

ATTACHMENT [AF 6]

This is the attachment marked “[AF 6]” referred to in the witness statement of Arie Freiberg dated 30 July 2015.

Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders

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Introduction

This document contains the guiding principles set out in the Sentencing Advisory Council's report on *Sentencing Practices for Breach of Family Violence Intervention Orders*.

In that report, the Council reviewed sentencing practices for breaches of family violence intervention orders and identified a number of matters that it considered were particularly relevant to breaches of these orders. It found that there was a predominance of lower-end sentencing orders, particularly fines and adjourned undertakings, and these were imposed relatively frequently on repeat offenders. It also found that there was a widespread perception amongst those consulted that current sentencing practices did not properly reflect the seriousness of the offence.

The Council concluded that the major purpose of sentencing in these cases should be to achieve ongoing compliance with intervention orders, which will ultimately lead to better protection of victims and their families.

Punitive outcomes are not necessarily the right answer. The Council strongly believes that imprisonment is not the ultimate response to every serious offence. Rehabilitative or interventionist measures with offenders should be encouraged where they can lead to long term protection of victims and the community more generally.

The Council also observed that family violence dynamics can result in some sentences, particularly fines, punishing victims

as much as they do offenders. It was of the belief that more flexible sentencing options that incorporate community work and even some form of coercive rehabilitation, can be more effective in dealing with offenders.

Given the unique and complicated issues associated with family violence, it is crucial that magistrates have as much information as possible at their disposal in order to assist them in the very difficult task of sentencing breaches of family violence intervention orders.

The Council is acutely conscious of the pressures that magistrates, police and police prosecutors work under. It believes that contextualising information is an important step forward, and so to assist courts, police and legal practitioners, the Council has developed guiding principles specifically focused on breach of family violence intervention orders.

This guidance is not meant to replace judicial discretion, which remains at the heart of our system. The guiding principles are about providing more information to the public, to the courts and to governments.

The Council's full report on *Sentencing Practices for Breach of Family Violence Intervention Orders* is available from its website.

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.
- 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.

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.

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.

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.

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.

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.

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.

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).

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).

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.

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.

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.

Sentencing Range and Factors

Considerations for Each Sanction

<p>Low</p> <p>Nature of the breach is not serious and it has minimal impact on the victim</p> <p>Single instance offending</p> <p>Offender has no prior family violence convictions (or very few non-family violence convictions)</p>	<p>Adjourned Undertaking with/without Conviction (Low)</p> <p>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.</p> <p>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.</p> <p>Fine (Low)</p> <p>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.</p>
<p>Medium</p> <p>Nature of breach is moderate and it has a moderate impact on the victim</p> <p>More than one instance of offending</p> <p>Breach occurs in or near the victim's home</p> <p>Breach is in the presence of children</p> <p>Breach occurs only a short time after the making of the order or an earlier breach</p> <p>Offender has some relevant prior convictions</p> <p>Victim is particularly vulnerable</p>	<p>Community-Based Order (Low and Medium)</p> <p>When imposing a community-based order, a court could consider attaching:</p> <ul style="list-style-type: none"> • 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. <p>Intensive Correction Order (Medium)</p> <p>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.</p>
<p>High</p> <p>Nature of breach is serious and it has a serious impact on the victim (not limited to physical violence)</p> <p>Persistent or regular offending</p> <p>Breach occurs only a short time after the making of the order or an earlier breach</p> <p>Breach directly involves children</p> <p>Offender has many relevant previous convictions</p> <p>Victim's ongoing safety is compromised</p> <p>Breach involves a home invasion</p> <p>Victim is particularly vulnerable</p>	<p>Wholly (Medium) and Partially (High) Suspended Sentence</p> <p>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.</p> <p>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.</p> <p>Immediate Custodial (High)</p> <p>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.</p>

Publications of the Sentencing Advisory Council:

Sentencing Practices for Breach of Family Violence Intervention Orders Final Report

This report finalises a review of sentencing practices for the offence of breaching a family violence intervention order.

High-Risk Offenders: Post-Sentence Supervision and Detention Review

The Council's High-Risk Offenders: Post-Sentence Supervision and Detention Review has produced an issues paper, a discussion and options paper, a research paper on the recidivism of sex offenders and a final report.

Homicide in Victoria: Offenders, Victims and Sentencing Statistical Report

The report shows how sentencing outcomes for homicide vary on the basis of characteristics of the incident, the offender and the victim.

Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing Research Paper

The *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing Research Paper* provides analyses of both the substantive and methodological issues in the field, with discussion of the way to progress the capacity of the Council to gauge public opinion on sentencing in Victoria.

Provocation in Sentencing

The *Provocation in Sentencing Research Paper* examines provocation in sentencing decisions in Victoria, interstate and internationally. The paper suggests an approach to considering provocation in sentencing.

Recidivism of Sex Offenders Research Paper

This research paper examines the evidence about the prevalence and nature of sexual offending, characteristics of sex offenders, recidivism rates among different kinds of sex offenders and the efficacy of treatment programs.

Suspended Sentences in Victoria: A Statistical Profile

This report presents an analysis of suspended sentences imposed in the Magistrates' Court and higher courts from 2000–01 to 2006–07.

Suspended Sentences Review

The Council's review of Suspended Sentences has produced an information paper, discussion paper, interim report and two final reports.

Driving While Disqualified or Suspended Report

This report finalises an investigation of people who drive while disqualified or suspended. The report recommends improvements to methods for detecting the growing numbers of unauthorised drivers on Victorian roads.

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