody of his or her children as a result of being 'outed';
  - telling the victim that he or she will not be treated seriously by the justice system because it is inherently homophobic; and
  - telling the victim that the abusive behaviour is normal in same-sex relationships and that he or she does not understand gay or lesbian practices.<sup>534</sup>
- 5.134 Furthermore the heterosexist and homophobic nature of society may act to isolate people in same-sex couples from friends and family as well as the wider community. This isolation can make the victim more vulnerable to family violence as he or she may not have any support network to assist them in identifying the abuse and/or seeking help.<sup>535</sup>
- 5.135 The data do not provide information on the situation of the victim in breach matters, so it is not possible for the Council to analyse whether particular victim vulnerability leads to more severe penalties for offenders. The prosecution should ensure that it provides magistrates with sufficient information about any vulnerability of the victim. Magistrates should inquire as to any particular vulnerability on the part of the victim during sentencing for breach, if the prosecution has not provided sufficient details in this regard.

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530 Australian Bureau of Statistics, *Women's Safety Australia 1996* (1996).

531 *Family Violence Act 2004* (Tas) s 13(a).

532 Marian Pitts et al., 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians' (2008) 51. The family violence issues raised in relation to same-sex couples are generally similar to the difficulties faced by transgender and bisexual people. See Carrie Chen, *Domestic Violence in Gay and Lesbian Relationships*, Australian Domestic and Family Violence Clearinghouse Topic Paper (2005) 1.

533 Chan (2005), above n 532, 2–3.

534 Ibid 3. See also Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3(4) *Murdoch University Electronic Journal of Law* 2–3.

535 Chan (2005), above n 532, 4.

- 5.136 The Federation of Community Legal Centres was concerned about specifying certain vulnerability factors in a list (see summary). Their view is that such a list could be 'rigidly interpreted as exhaustive',<sup>536</sup> particularly where other vulnerabilities are not listed, such as recent separation. In addition, the Federation suggested that singling out these particular groups may have the adverse effect of 'perpetrators from rural, Indigenous or gay/lesbian/transgender/intersex backgrounds receiving more severe sentences than other offenders'.<sup>537</sup> The Federation proposed that it would be preferable to deal with these particular vulnerabilities more generally as part of the context of the breach and the impact on the victim.
- 5.137 Similarly, while the Aboriginal Family Violence Prevention Service supports the view that 'particular circumstances and vulnerabilities of the victim will be relevant to sentencing', it 'does not support the listing of examples of vulnerabilities as [this] tends to oversimplify and generalise what are complex issues requiring case by case assessment'.<sup>538</sup>

### Summary

- 5.138 The particular circumstances of the victim—including any special vulnerability—are relevant to the nature and impact of a breach offence. Victim vulnerability may aggravate the seriousness of a breach of intervention order such that a higher penalty is justified.
- 5.139 There are a number of factors that may make a victim particularly vulnerable in family violence situations, for example, if the victim:
- is disabled;
  - is Indigenous;
  - is from a non-English speaking background;
  - is not a legal resident of Australia;
  - lives in a rural area;
  - is pregnant; or
  - is gay, lesbian, bisexual, transgender or intersex.
- 5.140 While the Council is aware of concerns raised about the specification of particular vulnerabilities, those factors listed are not intended to constitute an exhaustive list. They are intended to be a guide as to circumstances in which a victim may be especially vulnerable and the offender has taken advantage of that particular vulnerability in breaching an intervention order.

<sup>536</sup> Federation of Community Legal Centres (Submission).

<sup>537</sup> Federation of Community Legal Centres (Submission).

<sup>538</sup> Aboriginal Family Violence Prevention and Legal Service (Submission).



## Factors Relating to the Offender

### Culpability

- 5.141 The *Sentencing Act 1991* (Vic) requires a court to take into account the offender's culpability and degree of responsibility for the offence.<sup>539</sup> In relation to the offence of breach, culpability can refer to the degree to which the offender intended to breach the order. The offender may have intended the breach, been reckless as to whether the order was breached, been aware of the risk of breach or been unaware of this risk due to an incomplete understanding of the terms of the order.<sup>540</sup>
- 5.142 From meetings with magistrates, court observations and discussions with police, it seems that generally magistrates thoroughly explain the significance of a breach of intervention order when imposing it. Thus, it is highly unlikely that a defendant who had attended court for the imposition of the order could successfully argue inadequate understanding of the terms of the order.
- 5.143 If an offender does not attend court to hear the consequences of breach explained, generally this should not be taken into account as a mitigating factor. However, Victoria Legal Aid representatives were of the opinion that disability, for example intellectual disability or mental illness on the part of the defendant, is a factor that magistrates should take into account in terms of the defendant's culpability.<sup>541</sup> Such factors, along with others such as poor English, may be relevant to whether an offender understood the terms of the order in situations where the offender was not present in court to hear the order explained.
- 5.144 In its submission, the LIV was concerned that there may be reasons other than language difficulties, intellectual disability or mental illness that may preclude an offender from fully understanding their obligations under a family violence intervention order. This is particularly significant where the offender 'has not taken legal advice'.<sup>542</sup> Accordingly, in their view, there should be 'a general discretion [for the court] to take into account as a mitigating factor that the offender was not present when the [family violence intervention order] was made'.<sup>543</sup>
- 5.145 One magistrate who responded to the Council's survey said they would take into account whether the offender was at court when the original intervention order was made and the consequences of breach explained. This magistrate noted that there are a large number of *ex parte* hearings.<sup>544</sup> In the period June 2004 to July 2007, there were 32,427 family violence intervention orders issued. A total of 34.9 per cent (11,262) of those orders were imposed in the absence of the defendant.
- 5.146 Police in the Ballarat focus group commented that in rural areas, particularly in small towns with only a limited number of shops and services, it can be difficult to avoid accidental encounters with aggrieved family members. In such situations this may be a factor to take into account in

539 *Sentencing Act 1991* (Vic) s 5(2)(d).

540 Sentencing Guidelines Council [UK], *Breach of an Anti-Social Behaviour Order: Consultation Guideline* (2008) 4.

541 Meeting with Victoria Legal Aid (24 September 2008).

542 Law Institute of Victoria (Submission).

543 Law Institute of Victoria (Submission).

544 Sentencing Advisory Council Survey of Victorian Magistrates (October 2008), Survey Number 13. The issue of *ex parte* hearings is discussed in Chapter 3, paragraphs [3.58] to [3.59].

considering culpability. However, as pointed out by one magistrate, courts should bear in mind the fact that some family violence perpetrators are 'highly skilled manipulators' who are 'all about control'.<sup>545</sup> Such men are often highly adept at hiding or disguising their abusive behaviour.<sup>546</sup> For these perpetrators, 'accidental' encounters with victims may be quite the opposite.

### Summary

- 5.147 In considering the offender's culpability in a breach of intervention order offence, the court should take into account whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order. The court should generally not take into account as a factor mitigating culpability the fact that the offender was not present in court when the original order was made and the consequences of breach explained. However, there may be situations in which the offender has not properly understood the conditions of the order (for example where the offender has poor English skills, an intellectual disability or a mental illness).

## Prior Convictions and Other Offending Behaviour

- 5.148 The *Sentencing Act 1991* (Vic) requires the court to take into account the offender's previous character in sentencing.<sup>547</sup> Section 6 of the Act sets out the factors the court *may* consider in determining the offender's character, which include:
- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;
  - (b) the general reputation of the offender; and
  - (c) any significant contributions made by the offender to the community.
- 5.149 Thus it is clear that magistrates can take into account not just prior convictions, but also *prior findings of guilt* where no conviction has been recorded.
- 5.150 Where an offender has repeatedly breached an intervention order in relation to the same complainant, the harm caused to the victim is likely to be compounded by each subsequent breach. Therefore, it would appear that courts should give more weight to previous breaches of an intervention order against the same victim than other prior convictions not related to the victim. However, it seems that police do not always provide such information to magistrates. One magistrate in the Council's survey commented:
- Prior convictions for similar offences are very relevant in this area but it is unusual for information to be provided about whether or not the priors are similar in nature or relate to the same family member.
- 5.151 An issue noted by magistrates is that, where substantive charges are filed at the same time as an intervention order, they are often withdrawn in exchange for a plea of guilty to the breach of an intervention order. There is then no record of the offending behaviour that gave rise to those substantive charges, making it difficult for the court to assess the new breach in its proper context.<sup>548</sup>

<sup>545</sup> Meeting with Magistrate (September 2008).

<sup>546</sup> Meeting with Voices of Women for Justice (1 October 2008).

<sup>547</sup> *Sentencing Act 1991* (Vic) s 5(2)(f).

<sup>548</sup> Submission 5 to Sentencing Advisory Council's June 2008 report *Breaching Intervention Orders* (Magistrates' Court of Victoria). See also Chapter 3, paragraph [2.84].

*Rolled up charges*

- 5.152 In previous consultations on the maximum penalty for breach of an intervention order, the Magistrates' Court noted some of the difficulties that arise in sentencing an offender with prior convictions for breaching an intervention order. In particular, the Court identified the practice of rolling up breach charges as a practice that complicates the sentencing process for a subsequent breach.
- 5.153 A rolled up charge is where:
- the [prosecution] can present numerous individual charges in a convenient form. It involves a form of drafting that would ordinarily be bad for duplicity, but with the consent of the offender, may be adopted on a plea.<sup>549</sup>
- 5.154 If the prosecution resolve a number of breach matters by rolling them up into one charge, this one charge is all that appears on the offender's criminal history. This makes it difficult for the sentencing court at a subsequent breach to know the scope of the previous offending. The Magistrates' Court suggested that 'the Court would have more success in making defendants accountable for their violence if a way could be found to record the nature and extent of the breaching behaviour when recording the penalty'.<sup>550</sup>
- 5.155 The Office of Public Prosecutions is also of the view that the court should be told where prior convictions consist of rolled up charges, in order to provide the fullest possible context to the court.<sup>551</sup>
- 5.156 According to some police prosecutors, charges may be 'rolled up' if, for example, the victim has withdrawn her support and no longer wishes to give evidence, or in order to obtain a guilty plea from the defendant.<sup>552</sup> The prosecutors stated that due to the complexities of the police 'LEAP'<sup>553</sup> electronic charge recording system, it is almost impossible even for them to find out whether that one breach conviction started out originally as a number of breach charges.
- 5.157 While Victoria Police have suggested that they support the provision of this type of information to the court in principle, 'to achieve the proposal in a manner which is accurate, efficient and consistently applied is currently unfeasible'.<sup>554</sup>
- 5.158 In their comments to the Council on the draft report, Victoria Police confirmed that at present 'there is no means electronically to establish via LEAP whether any prior conviction relates to the victim in question and whether any of these convictions represent rolled up counts'.<sup>555</sup> They provided an example of the type of information that can be obtained from the LEAP system:

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549 Judicial College of Victoria, 'Rolled-Up Counts', *Victorian Sentencing Manual* (2005) [9.2.5] <<http://www.justice.vic.gov.au/emanuals/VSM/default.htm>> at 20 November 2008.

550 Ibid.

551 Letter from Office of Public Prosecutions dated 13 February 2009.

552 Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008). See also Chapter 2, paragraphs [2.85] to [2.87].

553 Law Enforcement Assistance Program.

554 Victoria Police (Submission).

555 Victoria Police (Submission).

[A]n enquiry on LEAP with regard to a defendant who has breached a FIVO [family violence intervention order] reveals that he/she has one prior conviction for breach of a FIVO. A further enquiry into the defendant's history may show that the respondent had five charges for breach of FIVO but that four of those charges were withdrawn. There is no mechanism to enable a member to identify that the five charges were, in fact, rolled up into one as opposed to withdrawn for other reasons (such as insufficient evidence).<sup>556</sup>

- 5.159 The information in the LEAP system is electronically transmitted from CourtLink where the outcome is initially recorded.
- 5.160 Victoria Police advises that while the provision of information is currently hampered by the limitations of the current system, 'there is potentially scope to review this process in the future ... Such a review would necessarily need to encompass CourtLink and would require funding'.<sup>557</sup>
- 5.161 Even if the information was readily available, the Law Institute of Victoria submitted that, as prosecutors will not necessarily know the reason as to why charges are rolled up, it would be 'unjust' for the court to take into account the fact that charges had been rolled up at sentencing.
- 5.162 The Law Institute of Victoria suggested other reasons as to why charges may be rolled up, such as:
- The prosecution has made an assessment that there is insufficient evidence to secure a conviction on one or more charges.
  - The victim or other witnesses may have been assessed by the prosecution as being likely unreliable, unsympathetic, lacking in credibility or competence or otherwise unpersuasive in contested hearing.
  - The victim or other prosecution witnesses may be unable to withstand the rigours of cross-examination during a contested hearing because of their age, state of mental health or physical health at the time, which may or may not be connected to the offender's behaviour.
  - Prosecution witnesses may be unavailable to come to court because they are incarcerated, overseas or cannot be located or unwilling to attend at the time of the contested hearing.
  - The defendant may have raised a defence in relation to his fitness to be tried or may be otherwise suffering from mental impairment which may be relevant to proving *mens rea*.<sup>558</sup>

### *Prior convictions for family violence*

- 5.163 According to the Magistrates' Court submission, police prosecutors do not generally provide information to the court as to whether prior convictions:
- are family violence related offences; and
  - relate to the same victim as the instant offence.<sup>559</sup>
- 5.164 This is also largely due to problems around the type of information that is readily available in the LEAP system. While the police should be able to determine from the victim whether or not she was also involved in a previous matter, some victims may not want to disclose prior offences committed against her for fear of reprisal by the offender.

556 Victoria Police (Submission).

557 Victoria Police (Submission).

558 Law Institute of Victoria (Submission).

559 Magistrates' Court of Victoria (Submission).

## Sentencing Practices for Breach of Intervention Orders

5.165 In principle, the Law Institute supported 'the suggestion that police advise whether an offender's prior convictions relate to the victim who is the subject of the FIVO proceedings'.<sup>560</sup> However, they had some reservations as to the possible sources of this information, commenting that information about previous offences should only be taken into account where it is drawn from 'police summaries, court records or material tendered by defence on the plea to minimise challenges on the facts on which the court relies for sentencing'.<sup>561</sup>

### Summary

5.166 It is important for magistrates to consider the full context of the breach when sentencing. This should include information about prior convictions and findings of guilt. Where possible, prosecutors should provide magistrates with information about whether any of these related to the victim in question, in which case some detail about the substance of these offences should be included in the brief.

5.167 In addition, it would assist magistrates to be aware of whether or not prior matters are rolled up charges; however, it would seem under the current system that the police are unable to provide this information.

5.168 The Council accepts that the current limitations of the police records management system will inhibit the ability of police and prosecutors to obtain detailed information about prior convictions and findings of guilt. The Council is of the view that this may be resulting in courts sentencing offenders without a proper understanding of their prior history, which could result in the imposition of inappropriate sentences. In order to rectify this situation in the long term, the Council supports consideration of how relevant information about prior convictions and findings of guilt could be recorded in a manner easily accessible to police.

### Previous Good Character

5.169 It is a generally accepted principle of sentencing that previous good character can be taken into account by the sentencer. As outlined at [5.148], the *Sentencing Act 1991* (Vic) obliges magistrates to have regard to the offender's previous character, the offender's general reputation and any significant contributions made by the offender to the community.<sup>562</sup>

5.170 One participant in the Council's consultations suggested that the defendant's 'good character' should not be taken into account at all in breach matters. The offender's 'good character' can undermine a woman's support in the community, which isolates her even more.<sup>563</sup> The Federation

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560 Law Institute of Victoria (Submission).

561 Law Institute of Victoria (Submission).

562 *Sentencing Act 1991* (Vic) s 5(2)(f).

563 Community Legal Centres Roundtable (18 September 2008).

of Community Legal Centres submitted that previous good character should not carry any weight in its own right.<sup>564</sup> A victim described how her partner was the 'best showman [she'd] ever heard' when he appeared in court and how distressing it was that no one could see the way he behaved towards her in private.<sup>565</sup>

- 5.171 In the UK, the Sentencing Guidelines Council has taken the view that this general principle should be qualified to some extent by the context of domestic violence. This is because 'one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae'.<sup>566</sup> In this context, the UK Council determined that, where a proven pattern of family violence can be established, the offender's good character outside the home should not be relevant. However, good character may take on some relevance if the offending before the court is an isolated incident and not part of a pattern of behaviour.
- 5.172 The New South Wales Sentencing Council examined the relevance of good character evidence in relation to the sentencing of sex offenders. The NSW Council concluded that courts should not take into account the offender's good character in sexual offences against children where the good character of the offender facilitated the commission of the offence. An example of this is where the offender is 'a close relation or a person in authority', such as a schoolteacher or church elder.<sup>567</sup>
- 5.173 In 2008, the *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended in accordance with the recommendation of the NSW Sentencing Council. The relevant section provides that:
- In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.<sup>568</sup>

### Summary

- 5.174 In considering the offender's previous character for the purposes of sentencing breach matters, magistrates should take into account any proven pattern of family violence. Where this exists, any evidence of the offender's good behaviour in society generally should be given little weight. This is in recognition of the fact that many perpetrators of family violence confine their violent behaviour to the home and their 'dual personality' allows them to continue to abuse their partner over a long period of time. Even in the event that there is no proven pattern of family violence, magistrates should be most cautious in giving too much weight to evidence of an offender's 'good character'.

<sup>564</sup> Federation of Community Legal Centres (Submission).

<sup>565</sup> Meeting with Voices of Women for Justice (1 October 2008).

<sup>566</sup> Sentencing Guidelines Council [UK] (2006), above n 428, 5–6.

<sup>567</sup> New South Wales Sentencing Council, *Penalties Relating to Sexual Assault in New South Wales: Volume 1* (2008) 157.

<sup>568</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (5A).

## Timing of the Breach

- 5.175 Under the UK Guidelines for Breach of a Protection Order, where the breach is a second or subsequent breach or the breach was committed shortly after the imposition of the order, the court may take this into consideration as an aggravating factor. Conversely, where an offender has complied with the conditions of an order for a 'substantial period' prior to the breach, the court may take the period of compliance into consideration as a mitigating factor. The decision as to whether or not the period of compliance should be taken into account as a mitigating factor will be influenced by the history of the relationship and the nature of the breach. It should be noted that responses to the Sentencing Advisory Panel's consultation paper cautioned against assuming that the first breach before the court is the first actual breach and therefore, in effect, giving the offender credit for good conduct.<sup>569</sup>
- 5.176 The Law Institute of Victoria was concerned with the view that a breach committed soon after the commission of the order should be considered an aggravating factor. It suggested that such a breach may occur because the offender has not fully understood the implications of the intervention order. In its submission, the LIV suggested this may be particularly relevant where:
- there are arrangements in place for access to children, financial support arrangements or distribution of property following a separation, where there may be Family Court or other orders which are inconsistent with the [family violence intervention order].<sup>570</sup>
- 5.177 The Council's statistics show that the likelihood of a custodial sentence<sup>571</sup> increased the longer the breach was committed after the order, which is an unexpected finding.<sup>572</sup> Figure 27 shows that more than half of breaches occurred within the first twelve months of an order (52 per cent), while one quarter occurred within the first two months (25.4 per cent). Nearly one third occurred more than two years after the order (31.2 per cent). As can be seen from Figure 28, the likelihood of a custodial sentence tended to increase with the time between the granting of the order and its breach. A custodial sentence was imposed on one fifth (20.0 per cent) of offenders who breached within the first two months, compared with over a third (36.6 per cent) for those who breached 24 months or more following the order.
- 5.178 As with other analyses that attempt to link sentencing decisions to a single factor, the results of this analysis require careful interpretation. Sentencing decisions often rely on a complex range of factors; to measure the impact of any single factor, the effect of other factors must also be statistically measured. While lag appears to have an effect on the sentence imposed, analyses elsewhere have also shown the importance of factors such as other offences within a case and prior offending history.

### Summary

- 5.179 Where an offender has committed a second or subsequent breach, or a first breach within a short time after the imposition of the family violence intervention order, this demonstrates a lack of respect for the court. Magistrates should take this into account when considering the seriousness of the offence.

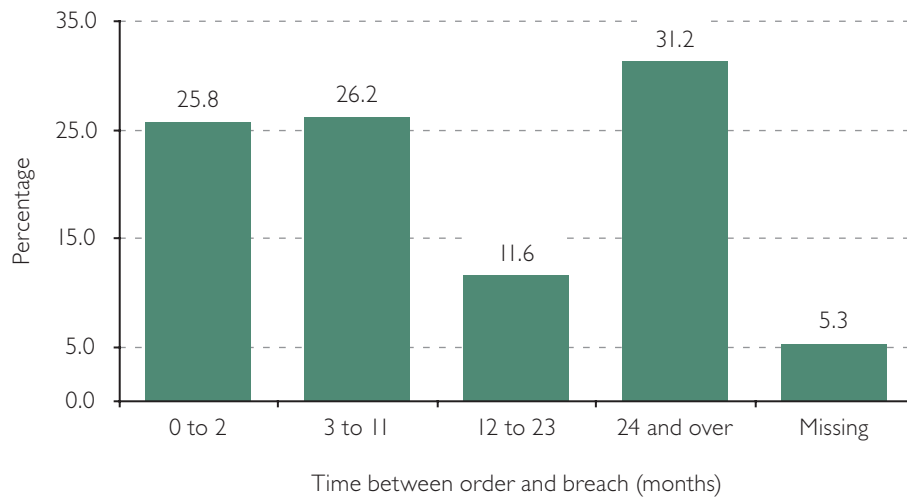
<sup>569</sup> Sentencing Advisory Panel [UK] (2004), above n 431, 8.

<sup>570</sup> Law Institute of Victoria (Submission).

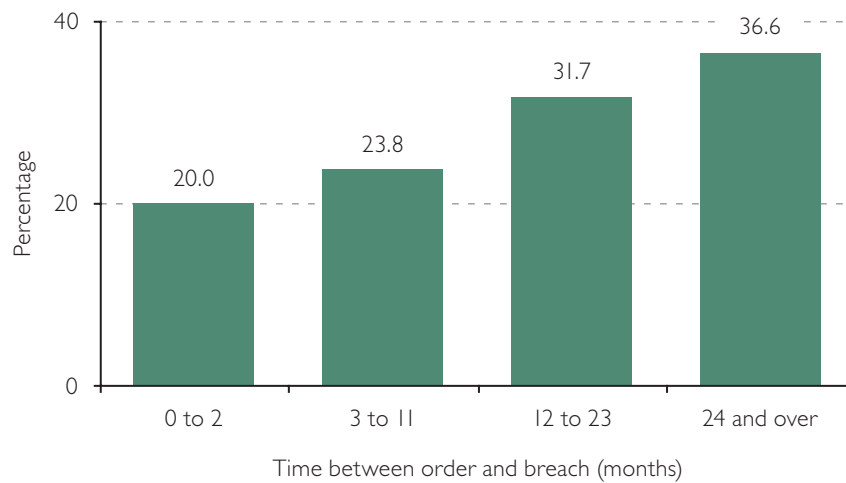
<sup>571</sup> A custodial sentence includes imprisonment, partially and wholly suspended sentences and intensive corrections orders.

<sup>572</sup> A participant in the Community Legal Centres Roundtable (18 September 2008) commented that these data go against expectations.

**Figure 27:** The percentage of offenders sentenced for breach of a family violence intervention order by lag between order and breach offence, 2004–05 to 2006–07



**Figure 28:** The percentage of offenders sentenced for breach of a family violence intervention order who received a custodial sentence by lag between order and breach offence, 2004–05 to 2006–07







## Chapter 6: A New Approach



## Introduction

- 6.1 The offence of breach of a family violence intervention order provides challenges for all levels of the criminal justice system. It is an under-reported offence, and police are faced with significant difficulties in bringing these matters to court. Breaches are difficult to prosecute, and in order to secure a guilty plea other accompanying offences may be withdrawn. The courts then face the difficult exercise of sentencing for breaches, in many cases without sufficient information to place the offending behaviour in context. This involves weighing up often competing sentencing purposes and factors.
- 6.2 Magistrates must arrive at a sentence that reflects the appropriate sentencing purposes of specific and general deterrence, retribution, rehabilitation, punishment and protection of the community. The Council's consultations and those conducted by the VLRC for their 2006 report *Review of Family Violence Laws* reveal that many people regard current sentencing practices for breach of family violence intervention orders as failing to achieve these purposes. There is significant frustration amongst stakeholder groups at the perceived inconsistencies in approach and outcome, as well as the general leniency in sentencing these matters. This report's analysis of sentencing practices reveals that sanctions are weighted at the lower end of the hierarchy—fines and adjourned undertakings—even for repeat offences.

## Appropriateness of Current Sentencing Practices

### Do Penalties Reflect the Seriousness of the Offence?

- 6.3 A number of stakeholders were concerned that the sanctions imposed for breaches of intervention orders do not always reflect the seriousness of the offence. For example, participants in a Family Violence Service Provider roundtable commented that, while some breaches can be mild, multiple mild breaches can have a great impact on a victim, and magistrates' imposition of (perceived) 'inappropriate' penalties in these matters may reflect their lack of understanding about the dynamics of family violence.<sup>573</sup> Many Victoria Police representatives who were consulted were of the view that magistrates generally do not take breaches of intervention orders seriously enough, whether or not physical violence is involved. Several complained that sentences for breaches are generally 'far too light', even for second and third breaches.<sup>574</sup>
- 6.4 Statistical analysis confirms stakeholder perceptions that the majority of sanctions for breaches are at the lower end of the sentencing hierarchy. The fine was the most commonly used sanction for breaches of family violence intervention orders in the period July 2004 to June 2007, with 37.2 per cent of people sentenced for breach receiving a fine. An adjourned undertaking (at the bottom of the hierarchy) was the second most common sanction, with 18.5 per cent of those sentenced for breach receiving this sanction.

<sup>573</sup> Family Violence Service Providers Roundtable (18 September 2008). Participants in the meeting with VLA on 24 September 2008 also thought that the impact on the victim of the breach is an important factor to be considered in sentencing for breach of intervention orders.

<sup>574</sup> Victoria Police Focus Group (Ballarat) (1 October 2008).

- 6.5 Despite their widespread use, fines could be considered an inappropriate sanction for breach of an intervention order because of their potential to affect the victim's finances adversely and because of their inability to provide any level of rehabilitation of the offender or protection of the victim. The Council's data show that 50.9 per cent of people who received a fine at the first sentence date received another fine at the second sentence date. Fines are also imposed in many cases for a subsequent offence where the offender received a higher sentence for the first offence. For example, of the people who received a community-based order at the first sentence date, 29.3 per cent received a fine at the second sentence date. While a fine may be an appropriate sentence for a first time offender, this sanction is of questionable utility when imposed on a repeat offender.
- 6.6 Many consider the adjourned undertaking to be an excessively lenient sanction.<sup>575</sup> In its most simple form (that is, with no conditions attached) an adjourned undertaking merely requires an offender not to breach a court order, which seems an inappropriate sentence to impose for breach of a court order. Arguably, such an adjourned undertaking is not an appropriate sanction for an offender who has already shown disregard for a court order. From the Council's consultations, it appears that some magistrates are using this sanction as a vehicle through which to attach the condition of participation in a men's behavioural change program. However, as there is often no supervision—judicial or otherwise—of the offender's participation in any program, this sanction provides little in the way of deterrence, punishment, denunciation or community protection, particularly where there is no conviction imposed.
- 6.7 As the adjourned undertaking is at the bottom of the hierarchy, it should only be used for repeat offenders in very limited circumstances. Council data showed that 15.8 per cent of defendants who received an adjourned undertaking at the first sentence date also received this sanction for a subsequent breach offence. Also, a percentage of those sentenced to sanctions higher on the hierarchy at the first sentence date received an adjourned undertaking for a second breach. While the details of these offences are not known, it is difficult to imagine the type of situation that would warrant the imposition of this sanction for a second offence, particularly in the context of this type of offending.
- 6.8 While the Council does not suggest that there should be a shift to imprisonment, as this is not always the most appropriate sanction to address the sentencing purposes most relevant to this offence, in its view, more use could be made of intermediate sanctions, particularly community-based orders. This sanction is not used frequently for breaches of family violence intervention orders, despite its potential for rehabilitation of the offender and through this, the protection of the victim.

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<sup>575</sup> See [3.90]–[3.94].

## Are Sentences Achieving Their Purpose?

- 6.9 Sentencing for contravention of a family violence intervention order takes place within the general context of section 5 of the *Sentencing Act 1991* (Vic), which states that the purposes of sentencing are punishment, deterrence, rehabilitation, denunciation, community protection or a combination of two or more of these purposes. Appropriately balancing these purposes is a delicate task in family violence cases, where measures intended to protect the victim can place them at increased risk and sentences designed to punish the offender may indirectly punish the victim.
- 6.10 As the function of a family violence intervention order is to protect the victim from future harm, the primary purpose of sentencing for contravention of an order should be to achieve compliance with the order or future orders to ensure the safety and protection of the victim. The protection of the community, which encompasses protecting the victim, should be the central purpose against which other sentencing purposes are balanced.
- 6.11 Denunciation, deterrence and punishment are also important purposes in sentencing for contravention of a family violence intervention order. The intervention order system relies on the perception that there will be serious consequences if orders are breached. However, caution should be exercised that these purposes do not conflict with considerations of community protection, particularly as regards the victim. For example, some offences will require a sentence of immediate imprisonment that appropriately punishes the offender and denounces the offender's conduct. Such a sentence will protect the victim in the short term by incapacitating the offender and may have some deterrent effect. However, the long-term protection of the victim is also important.
- 6.12 Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine. Therefore, sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition), which are structured to ensure that it is the offender that must serve the punishment, may be more effective in achieving this sentencing purpose (see further [3.62]–[3.65]).
- 6.13 Another sentencing purpose which can be compatible with protecting the victim (particularly in the long term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine. Such sentences may achieve more in ensuring long-term compliance with the intervention order.
- 6.14 The weight given to the often competing purposes of sentencing set out in section 5 of the *Sentencing Act 1991* (Vic) will differ according to the circumstances of each case. However, in all cases involving contravention of an intervention order, the central purpose should be achieving compliance with the order to ensure the protection of the victim and the community (see further [3.6]–[3.19]).

## Is Sentencing Consistent?

- 6.15 The Council is limited in its ability to assess whether or not there is consistency amongst magistrates in sentencing for breaches of family violence intervention orders, as there are no available data to support such an analysis. However, anecdotal evidence would suggest that inconsistency is an issue when sentencing for this offence.
- 6.16 Some stakeholders observed that many magistrates 'talk big but act small' in sentencing breach of family violence intervention order matters.<sup>576</sup> For example, a participant in the Melbourne Prosecutors Focus Group commented:
- I often find ... that the magistrates blow a lot of steam about it and say this is very serious and so on but then they come around and give them a \$500 fine or something.
- 6.17 Some magistrates are regarded as highly unsympathetic towards victims in family violence matters,<sup>577</sup> others as anti-respondent.<sup>578</sup> A participant in the Community Legal Centres Roundtable commented on inconsistencies between magistrates, whereby some are known to be more likely to impose terms of imprisonment for this offence than others, who may be more focused on the contempt of court component of the breach, rather than addressing the effect of the offending behaviour on the victim.<sup>579</sup>
- 6.18 One magistrate agreed that there was inconsistency among magistrates' responses to breaches. She suggested that those who had completed the family violence training probably had a much better understanding of the complexities involved.<sup>580</sup>

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576 Victoria Police Focus Group (Ballarat) (1 October 2008); Victoria Police Focus Group (Melbourne Prosecutors) (8 October 2008).

577 Meeting with Magistrate (September 2008).

578 Meeting with Victoria Legal Aid (24 September 2008).

579 Community Legal Centre Roundtable (18 September 2008).

580 Meeting with Magistrate (September 2008).

## Possible Reasons Behind Current Sentencing Practices

### Family Violence Offences Are Complex and Difficult to Sentence

- 6.19 Sentencing is a complex exercise, which involves the synthesis of competing purposes and a number of different factors. Given the unique and complicated issues associated with family violence, sentencing for breaches of family violence intervention orders presents a particularly difficult challenge.
- 6.20 There are many reasons why sentencing for breaches of family violence intervention orders is difficult. Family violence matters are highly emotive. As one magistrate pointed out, family violence offences 'strike at a person's very being' and 'involve an enormous breach of trust'.<sup>581</sup>
- 6.21 Unlike victims of many other offences, family violence victims may have conflicting feelings about the proceedings. Some may withdraw their support late in the process whereas others may ask magistrates to show mercy towards defendants in sentencing. Some victims may have invited the defendant into their homes, leading to a breach of intervention order. Defendants may have no prior convictions and present as 'model citizens' apart from their history of family violence. There are often complex issues around family finances. Unless magistrates have a solid understanding of these and other issues, as well as the particular dynamics of each case before them, it will be difficult to impose appropriate sentences.

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<sup>581</sup> Meeting with Magistrate (September 2008).



## Insufficient Information

### *Context of breach and impact on victim*

- 6.22 A further difficulty is the lack of information provided to magistrates about the context of the offending. The Council's consultations revealed confusion and disagreement amongst magistrates, police, prosecutors and defence lawyers as to how much information on the history between the parties and the background to the breach can be included on the police brief or presented by the prosecution. Most were of the view that very little background information, apart from prior convictions, can be presented to the court. If such information is not available to the court, magistrates are constrained in the extent to which they can consider the actual impact of the offending on the victim and other factors that are particularly relevant to the breach. This may lead to the imposition of sentences at the lower end of the hierarchy because without the relevant background, much of the behaviour covered by this offence may seem low on the scale of offending.
- 6.23 The Council's consultations revealed that there are significant legal and practical difficulties in providing contextual information to the court on a breach matter. The information currently collected by police about the history between the parties could not be readily put before the court. Further, there is a significant risk that introducing more information could lead to an increase in the number of contested applications for intervention orders and breach hearings. The Council is of the view that any measure that could potentially increase victim exposure to the criminal justice system through longer, more complicated court hearings would be highly undesirable.
- 6.24 There is some information that could more easily be provided to the court. For example, the Council is of the view that police should be routinely giving victims the opportunity to make a victim impact statement. This should also be accompanied by a referral to the Victim Assistance and Counselling Program to support victims through this process.
- 6.25 In addition, in those cases where the impact of the breach is not immediately clear, police taking the witness statement should ask victims how the breach affected them. This statement then forms part of the brief of evidence. The sentencing court could properly use this information to assess the seriousness of the offence before the court.

## Guiding Principles: Achieving More Appropriate and Consistent Sentences?

### Stakeholder Attitudes Towards Sentencing Guidance

6.26 The particular complexities associated with sentencing this type of offending have prompted calls for the 'reconsideration and clarification' of the relevant sentencing principles.<sup>582</sup> For example, the VLRC recommended that:

[t]he Magistrates' Court protocols should include information on the factors to take into account, and the full range of options available when imposing sentences for breaches of intervention orders.<sup>583</sup>

6.27 Amongst stakeholders there was some support for the use of some form of guidance for magistrates in sentencing for breach of intervention orders. Participants in the Community Legal Centres Roundtable were of the view that some guidance may be of use for magistrates in considering the aggravating and mitigating factors within the sentencing framework.<sup>584</sup> One participant suggested that whatever assistance for the courts is developed, it should cover all offending in the context of family violence, as the same issues will arise for breach as for family violence generally.<sup>585</sup>

6.28 Some defence lawyers were of the view that there is little to be gained by providing any sort of guidance to magistrates. One Victoria Legal Aid representative queried whether there was any need to outline sentencing factors for magistrates, as they are already taking these issues into account. This person submitted that there is enough in the *Sentencing Act 1991* (Vic) to assist magistrates and if it is thought that magistrates need a better understanding of family violence, then this can best be achieved through education and training.<sup>586</sup> Other Victoria Legal Aid representatives expressed the view that the use of guidance on sentencing factors may be too restrictive. If guidelines are needed they should be through Court of Appeal judgments, as has been done in other states. However, it was conceded that the limitation of this type of guideline was that nothing could be done until an appropriate case was before the court.<sup>587</sup> The Council notes that, because these cases are dealt with in the Magistrates' Court, they are highly unlikely ever to come before the Court of Appeal.

6.29 In their submission, the Federation of Community Legal Centres supported the need for guidance for magistrates 'over and above the general principles in the *Sentencing Act 1991* (Vic), in order to assist them in exercising their discretion and facilitate consistency of approach'.<sup>588</sup>

582 Warner (1996), above n 141, 116.

583 VLRC (2006), above n 5, 375.

584 Community Legal Centres Roundtable (18 September 2008).

585 Community Legal Centres Roundtable (18 September 2008).

586 Meeting with Victoria Legal Aid (24 September 2008).

587 Meeting with Victoria Legal Aid (24 September 2008).

588 Federation of Community Legal Centres (Submission).

6.30 The Law Institute of Victoria saw potential for guiding principles to have scope beyond use by the magistrates:

the LIV strongly recommends that the guidelines be readily available for use by police, prosecutors and defence. This would enable defence lawyers and prosecutors to properly prepare cases prior to sentencing, may also assist in settling cases, and would provide transparency and consistency in sentencing for breach of [family violence intervention orders]. Making the guidelines widely available would have the added benefit of raising the profile and educative value of the guidelines and, potentially, leading to culture change amongst past or potential offenders.<sup>589</sup>

6.31 A number of stakeholders took the view that the introduction of guiding principles should be accompanied by judicial education. One participant at the meeting with Victoria Legal Aid commented that guidelines would have to be accompanied by some training for magistrates.<sup>590</sup>

6.32 The Federation of Community Legal Centres and the Women's Legal Centre were also of the view that some level of judicial education was needed in the 'context and dynamics of family violence' in addition to the Council's guiding principles.<sup>591</sup>

6.33 At present, the Judicial College of Victoria runs extensive judicial education programs around family violence and provides substantial resources to judicial officers through the Judicial Officers Information Network (JOIN). The Council supports this important work of the Judicial College as the appropriate mechanism for continuing judicial education.

## The Council's View

6.34 If, through their sentencing practices, courts are perceived by victims, family violence service providers, police, offenders, practitioners and the community generally as not taking breaches of intervention orders seriously, this may serve to perpetuate cultural attitudes that allow family violence to flourish in our society. Victims of family violence are unlikely to report incidents, let alone undertake legal proceedings, if they see that the outcomes are more often than not 'a slap on the wrist'. Police are less likely to treat family violence incidents with the degree of attention they deserve if they perceive that breaches are not treated as seriously by the courts as other offending behaviour. This in turn means that offenders have little reason to cease their violent behaviour.

6.35 In order to promote more appropriate and consistent sentencing practices for breach of family violence intervention orders, the Council is of the view that magistrates would be assisted by some guidance in addition to the general principles provided in the *Sentencing Act 1991* (Vic). These general principles, designed as they are for application to criminal behaviour occurring within the adversarial offender–victim paradigm, can offer only minimal guidance in an area that arguably does not fit neatly within this traditional conception of the criminal law.<sup>592</sup>

<sup>589</sup> Law Institute of Victoria (Submission).

<sup>590</sup> Meeting with Victoria Legal Aid (24 September 2008).

<sup>591</sup> Federation of Community Legal Centres (Submission); Women's Legal Service (Submission).

<sup>592</sup> Douglas (2007), above n 26, 231.

- 6.36 The Council has developed some guiding principles, drawing on its research, consultations and data analysis, for use by those responsible for sentencing breach of family violence intervention orders. These can be found in Appendix I. In the guiding principles, the Council identifies a number of sentencing factors that are particularly relevant to breach of family violence intervention orders, and suggests ways in which judicial officers may consider these factors. It is intended that this discussion will assist courts in placing appropriate weight on the factors most relevant to this offence.
- 6.37 The guidance provided is not in any way designed to displace judicial discretion. As Fox and Freiberg have commented, 'judicial discretion in determining sentence occupies a central position in the criminal justice system'.<sup>593</sup> This guidance is for the specific purpose of ensuring that magistrates have as much information as possible at their disposal to assist them in exercising their discretion.
- 6.38 In addition, the Council intends that these guiding principles will promote some level of consistency of approach among sentencers. The goal is not absolute consistency of outcome as this is both unachievable and undesirable. As the Victorian Court of Appeal held recently in *R v MacNeil-Brown*:
- There is ... an 'ambit of reasonable disagreement' in the exercise of the sentencing discretion. It is a fundamental precept of sentencing law that there is no single correct sentence in a particular case, no particular opinion being uniquely right, and that there will be differences of opinion which, within a given range, are legitimate and reasonable.<sup>594</sup>
- 6.39 The New South Wales Sentencing Council made a clear distinction between consistency of approach and consistency of outcome in relation to sentencing. The NSW Council defined consistency in sentencing as meaning: 'account is taken of the same factors and that similar weight is given to those factors'.<sup>595</sup> The Sentencing Advisory Council's guiding principles are intended to achieve this outcome.
- 6.40 The Council also see a wider role for the guiding principles to be used by all involved in the sentencing process. Police prosecutors and defence lawyers may also use the guiding principles in formulating their submissions to the court at sentencing hearings for breaches of family violence intervention orders. The principles can promote consistency by providing a framework for submissions across different courts around Victoria.

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593 Fox and Freiberg (1999), above n 164, 28.

594 *R v MacNeil-Brown; R v Piggott* [2008] VSCA 190 (Unreported, Maxwell P, Buchanan, Vincent, Redlich and Kellam JJA, 24 September 2008) [8] (citations omitted).

595 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2004) 10.



# Appendices



# Appendix 1: Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders

## 1. Purpose of Sentencing

- 1.1 Sentencing for contravention of a family violence intervention order takes place within the general context of section 5 of the *Sentencing Act 1991* (Vic), which states that the purposes of sentencing are punishment, deterrence, rehabilitation, denunciation, community protection or a combination of two or more of these purposes. Appropriately balancing these purposes is a delicate task in family violence cases, where measures intended to protect the victim can place them at increased risk, and sentences designed to punish the offender may indirectly punish the victim.
- 1.2 As the function of a family violence intervention order is to protect the victim from future harm, the primary purpose of sentencing for contravention of an order should be to achieve compliance with the order or future orders to ensure the safety and protection of the victim. The protection of the community, which encompasses protecting the victim, should be the central purpose against which other sentencing purposes are balanced.
- 1.3 Denunciation, deterrence and punishment are also important purposes in sentencing for contravention of a family violence intervention order. The intervention order system relies on the perception that there will be serious consequences if orders are breached. However, caution should be exercised that these purposes do not conflict with considerations of community protection, particularly as regards the victim. For example, some offences will require a sentence of immediate imprisonment that appropriately punishes the offender and denounces the offender's conduct. Such a sentence will protect the victim in the short term by incapacitating the offender and may have some deterrent effect. However, the long-term protection of the victim is also important.
- 1.4 Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine. Therefore, sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition) which are structured to ensure that it is the offender that must serve the punishment may be more effective in achieving this sentencing purpose (see further [3.62]–[3.65]).



- 1.5 Another sentencing purpose which can be compatible with protecting the victim (particularly in the long term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine. Such sentences may achieve more in ensuring long-term compliance with the intervention order.
- 1.6 The weight given to the often competing purposes of sentencing set out in section 5 of the *Sentencing Act 1991* (Vic) will differ according to the circumstances of each case. However, in all cases involving contravention of an intervention order, the central purpose should be achieving compliance with the order to ensure the protection of the victim and the community (see further [3.6]–[3.19]).

## 2. Sentencing Factors

### Factors Relating to the Victim

#### *Nature of the contravention and its impact on the victim*

- 2.1 The nature of the contravention and its impact on the victim are important factors. The damage caused to victims who have suffered years of family violence may make them particularly vulnerable to conduct that in another context would seem relatively innocuous.
- 2.2 Breaches not involving physical violence can have a significant impact on the victim and should not necessarily be treated as less serious than breaches involving physical violence.
- 2.3 Where an offence has taken place in or in the vicinity of the victim's home, thereby depriving the victim of any feeling of safety or sanctuary, the contravention may be regarded as more serious.
- 2.4 Where it is not immediately clear what impact the contravention has had on the victim, when preparing the witness statement police should ask victims about the impact of the breach. This information should be included in the statement that forms part of the brief of evidence and should be taken into account in assessing the seriousness of the offence in that particular case.
- 2.5 Police should advise victims of their right to make a victim impact statement in every case. If there is no victim impact statement, the magistrate should enquire as to whether the victim has been given the opportunity to make such a statement.

See [5.6]–[5.65].

#### *Abuse of power*

- 2.6 People in family relationships generally have ongoing emotional, legal and/or financial ties, which can also include the joint care of children. They are therefore in a position to commit the kind of contravention that could more seriously affect a family member, not merely physically, but so as to cause mental anguish.

See [5.66]–[5.73].

#### *Presence of children*

- 2.7 When sentencing contraventions of family violence intervention orders, information about the exposure of any children to family violence should be available to the court. Where the original order was imposed to protect children, whether or not alongside another victim or victims, any contravention of this order will generally be more serious. This will be so regardless of whether or not the children are direct victims or were exposed to the breach behaviour.

See [5.74]–[5.97].

*Attitude of the victim*

2.8 Generally, the views of the victim should not significantly influence the appropriate sentence for a particular offence. Because victims of family violence may be placed in danger of further violence if they are regarded by the perpetrator as being responsible for the sentence, a court should be mindful as to whether the victim has provided any views on sentence free of pressure or coercion. This may require some consideration of the dynamics of the relationship between the victim and the offender.

See [5.98]–[5.115].

*Contribution of the victim*

2.9 It may be relevant that the conditions of the order were contravened following contact initiated by the victim. However, in assessing the degree to which this may mitigate the seriousness of the offence it is important to consider the history of the relationship between the parties, the nature of the contact and the victim's motivation in making contact (and in particular whether the victim was acting under any pressure or coercion). This may require some consideration of the dynamics of the relationship between the victim and the offender.

See [5.116]–[5.125].

*Vulnerability of the victim*

2.10 The particular circumstances of the victim—including any special vulnerability—are relevant to the nature and impact of a contravention. Victim vulnerability may aggravate the seriousness of a contravention of intervention order such that a higher penalty is justified.

There are a number of factors that may make a victim particularly vulnerable in family violence situations, for example if the victim:

- is disabled;
- is Indigenous;
- is from a non-English speaking background;
- is gay, lesbian, bisexual, transgender or intersex;
- is pregnant;
- lives in a rural area; or
- is not a legal resident of Australia.

See [5.126]–[5.140].

## Factors Relating to the Offender

### *Culpability*

- 2.11 In considering the offender's culpability in a contravention of intervention order offence, the court should consider whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order.
- 2.12 Generally, the fact that the offender was not present in court when the original order was made and the consequences of breach explained should not mitigate culpability. However, there may be situations in which the offender has not properly understood the conditions of the order (for example, where the offender has poor English skills, an intellectual disability or a mental illness).

See [5.141]–[5.147].

### *Prior convictions and other offending behaviour*

- 2.13 A court should take into account information about:
- prior convictions; and
  - findings of guilt (in particular any that relate to the victim in question or other family violence offences, where that information is available).

See [5.148]–[5.168].

### *Previous good character*

- 2.14 If there is a proven pattern of family violence, any evidence of the offender's 'good behaviour' and reputation in society generally should be given very little weight.

See [5.169]–[5.174].

### *Timing of the breach*

- 2.15 Where an order is contravened only a short time after the making of the intervention order or there has been an earlier contravention, this should be an aggravating factor.

See [5.175]–[5.179].

### 3. The Sentencing Range and the Appropriateness of Particular Sanctions

- 3.1 The following section is intended to be a guide to the relevant sentencing range and the use of sentencing dispositions for contraventions of family violence intervention orders, based on the presence of particular factors. The link between the sentencing ranges identified and the sanctions grouped with them should not be read prescriptively. The identification of certain factors within one of the sentencing ranges does not mean that the suggested sanctions will be the only 'correct' sentences in any given case.
- 3.2 The ranges are simply intended to provide some assistance to magistrates by grouping the factors discussed into a cohesive framework within which the individual circumstances of each case can be considered.
- 3.3 The most common sanctions in the sentencing hierarchy are all included in the table opposite. However, considering the Council's reservations about the use of suspended sentences generally, despite its place in the hierarchy, there would be very few cases in which a suspended sentence would be the appropriate sentence for breach of a family violence intervention order.

## Considerations for Each Sanction

## Sentencing Range and Factors

### Adjourned Undertaking with/without Conviction (Low)

In considering whether it is appropriate to attach a program condition, the court should take into account whether there are adequate mechanisms in place to ensure compliance. If there are no adequate mechanisms in place to ensure compliance, the court should consider ongoing court supervision of the undertaking (see paragraph [4.53]).

The court should also consider attaching a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim (see paragraphs [4.63]–[4.74]).

### Fine (Low)

The court should consider whether a fine will impact negatively on the victim, for example if imposing a fine may affect the offender's ability to pay child support payments or provide other financial support that the offender would normally provide to the household (see paragraphs [3.61]–[3.64]).

### Community-Based Order (Low and Medium)

When imposing a community-based order, a court could consider attaching:

- a condition directed at the offender's conduct such as a men's behavioural change program;
- the possibility of a community service order, fixing the number of hours (up to 20 hours per week) according to the gravity of the offence;
- a supervision order, for those offenders who demonstrate a high risk of re-offending; or
- a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim (see paragraphs [4.63]–[4.74]).

### Intensive Correction Order (Medium)

When imposing an intensive correction order, a court could consider attaching a special condition directed at the offender's conduct such as a men's behavioural change program; programs that are not based within Corrections Victoria may be attached to the order.

### Wholly (Medium) and Partially (High) Suspended Sentence

In deciding whether a suspended sentence is an appropriate sanction for a breach of an intervention order, the court should consider whether the offender requires some level of intervention to prevent further offending (such as a men's behavioural change or other rehabilitative or treatment program). If so, a suspended sentence would not be the appropriate sanction.

Further, if the court is of the view that the immediate safety of the victim is an issue, a suspended sentence is unlikely to be an appropriate sanction (see paragraphs [3.149]–[3.150]).

### Immediate Custodial (High)

Given the potentially serious and long-lasting effects of both physical and non-physical breach behaviour, immediate terms of imprisonment should not be confined to breaches involving physical violence. Where any non-physically violent behaviour caused or was intended to cause a high degree of harm and anxiety, a court should consider an immediate custodial sentence (see paragraphs [5.7]–[5.10]).

### Low

Nature of the breach is not serious and it has minimal impact on the victim

Single instance offending

Offender has no prior family violence convictions (or very few non-family violence convictions)

### Medium

Nature of breach is moderate and it has a moderate impact on the victim

More than one instance of offending

Breach occurs in or near the victim's home

Breach is in the presence of children

Breach occurs only a short time after the making of the order or an earlier breach

Offender has some relevant prior convictions

Victim is particularly vulnerable

### High

Nature of breach is serious and it has a serious impact on the victim (not limited to physical violence)

Persistent or regular offending

Breach occurs only a short time after the making of the order or an earlier breach

Breach directly involves children

Offender has many relevant previous convictions

Victim's ongoing safety is compromised

Breach involves a home invasion

Victim is particularly vulnerable

## Appendix 2:

# Statistical Analysis Methodology

### Data

- 1.1 The source for the breach of intervention order data was the criminal component of the Magistrates' Court case management system, Courtlink. The Sentencing Advisory Council receives regular extracts from this system, and using these extracts has built a database of all sentences imposed for all charges in the Magistrates' Court from 1 July 2004 onwards.
- 1.2 For the purposes of the data analysis in this report, a subset of the Sentencing Advisory Council's Magistrates' Court Database was created. It comprised all cases in which a breach of family violence intervention order was sentenced in the three years from 1 July 2004 to 30 June 2007.
- 1.3 This dataset contained a range of information about all charges sentenced for each defendant, including the date the offence was committed, the date of the sentence, the sentence type and quantum, and various defendant characteristics. For each breach of intervention order charge in the dataset, the dataset included additional information sourced from the civil component of Courtlink about the original order, such as the age of, and relationship of the defendant to, all aggrieved family members and the date the order was made.

### Methodology

#### *Determining the type of intervention order breached*

- 1.4 While the charge of breach of intervention order is recorded in the criminal component of Courtlink, the type of intervention order (stalking or family violence) breached is not. Because the focus of this report is breach of family violence intervention orders, it was important to know the type of intervention order breached.
- 1.5 The only way of determining the type of intervention order breached was to access the original intervention order imposed in the civil component of Courtlink. Unfortunately, however, there is no unique identifier linking cases in the criminal and civil components of Courtlink. As a proxy, the Council therefore used name and date of birth information to link data across the two components of Courtlink. Through an iterative process the Council was able to locate the original intervention order for 88 per cent of breached intervention orders.

#### *Counting rule for sentence type*

- 1.6 The counting rule for sentence type for breach of family violence intervention orders was the most severe sentence attached to charges of this offence for a defendant. Therefore, if a defendant had multiple breach charges, only the most severe sentence would be counted.

## Analysis

- 1.7 There were a number of key aspects to the Council's analysis:
- the effect on the breach sentence of other offences committed by the one defendant;
  - the effect on the breach sentence of the lag between the order and its breach;
  - the effect on the breach sentence of the presence of young children on the original order;
  - sentence trajectories for repeat breach defendants; and
  - the rate of repeat breaching.

### *Breach sentence and other offences committed by the one defendant*

- 1.8 The effect on the breach sentence of other offences committed by a defendant was assessed at both the case level and the breach date level.
- 1.9 The case level comprised all charges sentenced in the same case as the breach, regardless of the date these other offences were committed. In contrast, the breach date level was all charges committed by a defendant on the same date as the breach. For both levels, the number and type of other offences were determined and variation in sentencing practices for the breach was assessed according to the number and type of other offences.
- 1.10 An 'other' offence was defined by the statutory reference charged. The counting rule used was one count for each different statutory reference in a case. Therefore, multiple charges of the same statutory reference were reduced to one count.
- 1.11 It should be noted that the impact of different types of offences on the sentence for breach of intervention order is difficult to assess, particularly because cases often involve a number of different offence types. For example, cases involving a breach of intervention order and a theft are also likely to involve a number of other offences. Thus the impact of theft is difficult to assess.
- 1.12 A further caveat to this analysis, and indeed other analyses that attempt to link a single factor to sentencing, is that multiple factors are often involved. Therefore, any single factor that appears to have an effect on sentence variation needs to be interpreted with caution.

### *Breach sentence and the lag between the order and the breach*

- 1.13 The effect on the breach sentence of the lag between the order and the breach was assessed by examining sentence variation for breaches according to the time between the date that the original intervention order was imposed and the date the breach offence occurred for the one defendant.
- 1.14 The order date for breaches was obtained from the civil component of Courtlink and the breach date, as well as sentencing information, was obtained from the criminal component of Courtlink.



*Breach sentence and the presence of children on the original order*

- I.15 The effect on the breach sentence of the presence of children/young people on the original intervention order was assessed by examining sentence variation for breaches according to the presence of children under 18 years old on the original intervention order.
- I.16 Information about aggrieved family members was sourced from the civil component of the Courtlink system, and was linked to breach records using name and date of birth information common to records from both components of Courtlink.
- I.17 The presence of children on an intervention order does not necessarily mean the breach directly impacted on the children.

*Sentence trajectories*

- I.18 Another component of the statistical analysis was how sentencing changed when a person was sentenced on successive occasions or episodes. Specifically, the Council was interested in whether sentence severity escalated. The sentencing hierarchy described elsewhere was employed to determine change or trajectory in sentencing. Theoretically, sentences should be more severe for subsequent breaches than for an initial breach. The *Crimes (Family Violence) Act 1987*—in operation for the period under examination—provided that the maximum penalty rose from 2 years' imprisonment to 5 years' imprisonment for a subsequent breach.
- I.19 To perform this analysis, names and dates of birth of people were used to link together cases of breach of a family violence intervention order for the one person, and sentence dates were used to determine consecutive sequence. It was not possible to determine how many records could not be matched due to data entry inconsistencies (that is, names being entered differently for different sentence dates). However, while inconsistencies no doubt do occur, it is believed that they are relatively uncommon.
- I.20 The longitudinal nature of this subsequent sentencing analysis makes it important to understand the full history of defendants being sentenced. Unfortunately, it was not possible to determine whether a defendant sentenced within this period had had sentences for breach of intervention order prior to July 2004. Thus, using these data it is not known whether the first case in which a person appears *within the dataset* is in fact their first breach of intervention order. While the analysis was unable to determine whether a case was the first for a defendant, it was able to determine the sequence of cases for a defendant within the dataset. Some transitions will be first to second, other transitions could be, for example, fourth to fifth. The difference in sentencing may vary the further into an offender's career the case occurs. Despite this limitation, it is still valid to gauge the change in sentencing across consecutive episodes of sentencing.

## Appendix 3: Person Analysis: Recidivism

- 1.1 The purpose of this analysis was to assess the level of recidivism for breach of a family violence intervention order.

### Recidivism

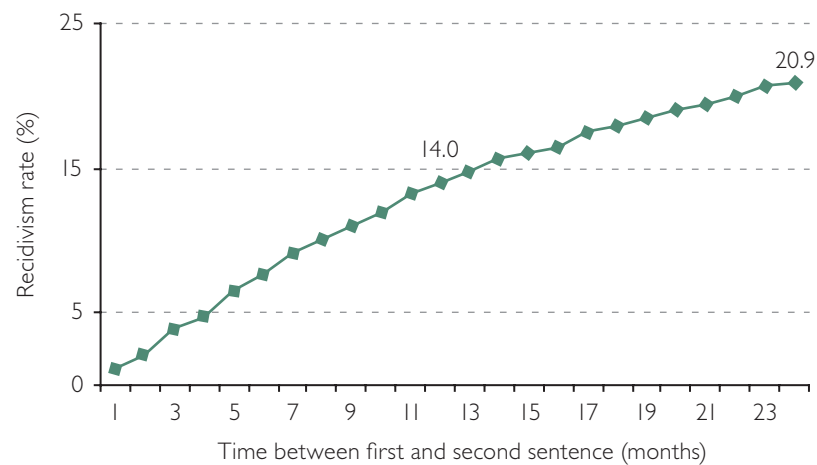
- 1.2 Broadly, recidivism may be defined as the repetition of offending by the one person. Within this definition, details vary in the type of offending, the length of time between repetitions and the threshold of measurement. Here, the definition of recidivism is restricted to repetition by the one person of proven charges of breach of a family violence intervention order over a two-year time frame.
- 1.3 It is recognised that restricting the definition of recidivism to proven charges of the offence (that is, those that are proven and receive a sentence in court) will necessarily result in an underestimate of the true breach of intervention order recidivism rate. This is due to the well documented issue of attrition both before and within the criminal justice system.
- 1.4 To assess repeat offending it is important to give all defendants the same length of time in which to re-offend. This was achieved by setting a repeat offence cut-off date for each offender. The baseline population therefore was all defendants sentenced for breach of intervention order in the first year of the reference period (2004–05). As the number of days from 1 July 2005 to 30 June 2007 is 730, this was set as the cut-off number of days: only repeat offences within 730 days of the initial sentence date were included.
- 1.5 A minor limitation with the data is the use of sentence date as a time indicator. Sentence dates by definition follow offence dates, sometimes by substantial lags due to report, investigation and case delays. This means that subsequent offences may have occurred before the baseline sentence date. This limitation is unlikely to have an impact on the overall recidivism rate.

### Recidivism Rate

- 1.6 The number of people sentenced for breach of a family violence intervention order in 2004–05 was 1,151 (average age: 34.4 years, 90.3 per cent were male).
- 1.7 The analysis of recidivism considers recidivism in terms of the overall rate according to the time between the first and second sentence, gender and age group of defendant and sentence type at the first sentence date.
- 1.8 Of the 1,151 people sentenced in 2004–05, 241, or 20.9 per cent, were sentenced on at least one subsequent occasion for breach of a family violence intervention order within two years of the initial sentence date.

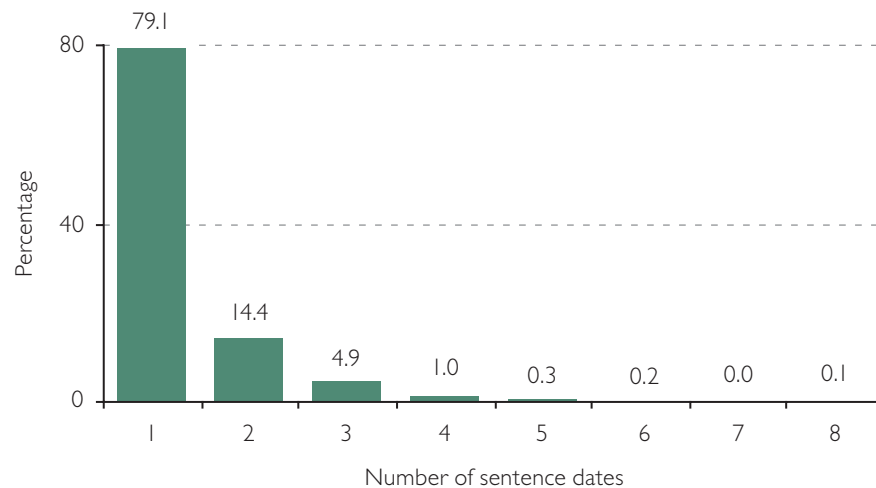
- 1.9 Figure 29 shows the cumulative recidivism rate by the time between the first sentence date and second sentence date. The rate increased more sharply in the first year than the second year. Over the first 12 months the recidivism rate reached 14.0 per cent, but over the next 12 months it rose a further 7.9 percentage points to 20.9 per cent. The average time between the first breach sentence and the second breach sentence was 9.7 months.

**Figure 29:** Cumulative recidivism rate by time between first sentence date and second sentence date of people sentenced for breach of a family violence intervention order in 2004–05



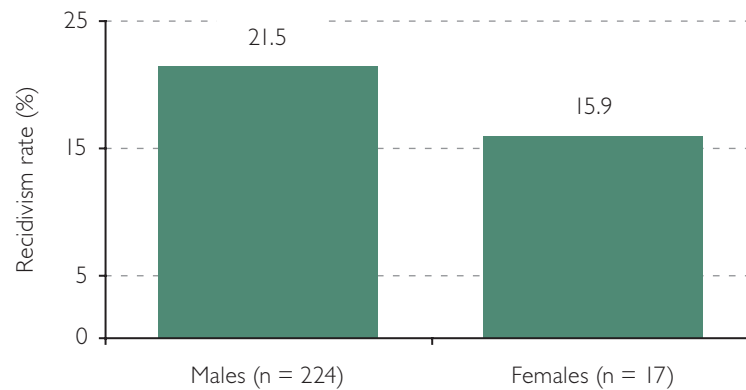
- 1.10 Figure 30 disaggregates the number of times people were sentenced for breach of a family violence intervention order within two years of their first sentence date. The highest number of sentence dates was eight (one person), while 14.4 per cent of people had two sentence dates.

**Figure 30:** Percentage of people sentenced for breach of a family violence intervention order in 2004–05 by number of times sentenced within two years of first sentence date



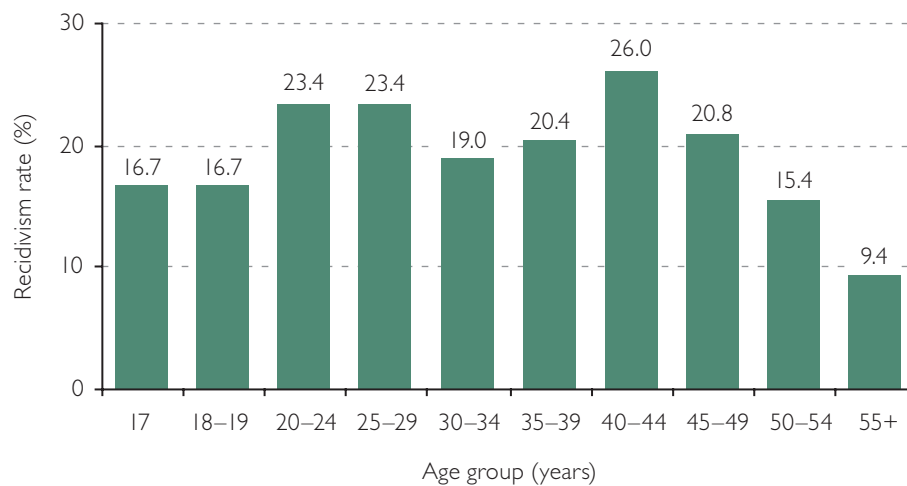
- I.11 Figure 31 shows the recidivism rate after two years by gender. Males (21.5 per cent) had a higher recidivism rate than females (15.9 per cent).

Figure 31: Recidivism rate for people sentenced for breach of a family violence intervention order by gender of defendant



- I.12 Figure 32 shows the two-year recidivism rate by age group. The rate was highest for people aged 40–44 years (26.0 per cent) followed by 20–29 years (23.4 per cent) and lowest for those aged 55 years and over (9.4 per cent).

Figure 32: Recidivism rate for people sentenced for breach of a family violence intervention order by age group of defendant



## Summary

- I.13 This analysis has shown that the recidivism rate for the offence of breach of a family violence intervention order was just over one fifth (20.9 per cent) after two years from the baseline sentence date. It was higher for males than females and highest for defendants aged 40–44.

## Appendix 4: Consultation

### Meetings/Visits

Date	Meeting/Visit
21 July 2008	Meeting with Magistrates (Melbourne)
25 August 2008	Visit to Family Violence Division of the Magistrates' Court (Heidelberg), including meetings with court registrars, defendant worker, applicant worker, prosecutor and magistrate
17 September 2008	Meeting with men's behavioural change program service providers
18 September 2008	Community Legal Centres Roundtable
18 September 2008	Family Violence Service Provider Roundtable
23 September 2008	Visit to Family Violence Division of the Magistrates' Court (Ballarat), including meetings with defendant worker, duty lawyer and magistrate
24 September 2008	Victoria Legal Aid
1 October 2008	Victoria Police Focus Group (Ballarat)
1 October 2008	Meeting with Voices of Women for Justice
2 October 2008	Victoria Police Focus Group (Region 4)
8 October 2008	Victoria Police Focus Group (Melbourne Prosecutions)
15 December 2008	Attended Family Violence Stakeholder Reference Group Meeting
12 January 2009	Meeting with Magistrates (Melbourne)
4 February 2009	Meeting with Melbourne Prosecutions

### Responses to Draft Report

Date	Organisation
12 February 2009	Women's Legal Service
13 February 2009	Office of Public Prosecutions
15 February 2009	Confidential
15 February 2009	Confidential
16 February 2009	Victorian Aboriginal Legal Service Co-operative Ltd
25 February 2009	Federation of Community Legal Centres
25 February 2009	Law Institute of Victoria
26 February 2009	Aboriginal Family Violence Prevention and Legal Service (Victoria)
5 March 2009	Victoria Police
11 March 2009	Magistrates' Court of Victoria

# Appendix 5:

## Survey of Victorian Magistrates

### **SURVEY OF MAGISTRATES ABOUT BREACH OF FAMILY VIOLENCE INTERVENTION ORDERS**



This survey, conducted by the Sentencing Advisory Council, aims to canvass your views about sentencing for breaches of family violence intervention orders. It is intended to be read with the *Breaching Family Violence Orders—Consultation Paper*.

The results of the survey will be used to inform the council's advice to the Attorney-General on current sentencing practices for this offence.

This survey is **strictly confidential and anonymous**. No analysis will identify individual respondents.

#### **Demographic questions**

1. How many years have you been a magistrate?
2. Male /Female
3. Please choose jurisdiction: Rural/Regional/Metropolitan
4. What is the average amount of time you spend on
  - (a) family violence matters generally (%)
  - (b) breach of intervention orders (%)
5. Does the court in which you spend the majority of your time have a court assistance scheme for family violence applicants? Yes /No

#### **Sentencing for Breach of Family Violence Intervention Orders**

1. Do you think there is enough information provided to magistrates at the sentencing of breach of family violence intervention order matters, e.g. victim impact statements? If no, what further information would be useful?
2. (a) Do you think that the existing range of sanctions currently available for breach of intervention orders is sufficient and appropriate? Yes /No 
  - (b) Are there any changes you would like to see made to any of the existing sanctions?
  - (c) What additional sanctions (if any) should be available for these matters and why?
3. The data tells us that fines are the most commonly used sanction for breach of family violence intervention orders (see page 6 of the consultation paper). What sentencing purposes are achieved by imposing a fine in these matters?

4. 77% of offenders who were sentenced to a fine for breaching a family violence intervention order in the period July 2006 to June 2007 also had a conviction recorded against them. This is higher than the percentage of people who had a conviction recorded in addition to a fine being imposed for all offences sentenced in the Magistrates' Court (56 %) (see page 7 of the consultation paper). Why are courts more likely to record a conviction with a fine for breaching a family violence intervention order compared to other offences?
5. If in a particular case you consider that a conditional non-custodial sanction is appropriate, what factors would influence your decision on whether to impose a community-based order or an adjourned undertaking?
6. Are there any circumstances in which you would impose a sentence of imprisonment for breach of a family violence intervention order where the victim had not suffered any physical violence?
7. A number of sentencing factors have been identified as being particularly relevant to sentencing breach of family violence intervention orders (see pages 11–14 of the consultation paper). Do you consider these factors as being relevant to this offence? Are there any that have been omitted?
8. Do you consider the currently available men's behavioural change programs sufficiently accessible, flexible and effective?
9. Do you think that there should be court supervision of offenders who are participating in men's behavioural change courses and/or programs to address associated issues, such as drug/alcohol programs?

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