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VICTORIAN ROYAL COMMISSION INTO FAMILY VIOLENCE

MELBOURNE

THURSDAY, 6 AUGUST 2015

(14th day of hearing)

BEFORE:

THE HONOURABLE M. NEAVE AO - Commissioner

MS P. FAULKNER AO - Deputy Commissioner

MR T. NICHOLSON - Deputy Commissioner

COMMISSIONER NEAVE: Thank you, Ms Ellyard.

MS ELLYARD: Good morning, Commissioners. The focus of the evidence today is the criminal justice response to family violence. This builds on the evidence that the Commission has been hearing this week about other ways in which the law and order system interacts with or responds to family violence matters.

We have heard already about the initial police response to family violence. We have had two days of evidence dealing with different ways in which the intervention order system responds to family violence, including the latter part of an intervention order system which becomes in effect a criminal justice response, as we heard yesterday, if intervention orders are breached.

What we turn to today is the broader criminal law system and how family violence matters arise in and are dealt with by that system. So, we are moving beyond questions of such things as breaching intervention orders into the realm of other perhaps more serious offending that arises in a family violence context and how that might be responded to.

When we think about a criminal justice response, it's important to consider three quite disparate or separate elements. Firstly, there is the question of what are the offences with which someone can be charged. We know there are many substantive offences which already arise and are charged in a family violence context: Aggravated burglary, the offence of breaking into a house with the intention to assault someone therein, is an offence that is sometimes charged in a family violence context; serious assaults; sexual assaults; attempted

murders; and indeed in severe cases murder and manslaughter offences are charged and prosecuted in a family violence context.

Some of the issues we will deal with today are whether or not there ought to be additional offences that arise that could respond to family violence. That's the first issue, what are the offences.

The second issue is what is the process by which those offences are brought before the court and come through the court? How does that process work? Is it responsive? We have already heard some evidence about the impact of delay and the impact of expedition on the prosecution of matters at the Magistrates' Court level. We will take up that issue a little in relation to the higher courts today and consider to some extent the way in which the experience of victims is reflected and appropriately responded to by the criminal justice system. So that's the second issue, process.

The third aspect is then sentencing. What are the sentences that are available in family violence offending; what are the statistics that are available about the kinds of sentences that are imposed; the purposes for which they are imposed; and should there be any changes in relation to the way the sentencing structure works. Part of sentencing involves consideration of what's done for people after they are sentenced, if they are sentenced to a community corrections order or to prison time; what are the services that are available; what are the mechanisms that are available to deal with the causes of their offending and monitor them.

So, against that backdrop, the themes for today are: Firstly, how much of the response to family violence should be a criminal law response and what are the limits on what the criminal law can do in response to and to prevent family violence?

Secondly, how does the criminal law process, as it presently stands, treat victims of family violence? Does that process take appropriate account of their needs and their wishes?

Thirdly, as I have adverted to, should there be additional offences created to fill gaps in the criminal law's response to family violence?

Fourthly, how are family violence offences or offences arising in a family violence context regarded for sentencing purposes? Should there be changes in sentencing practice to better reflect the nature of family violence offending?

Fifthly, after offenders are convicted and sentenced, what opportunities are there for the sentences to operate as a tool of ongoing rehabilitation as well as a tool of risk management and punishment?

Then, finally, what are the ways in which the ongoing risk posed by perpetrators can be assessed and managed by Corrections Victoria and those who have responsibility for such matters?

Turning then to the witnesses that we are going to call, the first evidence will be via videolink with two professors, Professor Heather Douglas of the University of Queensland and Professor Leigh Goodmark from the University of Maryland, who will together give some evidence about some of these more philosophical issues of

what should the role of the criminal law be; what are the differing ways in which the criminal law might frame its response to family violence, such issues for example as mandatory against discretionary policies for arrest and prosecution, the ways in which typologies of violence might be used or misused, whether or not there ought to be a restorative justice approach to family violence offending, whether there ought to be more collaborative approaches between law and order and other agencies.

Next we will hear from Helen Fatouros, who is the director of criminal law services at Victoria Legal Aid. Her evidence will offer both a practice and a policy perspective on the current criminal law system, but also some reflections on the way the criminal law has developed in other areas, particularly in relation to sexual assault matters; the extent to which those developments might have applicability or might have already been taken up in the family violence space; some changes in processes and sentencing practices in family violence matters; and the need to include victims in an appropriate way when decisions are made about what will happen in criminal matters.

Next we will hear from Professor Arie Freiberg, who is the head of the Victorian Sentencing Advisory Council and his evidence will deal specifically with the past and the present approach to sentencing for family violence matters in Victoria and he will also be able to assist you with references to the practices and statistics available in other jurisdictions.

You also have before you, although we are not calling her to give oral evidence, the statement of

Dr Christine Bond which also deals with matters of sentencing. She has conducted an extensive review of family violence laws across Victoria and she gives some evidence about the importance of uniformity and she makes an assessment of the degree to which the systems operating in different states protect or don't protect the interests of victims.

Then in the afternoon we will hear again from Magistrate Broughton whom we heard from yesterday. The focus of her evidence today will be particularly on criminal law processes in the Magistrates' Court. Then we will hear from Marisa De Cicco, who is from the Department of Justice and Regulation. Her evidence will deal with that department's position and approach to criminal justice issues and she will be in a position to assist you with some information and reflections on how policy has developed in this area.

Then, finally, we will hear from the Commissioner for Corrections Jan Shuard and Assistant Commissioner Craig Howard in relation to Corrections Victoria's position and approach to family violence offenders, including the potential for ongoing supervision of offenders where there are high risk cases.

The submissions that have been received by the Commission include a large number of recommendations that various interested parties invite the Commission to consider. Some of those recommendations that have been put forward through the submissions process include substantial recommendations for legislative change. Legislative change to the Bail Act to deal with the extent to which family violence offenders can receive bail;

legislative change to the Crimes Act, particularly in relation to the present offence of failure to report sexual abuse of children; amendments to the Criminal Procedure Act in relation to contested hearings; amendments to legislation that might presently prevent the use of remote witness facilities or that might direct victims of family violence to give evidence on multiple occasions; amendments to other laws, social security, tenancy and infringement laws, which criminalise victimhood in family violence contexts; and a number of submissions have also invited the Commission to consider greater use of diversion schemes and restorative justice, particularly where young people are concerned, but in the broader context as well. All of those recommendations having been put forward, the Commission is going to be invited to consider them as part of the evidence.

That completes the opening. I understand that we have Professors Douglas and Goodmark ready for us on the screen and I will ask that the screen be brought up and that they be sworn in to give their evidence.

<HEATHER ANNE DOUGLAS (via videolink), affirmed and examined:

<LEIGH SUZANNE GOODMARK (via videolink), affirmed and examined:

MS ELLYARD: Thank you very much, Professors. I'm not sure if you can see me. I hope that you can. Thank you very much for your attendance and participation today.

May I begin with you, please, Professor Douglas. You are presently the Professor of Law at the University of Queensland. Could you summarise for the Commission, please, your particular research interests and your professional background?

PROFESSOR DOUGLAS: Previously I was a lawyer some time ago,

but for some time I have been an academic based at the University of Queensland. My research has revolved around my interests in women and the justice system and in relation to Indigenous people in the justice system, primarily the criminal justice process, but I have also looked into child protection and civil or domestic violence protection orders in the domestic violence context.

MS ELLYARD: You have made a statement to the Royal Commission that's dated 20 July 2015. Are the contents of that statement true and correct?

PROFESSOR DOUGLAS: Yes, they are.

MS ELLYARD: You have attached to your statement a number of articles previously written by you dealing with matters that are of interest to the Commission.

PROFESSOR DOUGLAS: Yes, that's true.

MS ELLYARD: May I turn to you, Professor Goodmark. You are presently a Professor at the University of Maryland in the United States. Could you summarise for the Commission, please, your professional background and your research interests?

PROFESSOR GOODMARK: I started as a lawyer representing women and children in a variety of civil contexts, including protective orders, custody, divorce, child support and other related kinds of matters. I then became an academic. I have also been a policy analyst at the American Bar Association's Centre on Children and Law where I headed their children and domestic violence project. For the last 12 years I have been a clinical teacher teaching a clinic in which my students and I represent clients in various family violence related

matters and my research is on domestic violence and the law and particularly the ways in which the law fails to adequately protect victims of domestic violence and provide them with justice in a meaningful way.

MS ELLYARD: Thank you. The first question that I would like to invite you both to reflect on, but perhaps first turning to you, Professor Douglas, is the extent to which the response to family violence should be a criminal law response and some of the issues that arise in using the criminal law as a way of responding to family violence issues.

Turning first to you, Professor Douglas, could you comment, please, on what you see as the role of the criminal justice system in responding to family violence?

PROFESSOR DOUGLAS: I think to sort of say how much or how far it should go or how important it should be is almost the wrong kind of question. I think it should definitely be available and a real option in these cases and I think at the moment that's the problem, that it's actually not a real option for people to pursue in these cases. Police aren't giving opportunities to victims to make criminal complaints in many cases and in other cases where they are providing opportunities for criminal complaints to be made by victims of domestic violence they are really given a very difficult context in which to make the call.

So it might be in the tense moments of a police call-out that they are asked whether they want to assist the police with a criminal prosecution, which is clearly the wrong moment to do that. Then of course the follow-up to the criminal prosecution is very little support, both through the preparation for the case and then the case as

well. So women drop out of the system at all of those points.

So I think the opportunity for them to be involved in the criminal justice system is really important and for many women who I have spoken to, criminal justice processes are very important to them and the sentencing process has been very helpful to them in terms of their recovery and in terms of stopping the violence. So I think it needs to be an option generally in cases of domestic violence. That would be my position in relation to that.

MS ELLYARD: Thank you. May I turn to you, Professor Goodmark, and I neglected to note that you have made a statement that's dated 30 July 2015. Are the contents of that statement true and correct?

PROFESSOR GOODMARK: They are.

MS ELLYARD: Can I ask you then to comment from your perspective and from the United States perspective on this issue of the extent to which the criminal law is the correct frame within which to respond to family violence and from your perspective some of the issues that arise using the criminal law?

PROFESSOR GOODMARK: Certainly. So the criminal law is a much better developed resource for people subjected to abuse in the United States and that has both positive and negative effects. I agree with Professor Douglas that the criminal law absolutely needs to be an option, both because it sends a message to perpetrators that their behaviour is illegal, but also because it's a very important option for some people subjected to abuse, that they want retributive justice, they want punishment, they want the kind of

separation that the criminal justice system can provide. But in the United States some of the innovations we have made in the criminal justice process have been extremely disempowering to people subjected to abuse.

Just to name a couple of them, one thing we have done in the United States is in response to very, very low arrest rates by police, many jurisdictions adopted what are called mandatory arrest statutes and under a mandatory arrest law police lose the discretion to make a determination as to whether an arrest should occur. Instead, any time that police go to the scene of a domestic violence offence and there is probable cause to believe that such an offence has occurred, police are required to make an arrest.

While that was seen as a way of ensuring that police would not use their discretion to continue to not make arrests, the pendulum has swung I think a bit too far, in that what that does is take away from the people who are subjected to abuse any ability to determine whether arrest is actually the thing that best meets their goals at the given time. So, you don't have the ability as a victim of violence to say, "I want the police to intervene at the intermediate moment to stop this violence, but I'm not interested in prosecuting, I'm not interested in being part of the criminal justice system."

Similarly, in response to low rates of prosecution in domestic violence cases, a number of prosecutors' offices have adopted what are called "no drop" prosecution policies and in no drop prosecution similarly what that means is that whenever prosecutors have sufficient evidence to make a case of intimate

partner violence, they will do so regardless of whether the person subjected to abuse is interested in having that case brought forward.

MS ELLYARD: If the victim doesn't want to give evidence, how does that work in practical terms for the prosecutor who can't drop the case in which the victim would be the key component?

PROFESSOR GOODMARK: In jurisdictions that have what are called soft no drop prosecution policies, they do it with other forms of evidence: photographs, medical records, statements on the scene. But in jurisdictions with hard no drop prosecution policies, that has meant subpoenaing reluctant victims to testify, arresting those victims when they fail to comply with subpoenas, incarcerating them as material witnesses and prosecuting them for perjury in cases where they give statements that are inconsistent with statements that have previously been given to police. All of those I think are really problematic consequences of this focus on the criminal justice.

Similarly with mandatory arrest, the unintended consequences of that has been an increase in the number of dual arrests, so where police go to the scene and can't make a determination as to who the primary offender is, they arrest both parties and arrest the women. It is in fact arrests of women that have increased most significantly since the inception of mandatory arrest.

While I do believe there is an important role for the criminal law, the caution I would bring you from the United States is be careful how you administer it. Don't make it the be-all and end-all of your policy in terms of intimate partner violence and be very aware of the impact

of such policies on the people who they are meant to protect.

MS ELLYARD: May I follow up a little bit more on that issue of what you describe in your statement as the removal of a woman's agency and invite first you, Professor Goodmark and then you, Professor Douglas, to comment on this issue of what ought to be the primacy or lack of primacy given to the opinion of the victim and the needs of the victim when decisions are made about how police and courts respond to family violence?

PROFESSOR GOODMARK: I recognise that the State has an independent role in terms of ensuring justice, but these cases are somewhat different in that they are involving the most intimate relationships in people's lives and so I feel very strongly that, as between the State and a person who has been subjected to abuse, that the person subjected to abuse should have the primary responsibility for determining how these cases are dealt with.

That's a bit of a controversial statement, in that many people believe that victims of domestic violence are so controlled by their partners that they are unable to make those kinds of determinations. But I have represented hundreds, if not thousands, of women over the last 20 years and I have had very few of them who were so completely controlled that they were unable to make a rational decision for themselves about what they wanted to see happen in their lives, whether that meant prosecution or pursuing a civil protection order or some other kind of remedy.

So I think we let the tail wag the dog a bit in letting the concern about victims who are so coercively

controlled dictate our policy for all victims of domestic violence, many of whom are perfectly capable of saying, "Yes, this is something I want," or, "No, this is something I don't." When we do that we essentially put the State in the shoes of the batterer by allowing the State to make decisions that control her life in the way that the batterer was doing previously.

MS ELLYARD: Professor Douglas, could I invite you to comment on that same topic?

PROFESSOR DOUGLAS: Yes. I tend to agree that generally women should be the ones making the decision about pursuing criminal justice processes. But I do think there is a big issue about how that decision making is supported, because I do think a lot of the women that are involved in domestic violence cases are very vulnerable women. There may be language issues, there may be all sorts of vulnerabilities that they are experiencing and these might intersect with each other, and they really need the support to work through that decision-making process.

So I would recommend that decisions aren't made about prosecution at the scene of a domestic violence call-out, probably ever, that probably the next day - there might be the situation where there might be an arrest or removal of a violent person, but the decision to prosecute might need to be discussed with the woman so she is properly informed.

I think a case work model where women who are considered to be victims of domestic violence are supported by a case worker through all of the realm of legal responses and various other service responses that they have to negotiate is also assisting them to inform

them about how the criminal justice system will operate, what they will be called upon to do, the likely outcomes and so forth.

But I think there also should be a responsibility on police to treat domestic violence call-outs as possible crime scenes and to collect the appropriate evidence and be ready to follow up with that victim as to whether they should proceed or not. I think it's really important to take the woman on the journey with the process if there is going to be a prosecution.

MS ELLYARD: One of the themes that has emerged thus far for the Commission is the experience of some women who were I guess invited by the police to make a decision, "Do you want to lay charges or not," and felt under a lot of pressure that if they were the ones making that decision they would then feel guilty about the consequences. I guess on the other side we have had evidence about women who felt pleased to be able to say to the perpetrator, "It's not me, it's the police doing it," and that gave them a degree of protection. It was actually what they wanted but the role of the State meant that they were able to shield themselves behind that. Would either of you have any further comments on how we strike this balance between the agency of women on the other hand, but the need to make sure that they are not, if they are given the central role, unable to exercise that role in the way that they might really want?

PROFESSOR DOUGLAS: I really think so many more women will come on that journey if they have good access to information and good support through that process. Whether that is a realistic aspiration, given what that would mean, having

someone work through something that might take six months to come to fruition and then deal with the court and work through all the police contacts that they need to work through. But I think we would find that there are a lot more women going through that process.

We speak to women every day, and a lot of the women I speak to can't understand - they are really quite bemused by the fact that they have been assaulted or they have been stalked for weeks and the criminal justice process would kick in for somebody else but it isn't interested in their situation, and they ask me, "Why is it the case that the criminal justice system doesn't apply when it's a domestic violence case?" I need to say, "Well, there is no rule about that. That's just what seems to be happening."

So a lot of women are really wanting to get involved in the criminal justice process and want to have that opportunity to be involved in a safe way. So I think that's really the crux of it.

PROFESSOR GOODMARK: The two things that most victims want, just to echo Professor Douglas, is time and information. So, if we can give people time to make their decisions and information about what those decisions mean, I think that you can create a kind of partnership.

As to this question of who is it that's responsible, women don't lay charges. At the end of the day it's always going to be the police who are laying the charges. I think if we are thoughtful about the way that we present that information then it's never - I think a victim could say, "I am interested in going forward with prosecution but it will look like it's my decision. You

need to bring the charges."

I think if police are thoughtful about the ways in which they interact with women we can make that happen. But women need the information to be able to make those decisions. What I'm advocating for is not a system in which women have to go and press their own charges, and we have that in Maryland. It's a bit of a disaster. I think it's a terrible system. Police are ultimately always going to be responsible for that. It's how that information gets conveyed and presented both to the woman and the perpetrator that I think really matters.

MS ELLYARD: Professor Douglas, can I turn to another issue that's already been adverted to by Professor Goodmark, and that's this issue of I guess cross-applications or cases where the police can't determine who the primary offender is or for whatever reason there end up being applications for intervention orders by both parties against each other.

At paragraph 17 and following of your witness statement you refer to some research that you have done and some of the conclusions you have drawn about this issue. Could I ask you to speak a bit about the question of cross-orders and the issues that they present?

PROFESSOR DOUGLAS: I think cross-orders are really problematic because they potentially neutralise any protective value of a protection order. Some women report that they are unwilling to call the police to breach a protection order when there is a dual protection order in place because they are concerned that they may be breached instead. So I think there's a real problem with protection orders in that context.

The message also of a dual protection order is that both people are as bad as each other. We have introduced in Queensland into our domestic violence protection act in 2012 a provision that says that magistrates have to turn their mind to the person most in need of protection because we have recognised dual protection orders as a problem. Hopefully more magistrates are taking note of that to make decisions. But I think there is an attitude amongst police, "This is a hard decision. I'm going to leave it up to the magistrate." So then a magistrate needs to make a hard decision.

The difficulty in Queensland in particular, and I can't comment necessarily on Victoria, is that a lot of our cross-applications, over 40 per cent of them, are lodged by police on behalf of both parties. So it's a bit of a copy-and-paste effort between both applications. Really, it's a sign that the police are just throwing this up to the magistrate to make the decision, and that's obviously really problematic, especially given it is an adversarial system, theoretically, and the police are acting for both parties. So I think that's a real problem, police are collaborating in that problem.

What we also see is there has been a jump in cross-orders in New South Wales and Victoria - we do have statistics on this - since family law changes which have made shared care a priority and domestic violence a way to move away from that position. So I think that cross-orders are sometimes used as a tactic by perpetrators to neutralise any suggestion of domestic violence in the Family Court. So I think that's something

that magistrates need to be very wary of as well.

I think generally we should be aiming not to have cross-orders. I don't think they are particularly useful. I think they send a really problematic message in that they stigmatise the woman who may be being abused in the circumstances as well, and I think that neutralises the protective function of them.

MS ELLYARD: You go on in your statement to talk about, and this builds on this question of who is most at risk, the development of a typology of violence that characterises violence between intimate partners in one of two ways, and you have some concerns, I suppose, about the use of that typology in the criminal law context, whatever might be its use in other places. Could you speak a little bit about that, please?

PROFESSOR DOUGLAS: I think that coercive and controlling violence has been taken on by so much of the legal system in Australia, I think. Certainly family lawyers have taken up this terminology, and a defence has actually been introduced in England called coercive and controlling behaviour. I have real concerns in Australia because it distinguishes it from other forms of violence, such as common couple violence or situational couple violence, which - this is based on Michael Johnson's work, essentially, who actually tracks a range of types of violence in the typology.

But I guess the two key ones from the perspective here are coercive and controlling violence and common couple violence. If we distinguish those two I think there's a real risk that we miss serious and concerning violence by saying, "Situational couple violence isn't a

concern for police in relation to prosecution or domestic violence protection orders; we're focusing on coercive and controlling violence." So anybody involved in situational couple violence doesn't get the level of support that they might need. So I think it's a risky process to focus on coercive and controlling behaviour. Given that sort of typology literature that's developed, I think we have really taken it on board in Australia, and I think it's a concern that we have done that.

MS ELLYARD: Professor Goodmark, to what extent is the broader concept of family violence that I think you are aware we have in Victoria part of the discourse about the criminal response to violence in the United States?

PROFESSOR GOODMARK: Our response to violence is actually much more fragmented than yours. So child abuse neglect is considered a separate concern from intimate partner violence, which is why I use those terms in my work much more frequently. There's been some work around the overlap of intimate partner violence and child maltreatment in the United States, most notably through what was called the federal Green Book project, that looked at that intersection and tried to find ways to better bring together Family Court judges, child protective services workers and domestic violence advocates.

That work has been I think lovely in aspiration, mixed in execution. But we definitely conceive of things differently. The place where they come together in really problematic ways actually in the United States is when people subjected to abuse are held liable for their failure to protect their children from exposure to

domestic violence at times when they are being victimised. So you will see in some jurisdictions in the United States the person who actually does the harm to the child getting a minimal sentence but the mother who fails to protect the child getting a much more significant sentence. I think that's incredibly problematic and something that you would certainly want to avoid.

MS ELLYARD: Can we turn now to the question of sentencing for breaches of intervention orders. Professor Douglas, you have done some work on this area in the context of Queensland, which you refer to at paragraph 24 and following of your statement. What has been the result of the research you have conducted into the sentencing response to breach offences?

PROFESSOR DOUGLAS: The majority of breach offences that were sentences that we looked at in the group of 600 files plus that we looked at in Queensland was fines and no convictions. So 40 per cent of the cases resulted in fines, many of them under $200, and around 40 per cent also resulted in no conviction being recorded. Very few resulted in mid-level penalties, such as probation orders or prison sentences. This was regardless of whether the police had identified the particular breach as assault, criminal damage or stalking. Those were the three offences we looked at in particular.

So of the 640 files we looked at police had identified assault in 55 per cent of cases, nearly 200 cases; in over 100 cases they had identified criminal damage; and police had identified stalking in 60 cases. They hadn't charged any stalking offences, and they had charged four or five criminal damage offences and I think

16 assault charges. So they were quite serious breaches in many cases but they resulted generally in fines and no conviction being recorded.

MS ELLYARD: That was in part because they had been charged merely as a breach of the order rather than the breach of the order plus the substantive offence that might also have occurred?

PROFESSOR DOUGLAS: Usually that would be the case. So often breaches have a much lower sentence. They are a summary offence, which is the lowest form of offence in Queensland. They are heard in the Magistrates' Court. So the highest penalty in theory could be one year to a breach offence in that court. So that would be part of the reason.

But it's also because of the sentencing hierarchy I think in part, which is a bit of a "one size fits all" approach, which is you start at the bottom and move up. So in spite of the fact that fines might be quite inappropriate in a domestic violence case, because of the fact that those fines might be used as a further tool of abuse by abusers, who might then go on to say to his ex-partner or his partner, "I don't have the money for that. I can't give you money for food or supplies because I'm spending it on this fine that you have made me get," or withhold it from children - the partner who is being abused might even find she pays the fine as well. So a fairly inappropriate, you would think, response to a breach, and yet it was very common in the cases that we looked at.

It's notable, though, that in the Gold Coast domestic violence court where some of the files existed

and where there was at that time a very good perpetrator program in place there was a higher proportion of cases that were placed on probation orders and sent to men's behaviour change programs. So it suggested to us that where those programs are available magistrates are willing to use them in some cases. So I think that was important that those resources were available. It made a difference to sentences to some extent. But overwhelmingly we saw fines and no conviction being recorded.

The problem I think with this is twofold. The fact that no conviction was recorded is a problem because we know that by the time someone is charged with a breach of a protection order the order probably has been breached already a number of times. So we are already way down the track. Yet the criminal justice system just sees this one breach, so places it low on the sentence hierarchy, doesn't record a conviction, doesn't turn up on any kind of record.

The other point about this too is that choosing the breach charge instead of the substantive offence also has implications for the criminal record of that person as well. So we see a breach, which could mean anything from a telephone call to a serious assault. There's really no clarity in what that breach might have meant in that particular case.

So it is difficult for police to continue with a risk assessment of that person. If the person is moving around, they can't access their criminal record and know what that looks like; and it's difficult for employers and others who might be interested in a criminal record to know really what this person gets up to.

MS ELLYARD: Can I turn then to the question of additional offences. In your work, Professor Douglas, and in your statement you have outlined some of the thinking that you have engaged in about the creation of additional offences that might meet the perception that there are aspects of family violence behaviours that are not presently criminalised and perhaps should be. You have identified two particular issues. The first is an offence of cruelty. Could I invite you to summarise the thinking that led you to approach it in this way and the kind of new offences that you might propose for consideration?

PROFESSOR DOUGLAS: The discussion that I had with myself about new offences was really based on the development of the coercive and controlling offence in the UK. When I saw that I thought this is problematic for us in Australia in particular because of the reasons that I outlined before. But I think there is an argument for being able to - I think there are some violent behaviours or controlling behaviours or domestic violence orientated behaviours that do fall outside the criminal justice process, and these are ongoing behaviours that continue over potentially a period of time and that really have terrible implications for a woman's freedom, her right to freedom.

So I was trying to think of ways to encapsulate those behaviours in a new offence, and I was very focused on behaviours as well. I know that in other places they have developed offences of emotional abuse, for example, and I was concerned that that would be risky to develop those kinds of offences because of the concern of who might be implicated as a person committing emotional

abuse. So I was concerned to leave out those kinds of matters from an offence so that emotional abuse wasn't captured within that.

So I did come across this idea of cruelty, which is essentially a more simple offence or a lower level offence than the crime of torture, which we have in the code in Queensland, which has been used regularly, in fact, with domestic violence cases. I think the problem with torture is, first, that the penalty is very high, that it's 14 years in Queensland; and also that it's called "torture", which suggests an extraordinarily high level of harm has been committed.

So I was trying to think of an offence which would capture these lower level but continuous forms of harm that women experience. So things like consistently being forced to - and in Melbourne potentially this might mean more to you - shower under an outside hose through winter, for example, or to eat chillies or to eat from the dog's bowl every day - these kinds of really controlling behaviours that limit people's freedom. To not let them get dressed up for work every day or to apply for jobs and so forth - to really limit behaviours. So I was trying to think of an offence which would capture that.

So I thought of this offence of cruelty, which is a sort of lower level version of the torture offence, so serious ongoing harm towards the woman and that would be aggravated in the context of domestic violence. Do you want me to go into that? It's set out in the - - -

MS ELLYARD: No, it's set out. I wonder if I could ask you, Professor Goodmark, are there specific family violence

offences in US jurisdictions and, whether or not there are, what would be your reflections on the work that Professor Douglas has done in this area?

PROFESSOR GOODMARK: There are, but they are largely focused around physical abuse. So when you have a crime of domestic violence in the United States that's largely defined as physical abuse or fear of imminent serious bodily harm. But it doesn't encapsulate the other forms of abuse that are equally problematic, including the ones that Professor Douglas was talking about.

I share the same concerns about criminalising coercive and controlling behaviour or emotional abuse. I think that it's pretty likely that the unintended consequence we would see from that, unless it were very closely monitored, would be increased arrests of women. With the understanding that women were being harassing or nagging or doing other kinds of things that were emotionally abusive to her partner, I think the potential for misuse there is tremendous.

But, as to what Professor Douglas has suggested, what I think is important about it is both that it captures a range of kind of behaviours that are conducted in order to materially limit someone's liberty or autonomy. I think that's the crux of it. I think that the cruelty crime makes sense to capture some of the stuff that goes into coercive and controlling, but it's a better articulation of that piece of it, which is so important, which is that it's meant to limit somebody's life in a material way.

I can certainly remember clients who I have had who would absolutely have been subjected to the crime of

cruelty using Professor Douglas's definition, and I would have liked to have seen them have some kind of recourse that they didn't have otherwise.

MS ELLYARD: Professor Douglas, you have also identified perhaps the need for a specific offence of strangulation, given what we know about strangulation as a warning sign for more serious outcomes and something that might particularly arise in a family violence context. You did some research on this that you refer to at paragraph 35 of your statement. Could you summarise what that research found about this issue of strangulation?

PROFESSOR DOUGLAS: This came out of our cross-order applications process and my interest in police engagement with protection orders and when they decided to pursue protection orders on behalf of a party. It didn't seem to make much difference what the allegations were, and one that stood out was strangulation. So even where a woman had made an allocation that she had - often she said or the documentation said "choked", but even where she alleged strangulation and he perhaps had alleged that she had thrown his computer mouse across the room, police still made an application for a protection order on behalf of both parties.

So that led me to think about why is strangulation not being flagged here. Obviously a lot of the problems with strangulation are that it doesn't leave marks and that police in Australia I think don't ask about it directly, and yet we know that strangulation days after the event might actually leave quite serious harms on the victim. So I have suggested in one paper that we might think about the introduction of strangulation, something

I think that the taskforce in Queensland has actually decided to take up.

I think theoretically this crime actually is already encapsulated, but it doesn't seem to be charged there, and there might be particular reasons for that in Queensland where we have a complete defence to provocation. But it really isn't covered in the Victorian statutes either. There are sort of crimes that might encapsulate or cover it, but it's not directly noted.

I think there are a few reasons for creating a criminal offence. One is obviously that you hope that it becomes part of the range of options available to police when they are considering the appropriate charge, but one also is that when they do charge there's a fairly labelled charge, so it actually reflects the behaviour that went on. Given the risks we know associated with strangulation, having a previous history of strangulation on a police record I think would be very important information for police to know about when they are coming to a call-out.

We know that - I think the risks increase some 800-fold after an incident of strangulation that a woman will receive serious injury or be killed within weeks after the event. So it's a terribly serious allegation to make. So having that on a criminal record I think would be an important thing, or having it within police notice too would be an important thing.

MS ELLYARD: May I turn then to the question of restorative justice and turn to you first, please, Professor Goodmark. You have dealt with this a little in your statement and in your research. From your experience, is restorative

justice something that would be welcomed by at least some of the cohort of women you have assisted?

PROFESSOR GOODMARK: I think so. I should preface this by saying we have very few options in restorative justice in the United States currently and even fewer as pertains to intimate partner violence, but particularly among people who are not going to separate from their partners, and our studies show us that a fairly large number of people intend to continue their relationship with their partner.

For people who are going to be co-parenting, and for people who are living in the same small geographic or ethnic or religious communities, figuring out how to re-order relationships after intimate partner violence, knowing that there will be ongoing contact between the parties, is particularly important. I think there's a real place for restorative justice there.

I think what's interesting to me about it is that when I talk to front-line workers at domestic violence agencies they are very enthusiastic about the potential for restorative justice because the clients that they are working with are expressing to them their concerns about litigation, their concerns about kind of handing their problems over to a court, and their desire to see some way of re-ordering or re-working relationships in ways that keep them safe and engage other members of the community in ensuring that they stay safe as well.

So particularly for those folks who are not interested in being involved in state based systems - and, for us, the rates of people of colour involved in our state based systems are exponentially greater than the rates of white people, and so there is a real distrust

among people of colour in the States about using state based systems. For some of those folks for whatever reason they have no interest in using state based systems. Figuring out how to use restorative justice might give them another alternative to try to work through some of these issues.

MS ELLYARD: What would a restorative justice process look like? I'm sure there are many forms, but what are the key elements of restorative rather than retributive justice approaches?

PROFESSOR GOODMARK: The key elements are approaching an act of violence as a harm rather than a crime; giving somebody the opportunity to explain what the harm has done to them, so having the victim be able to articulate, "This is the harm that was done to me and this is what it meant to me"; having the perpetrator of that harm take responsibility for having committed that harm; and having the victim be able to articulate, "This is what I need in order to heal and move forward," with the community coming in behind to say, "We will do whatever is necessary to hold this person responsible and to ensure that the victim gets what they need."

So that plays out in a number of different ways. Most of the work that's being done in the United States is post-sentencing, so somewhat further down the line, post-conviction, and it's done in the form of victim offender mediation, for example, where victims and offenders post-sentencing are able to have this kind of a dialogue.

Often times what the victim wants is not kind of a tangible benefit in a way. What the victim wants is an

opportunity to tell that story, to have that story validated and to feel vindicated, to have the perpetrator say, "This wasn't your fault. This was my doing, and I take responsibility for it." So just going through that process can be really important for victims.

There are some places, and not in the United States, notably in New Zealand, where cases are being referred kind of as diversion to restorative processes. For example, conferencing can help to resolve the issues among the parties, and the results of that conference can then be considered by a judge when a judge is handing down a sentence.

In some cases the conference agreements are kind of standing in the place of the sentence. In other cases they are influencing the sentence in some way. That's not a place we have gone yet in the United States, and a big part of that is because given how focused we are on legal responses there's a real unwillingness to try things that are outside of the legal system. But some of us are interested in thinking through these issues and trying to work through them, and we have been doing a little bit of that.

MS ELLYARD: Professor Douglas, from your perspective is there a place for restorative justice as part of the suite, as it were, of options in Australia for family violence matters?

PROFESSOR DOUGLAS: Potentially, yes. I would want some kind of accountability mechanism, which I think restorative justice encapsulates because generally restorative justice processes ask the perpetrator presumably to say, "Yes, I realise I did the wrong thing." So I guess to some

extent that accountability is encapsulated.

I do think you are right to talk about it as part of a suite. I think to some extent we have seen this work in Queensland courts as part of the justice process in a sense that at the Brisbane Magistrates' Court there's been a program in place where both men and women have advocates from an organisation called Be There Connect, and we have seen that has led to much better negotiated resolutions around domestic violence in terms of who stays in the house and who moves out and what the conditions of the protection order will be. So I think this kind of advocacy question is more important to me.

I haven't thought a lot about restorative justice in the domestic violence context. I have been more focused on justice processes, criminal justice processes and protection orders. But, sure, I think there's a space, as long as they are safe and women are protected and they don't become considered as part of the problem of domestic violence. I think they have potential. We really haven't gone down that path very much in Australia to date for me to know much about how it might work here.

I know that in Indigenous communities night patrol organisations often do these kind of ad hoc restorative justice processes amongst members of the community to sort out violence within families. So we might be able to learn how that works a bit better to introduce it in other parts of our community; I'm not sure.

MS ELLYARD: Do the Commissioners have any questions for the witnesses?

COMMISSIONER NEAVE: I have a couple. I wanted to pick up,

Professor Douglas, on your suggestion for - it is Marcia Neave. I don't know whether you can see me or not. I don't think you can. Your proposed cruelty offence. Queensland is a code state, and obviously you have thought how that could be structured to fit into the Criminal Code. I wondered whether perhaps an intent of recklessness rather than intentionally inflicting cruelty might be a way to go if that offence were introduced, and I would like to have your comments on that.

PROFESSOR DOUGLAS: Reckless; I haven't actually thought about that until right this minute. Certainly intentional is problematic. Any kind of negligent approach or a duty of care would be problematic. We don't want it to be absolutely subjective. But I think somewhere in between that, and that's why I was moving towards that objective test of what would be the ordinary person think about the situation. So I suppose reckless might get close to that. That is what I was trying to capture. What would the members of the community who looked at this behaviour think of this behaviour? So really that is what I think is the - - -

COMMISSIONER NEAVE: We have offences in Victoria of recklessly inflicting injury and serious injury. So it could be kind of equated to one of those if it were introduced.

PROFESSOR DOUGLAS: Yes. That might be where to go - - -

COMMISSIONER NEAVE: The other question I had related to the cross-applications. I'm not sure that this is a police practice here, that this happens often here. I think you say that in the work that you did you did look at Victoria and that there were cross-applications made by the police. I just wondered how long ago that was.

PROFESSOR DOUGLAS: I think that was before your most recent tranche of reforms. Our data comes from I think 2008-10. So it's a while ago now. I think you have had - - -

COMMISSIONER NEAVE: I wonder whether the police in your state have a Code of Practice or management guidelines or something which determines that question of what they charge with when there's a breach which is also a substantive criminal offence like assault. Are there any police guidelines? The police may not comply with those guidelines, but are there any that deal with that?

PROFESSOR DOUGLAS: The police are supposed to - in terms of the prosecution guidelines they are supposed to charge the offence for which they have evidence to proceed. So if they have an assault they should be charging an assault. They may charge a breach alongside that. From my perspective, it would not be a problem to charge a breach and an assault charge and we have authority of the courts to do that. So I think a breach is a breach of a court order and the assault is the physical assault on the person. The sentencing would need to reflect the double jeopardy aspect of that.

COMMISSIONER NEAVE: Of course, yes.

PROFESSOR DOUGLAS: But I don't think there would be any problem charging both. So police are remiss in many cases in not charging both, although I appreciate there are lots of reasons for why they don't do that. They are making decisions in the heat of the moment, it's made very quickly and they don't revisit the question two days later, which is what I'm suggesting, which would create further work.

But hopefully some of these kinds of approaches

would actually reduce the work down the track because we are dealing with these things early and working out how best to deal with that particular situation. So I really want to avoid any kind of one size fits all approach, which the justice system obviously needs to do a lot of the time. But I guess that's the problem with the mandatory approaches. I don't think we want mandatory approaches. We need to maintain discretion, but we need to train people to exercise discretion appropriately considering risks and concerns for victims and so forth and the context of the behaviours.

COMMISSIONER NEAVE: Thank you very much indeed.

PROFESSOR DOUGLAS: Can I just mention one other thing that is really interesting, which is that in the US police don't take out protection orders. So this may explain to some extent why there is such a heavy engagement of police in criminal justice interventions in the domestic violence sphere in the US because they don't have anything else; whereas here obviously police protection orders have come in. I think protection order legislation to some extent has supplanted the criminal engagement in domestic violence cases in Australia, and the US doesn't have that possibility.

I think that's an interesting model, and I don't know whether that's really on the table. I know that some domestic violence workers would be very concerned that victims might be less protected if police moved out of protection orders, but there may be other advantages.

PROFESSOR GOODMARK: For us it's such a foreign concept to have the police involved in the protective order process because for us the protective order was created in order

to give women a remedy that they controlled without having to rely on the state in any way. I think one of the things that's really interesting about Professor Douglas's research is that protective orders are much more likely to be granted when they have been applied for by police which really disadvantages those women who come in on their own to seek those orders. It might be interesting to think through what would happen in that system if police were actually not involved. Would that give some greater autonomy to women and would that spur police to be more involved then in charging substantive crimes rather than feeling that they had just discharged their duties by seeking protective orders.

COMMISSIONER NEAVE: Thank you very much.

MS ELLYARD: Thank you very much, Professors, for your time. That's the conclusion of the evidence and I ask that the professors be excused with our thanks.

COMMISSIONER NEAVE: Thank you very much indeed.

PROFESSOR GOODMARK: Thank you for having us.

<(THE WITNESSES WITHDREW)

MS ELLYARD: If it is convenient, we will take the break now a little bit earlier than normal; but can I invite the Commission to come back at quarter to 11.

(Short adjournment.)

MS ELLYARD: Thank you, Commissioners. The next witness is Ms Helen Fatouros. She is in the box. I ask that she be sworn.

<HELEN FATOUROS, sworn and examined:

MS ELLYARD: Ms Fatouros, what is your present role?

MS FATOUROS: I'm currently the Director of Criminal Law Services at Victoria Legal Aid.

MS ELLYARD: How long have you held that position?
MS FATOUROS: Just over two and a half years now.
MS ELLYARD: Prior to working at Legal Aid, did you work elsewhere in the criminal justice system?
MS FATOUROS: I certainly did. I worked at the Office of Public Prosecutions. In fact, I started my career there as an articled clerk and progressed over the course of about 13 years to hold various roles.
MS ELLYARD: Amongst those roles, did you have a particular role at one time in the context of sexual offences prosecuted by the OPP?
MS FATOUROS: Yes, I did. From 2008 to 2010 I was the directorate manager of the specialist sex offences unit within the Office of Public Prosecutions.
MS ELLYARD: In addition to your work at the OPP and now at VLA, are there a number of other hats that you wear, as it were, in this area?
MS FATOUROS: Yes, I certainly do. I'm currently a board member of the inTouch Multicultural Centre Against Family Violence and I have been a board member on an all-female board for many years now at that service. I'm a director of the Sentencing Advisory Council, I was appointed to that role last year, and I'm a Commissioner of the Victorian Law Reform Commission, also appointed to that role last year.
MS ELLYARD: Having noted all those various hats that you wear, I want to make it clear that the questions I'm asking you today are about the totality of your experience rather than with you wearing any particular hat. Thinking about the prevalence of family violence cases in the criminal law, your statement which you have prepared details some

information that you have been able to glean about how much of Victoria Legal Aid's criminal practice might be attributable to family violence. Could you give an estimate, I suppose, based on your experience, of how prevalent family violence matters are in the criminal justice system?

MS FATOUROS: Some of the data is limited, but we are becoming better at collecting the data. We did some manual data collection around two matter types recently, being attempted murder and murder. We took a number of years where we looked at those cases and around 50 per cent of those cases were matters involving family violence in some way or another.

So, that's just a very small snapshot. But if you then go on to look at sexual offending and a whole lot of other injury or assault charges, it really accounts for a very large proportion of Legal Aid work, but a very large proportion of all criminal justice work. So, it has a very broad and pervasive impact.

MS ELLYARD: Thank you. You have made a statement to the Commission that's dated 5 August 2015 and I think you signed it this morning. Are the contents of that statement true and correct?

MS FATOUROS: Yes, they are.

MS ELLYARD: I want to turn, then, to I guess a bit of a snapshot looking back at the way in which the criminal justice system over the time you have been involved in it has shifted or altered its approach, including the way in which it responds to family violence matters.

At paragraph 22 of your statement and following you reflect on what the world looked like when you began

your career as a prosecution lawyer and then how it has changed since then. Could you speak a little bit about how the criminal justice system was back when you started and how it has changed over time?

MS FATOUROS: I think the best way - I think I make the comment there has been radical reform and renovation to the criminal justice system over the last decade at least and I recall a very early case when I was an articled clerk, I think, which involved the offence of incest and multiple charges. I want to provide this story to give you a snapshot of some of the experiences of victims well over a decade ago and then compare it to what we have now and the supports that are in place now.

I recall sitting in the instructor's chair and the victim in that case was an adolescent and she was giving evidence via a remote witness in the old County Court building which had many limitations, not the current new building. In the running of that trial the defence made an application, based on the clothing that that young complainant was wearing, to bring her into court so that the jury could see what she was wearing because the mother of the complainant was a sex worker and there was some tenuous link made there.

In spite of objection by the prosecution, that was permitted. That child was actually brought into the courtroom and was made to walk to the front of the Bar table and then walk back to the remote witness facility. When I think about - that's about 13 years ago. That's not that long ago. But we have come a long way. So I just provide that example.

That is quite an extreme example and it's

important for me to qualify that the work of both prosecutors and defence practitioners is difficult and complex, particularly in criminal trials, but it was a lot more frequent many years ago. So there have been lots of reforms in terms of rules of evidence, procedure, victim impact statements; there's been a lot of deep policy thinking about the involvement of victims within the criminal trial process in a respectful and empathetic way.

MS ELLYARD: If we take that example, there are a number of ways in which that example might be reflected on. The first is the fact that the witness was giving evidence remotely, but that there was some flexibility about that and some rebuttable presumption, I suppose, about whether or not witnesses could give evidence remotely. Thinking today, in family violence matters are there any general rules about the extent to which victims of family violence offences are able to give evidence remotely or not?

MS FATOUROS: There is currently such a large suite of options in terms of the way that victims and particularly vulnerable witnesses can give evidence, both in family violence cases and sex offence cases. They can give their evidence remotely, some of their evidence is delivered through video recording, there's lots of different ways now that evidence can be taken which is designed to minimise the trauma and the impact of the stress that comes from giving evidence in a criminal trial or a criminal proceeding.

MS ELLYARD: Are there hard and fast rules, though, about whether that will be available? So, if a victim is making, I suppose, the decision to make a statement that might take him or her on a certain path, are there

assurances that can be given at an early stage, "You'll never be in the same room as him," things of that kind?

MS FATOUROS: This is one of the transformations in the criminal justice system. It is now almost commonplace that the evidence of these classes of victims and witnesses is going to be taken remotely or through other forms or processes. So it's actually now very commonplace and in fact it's the exception rather than the rule that someone is giving evidence in that very traditional way in the witness box.

Having said that, I was actually listening to some of the evidence earlier this morning and I was interested in something Professor Goodmark said, which is a theme in my statement as well, and that is the importance of flexibility. In my life as a prosecution lawyer, I have conferenced hundreds of victims, children, adults, women, men and lots of different cases. The importance of some flexibility and discretion where victims actually do have some choice where they feel strong enough to give evidence in the courtroom, it can be very empowering, and having some flexibility in your provisions to enable that is important.

Having said that, from a practical point of view, and some of my comments are going to be slight generalisations, those witnesses or victims tend to be older children who are adolescents, almost on the cusp of adulthood. They tend to be adult victims who have quite good supports outside of the criminal trial process, both within existing victim support services, but also through their family and friends.

So I want to be very careful when saying that

it's not an overwhelming number of victims and witnesses who will want to give evidence in the courtroom, but we do need to understand that it's more complex than just saying, blanket rule, everyone gives their evidence remotely.

MS ELLYARD: Another aspect of that anecdote that you relayed is the extent to which it was obviously regarded as relevant evidence what a child complainant in an incest case was wearing to court. What reflections can you offer on the way in which rules of evidence and what's regarded as relevant in those kinds of cases have changed since that time?

MS FATOUROS: It's not just about the legal frameworks that have changed and the rules of evidence and procedures which have changed the dynamics of the courtroom. I think it's also that there is now a much greater appreciation and awareness of the social context in which this type of offending takes place. Just as the community has become more aware in lots of different ways, so too have juries and so too have the legal professionals working in the criminal justice system. But it's a long process and it's the combination of sound, balanced law reform and cultural change that actually effects these kind of shifts.

So, we are talking about changes over a long time and changes aided by various levels of legislative reform as well as reforms outside of the courtroom which are equally as important.

MS ELLYARD: One example of the reform you refer to at paragraph 25 of your statement is a report of the Victorian Law Reform Commission in 2004 that dealt specifically with sexual offence laws and procedures.

What were some of the key learnings from that reform that have been implemented, from your observation?

MS FATOUROS: Exactly the one I've just referred to in relation to that combinational or two-pronged - in fact it is probably more of a multi-pronged approach to actually achieving change and shifting attitudes as well as changing procedures and laws. That was a very critical report in that it tabled all sorts of experiences that victims had within the criminal justice system in relation to sexual offences and in particular it found that the process was actually harming in some respects victims.

Of the 202 recommendations, there was a raft of legislative amendments around special hearings, the giving of evidence, fast tracking of cases to provide finality, a whole raft of changes. But there were also a whole lot of recommendations around that cultural change that has to happen within the judiciary and the legal profession as well.

One of the recommendations actually gave rise to a training project that I led whilst at the OPP which was the interactive sexual offences - it had a very long name which I'm now struggling with - interactive legal education program which actually brought prosecutors and defenders together and there was an amazing cross-sector working group that worked for close to three years to design and prepare the profession for training that wasn't just legal and technical in nature, but also about the profession gaining an understanding of the broader dynamics and context in which sex offending happens.

MS ELLYARD: We have heard evidence before about the learnings that might exist, for example, in the police context about

the approach taken to sexual offending and the approach taken to the broader range of family violence offending, which includes but is not limited to sexual offending.

In your statement you, I suppose, caution against taking up in their entirety the kinds of reforms that have happened in the sexual violence space because they haven't always worked as perhaps they were going to work. One example that you give is the limitation that now exists in most sex offence cases on victims being cross-examined more than once. There is a recommendation that has been put forward to this Commission that that should be a rule that applies in any family violence case. I wonder would you offer your perspective on why that rule came in in sex assault cases and the way it might have worked for the benefit, but also sometimes to the detriment, of the victims concerned.

MS FATOUROS: I think that's a very appropriate reform and I'm not suggesting we should not very closely look at that sort of reform within the broader family violence space as well. But one of the benefits we have since 2006, it's almost a decade now, of those reforms in the sexual assault space is we have some good evidence about what has worked and what perhaps has had some inadvertent sort of consequences.

The purpose or the policy purpose behind that one-off cross-examination was designed to really limit the harm done to victims through the criminal trial process. But what it also came up against was, in our traditional criminal trial process of pre-trial hearings and committals, one of the benefits of pre-trial hearings or committals is that you get to assess the evidence and you

get to test the evidence in a way that enables narrowing of issues, identification of opportunities for resolution or enables prosecutors to actually say, "There are some deficiencies in this case and we need to assess as early as possible whether we are actually going to proceed with this case."

That opportunity can be lost and in some categories of sexual assault cases that can create problems because it means that you only get a real awareness and disclosure of the evidence very close to the trial, and it can be really damaging to victims for a discontinuance to come so close to a trial.

In fact, I have had to manage conferences with victims in that situation and it's a very difficult conversation to have because you have just taken that victim, with victim support services, as a prosecutor through the process, they have gone through a pre-trial hearing where sufficient evidence has been found, albeit at a different threshold to that of a criminal trial, and then right on the eve of trial, after they have been tested through a special hearing, that's when a case is discontinued. So there are benefits to really early assessment and identification of evidence and issues.

So that's just been one of the complexities, if you like, in terms of the reforms. But I think we can be progressive and, dare I say, radical. Radical in the legal profession doesn't have the same meaning as radical I think in the general community. Change is slow and it's a traditional profession and it's a hierarchical system. By that I mean there has been a longstanding debate in the profession and in the criminal justice system about the

value and worth of committals.

So, we perhaps need to look at alternatives to the committal process around that early disclosure, assessment of evidence, preparation of cases, so that we aren't doing harm to victims, but it's also quite unfair to accused to go through the process of preparing for trial, being in that dock and then having a prosecution discontinued very late in the piece, and of course it's not good for the community either.

MS ELLYARD: So, often the debate about committals has been very much framed in terms of the value that flows to an accused person from the opportunity to test the evidence against him or her. But, as I understand it, from your perspective there is in fact a strong benefit that will flow often to the victim, because if for whatever reason their evidence isn't going to be sufficient, the earlier they can be assisted to understand that, the better.

MS FATOUROS: That's right. When I used to conference victims - I agree with you; it works for both parties in an adversarial system. When I used to conference victims I would prepare them, particularly if it was a case that was going to go to a jury, I would prepare them very carefully with the assistance of victim support services. I would prepare them very carefully for what an acquittal actually means. I think it's really important to use very accessible, empathetic language in explaining the limitations of the criminal justice system and an acquittal is not a finding of innocence and it doesn't mean that you have been actively disbelieved.

That can be cold comfort to a victim who has experienced very significant trauma. But the more

conferences and the more support and the more information provided in the right language and manner, tailored to the needs of the particular victim, the better their understanding and acceptance of even outcomes which can be very disappointing for them.

MS ELLYARD: One of the other aspects that you have noted has been part of this change that's occurred over the last 13 years, particularly in the context of sexual offending, is I guess the change in community attitudes. The Commission has before it some evidence that suggests alarmingly there are, in some aspects of the community at least, still quite high levels of disbelief about why people don't leave violent relationships, a limited understanding of the dynamics of family violence.

In paragraph 26 you comment on the extent to which there are evidentiary provisions now that might permit, for example, the use of expert evidence to assist juries, who are members of the community, to understand the dynamics of relationships, including family violence. I wonder could you comment on that?

MS FATOUROS: So, there are specific provisions now around, certainly in sexual assault cases, the admission of evidence that goes to issues such as why a complainant may not report immediately or why a complainant may present in a particular way, particularly when there's sort of long-term abuse and within a familial context as well. That provision hasn't been used extensively, but it has been used enough for us to see how it operates in trials. Of course, it's subject to the same rules of evidence that all expert evidence is in terms of its reliability, its relevance and the qualifications of the expert. But that

sort of evidence I think has a place in the criminal justice system and in particular criminal trials, but it's also the combination of education within the community and the whole raft of community legal and other education and prevention work that needs to buttress those kind of provisions, if you like.

MS ELLYARD: So you don't want to wait until someone is a member of a jury to teach them about what family violence is?

MS FATOUROS: Exactly right. The strategy should be running, they should be supported and funded concurrently, because - for example, in my work with the inTouch board they have designed some really great culturally sensitive prevention programs where they work in depth with particular ethnic communities and the men within those communities and the preventative work is about safe relationships. It's about negotiating the complexities of relationships when you have your first child. It's about teaching men how to, if you like, approach relationships in a way that doesn't actually support violence-supporting attitudes.

So that kind of work is invaluable and it's done by a variety of services at the moment, but there's always a need for more investment in that kind of work as well.

MS ELLYARD: One of the other changes that you refer to, a more recent change, in paragraph 27 of your statement are recent changes to the Jury Directions Act which govern the way in which juries are assisted by a judge to understand and deal with the evidence in front of them. Have there been some specific changes that are relevant in the family violence context?

MS FATOUROS: Absolutely. I think the Jury Directions Act changes are a really great example of the criminal justice system and a wide variety of stakeholders working together over a long period of time to phase in quite significant legislative reform along with some cultural change training required to support it. There are now specific prohibitions in terms of what a prosecutor, defender or a judge cannot say or provide directions about, such as children are an inherently unreliable class of witness or their evidence is inherently unreliable or the fact that a woman doesn't complain immediately somehow discredits her account - and I'm obviously paraphrasing and summarising the actual language of the legislation - and the same with family violence. Just because a woman doesn't leave the abusive relationship doesn't reduce the reliability of her evidence. So there are now specific prohibitions in the Jury Directions Act.

I think when you compare that to the early days that I described where that wasn't the approach and there were - I remember the days of Longman warnings around delay - we have come a really long way.

MS ELLYARD: Staying with this issue of evidence and directions to the jury, the Commission has heard from a number of people through the submissions process, particularly perhaps the families of homicide victims where the deaths occurred in a family violence context, of their experience that the family violence context of their loved one's death wasn't ever reflected in what the jury heard or in the cases of a plea deal. The family violence context in the end didn't seem to form part of the facts on which the offender was sentenced and they felt that there was then

that disconnect between what their loved one had experienced and the basis on which the perpetrator was sentenced.

I wonder would you comment on, from your observation, why that might be the case and how do we strike a balance, I suppose, between reflecting the circumstances on the one hand and rules of evidence that exist for good reason on the other hand?

MS FATOUROS: If we take the trial process first, there are lots - the thresholds for the admission of tendency, coincidence or general propensity evidence, context or relationship evidence have been gradually lowered and increasingly that material is forming part of the trial process. But it is of course subject to quite strict rules of admissibility and it all depends on how the evidence is to be used. It will depend on a mixture of what the Evidence Act says and also rulings that the trial judge makes with the assistance of counsel as to what is actually admitted by way of that broader context relationship evidence.

But I can remember prosecution cases that I worked on involving intimate partner murders where there were real restrictions on that evidence. So, we have changed in that respect as well. It is more readily admitted, but I qualify that it will be confined, and appropriately so, given some of the dangers around that evidence. So again it's this balance between the victim being able to put their full account, but also the protections afforded through the presumption of innocence and the right to a fair trial. It's a difficult balance to strike.

In plea hearings there are two comments I would make. A lot of this material will form part of a plea, but it depends on the process by which a matter is negotiated and resolved. In the vast majority of plea hearings which are the subject of a plea of guilty by the accused, that material will be part of the prosecution summary which captures the full criminality of the offending and in the vast majority of cases accused people having pleaded guilty will accept that summary in full.

Where it's been a more protracted or negotiated case and care has been taken around the settlement of the facts, that will be reflected in what the judge hears and the basis upon which they sentence. If the victim has not been prepared and it has not been explained to the victim what the detail of the settlement was, I can understand feedback and evidence that the Commission may have heard from victims which say, "Well, it was an entirely sanitised account of what happened to me and it wasn't accurate." So if they are not prepared for what's going to happen in the plea hearing, it's going to be more difficult for them. So, that's part of the plea hearing process.

But there are also various rules of evidence around mitigating factors, aggravating factors and they are quite complex. So I think there can be lots of legal argument as well at plea hearings around how a judge should deal with a particular contextual or relationship factor in terms of the sentence, and that can be quite difficult for victims and accused as well.

Now, when there's been a verdict, sometimes the nature of the verdict determines the facts upon which a

judge is going to sentence. So, I'm describing now the best practice approach where there's really great care taken by highly skilled prosecutors and defenders, they have negotiated well, they have agreed on and settled on the facts, there has been good preparation of accused and victim. But that is not what happens every day in courtrooms across Victoria.

So I think we have got a lot better at this, but there are also situations and cases that I have had to deal with on appeal; in fact, a recent case where I was representing a client in the Court of Appeal where a very key factual matter involving family violence that my client had experienced at the hands of the victim in that case had not been clearly settled and articulated at plea, and it impacted on the appeal of that sentence.

So, when care isn't taken by both sides of the Bar table, it can make the task for the judge a lot more difficult in sentencing and it will invariably have an adverse impact on victims and accused.

MS ELLYARD: When those careful negotiations are happening, of course, the accused person is represented through his or her legal representatives, but the victim is not directly represented in the same way. From your experience, to what extent are the views of victims or should the views of victims be taken into account when decisions are made, for example, about whether to accept a plea to a lower category of offending or to discontinue a case entirely?

MS FATOUROS: The short answer to the two questions: absolutely they should be taken into account, and the second one is that they are taken into account in the vast majority of cases. In the hundreds of prosecutions I was

involved in, I would always consult victims around pleas of guilty, but ultimately the decision does rest with the Crown and there are difficult decisions to be made sometimes which can be difficult for victims to understand. Again, it's the process of communicating why it is that an offer perhaps to lesser charges is being accepted and to really taking the victim with you through the process.

MS ELLYARD: Thinking back to that first example that you gave of how it was like 13 years ago, another aspect of that example, I suppose, was the approach being taken - the take no prisoners approach I suppose being taken by the defence lawyer appearing in that case. At paragraph 28 and following you reflect specifically on the role of defence lawyers in family violence cases and I wonder could you speak to the Commission a little bit about change that might have happened, but the tensions that exist for the proper conduct of the defence on behalf of alleged perpetrators of family violence matters?

MS FATOUROS: If we think about some of those community attitudes you referred to earlier which can be quite damaging, members of the profession and the judiciary are normal everyday people who are drawn from that same community. They may have the benefits of education, training and specialist skills, but let's not lose sight that they are all human beings and I think it's very interesting to me the transition from prosecution to defence. One of the things that I found fascinating is the perceptions around defence lawyers differ, obviously, very much to how even my own family perceived me as a prosecutor. There are lots of misconceptions around the

roles of defence lawyers and there is this perception that they are out at all costs to get their client off, and that is very far from the truth.

There are lots of different rules, regulations and statutes that govern the ethical and professional conduct of all lawyers, and in particular defence lawyers. Just as it is difficult for victim support services and prosecutors to work with victims of family violence, it is equally challenging for lawyers to work with those alleged to have committed family violence.

Victoria Legal Aid clients present with a multitude of vulnerabilities. They can have mental illness, cognitive impairment, poverty, a whole range of issues. They are in crisis when you see them within the family violence duty lawyer lists and in order for you to even extract instructions to deal with that short first hearing, you can actually have to deal with that multitude of challenges before you can even get to assist them as you need to. So it's actually a very difficult and challenging role played by all defence practitioners in this space.

MS ELLYARD: The Commission has heard the experiences of particular victims of family violence who are subjected to prolonged, distressing cross-examination, who had their intentions questioned, who felt very much re-traumatised by the process of cross-examination. Obviously there's good reason why victims alleging serious crimes are cross-examined.

But, from your perspective now having straddled both the prosecution and the defence side, where is the appropriate balance to be struck between the interests of

the alleged victim, but perhaps in many cases in fact the victim, and the accused who is entitled to the presumption of innocence?

MS FATOUROS: The majority of defence practitioners are doing their best in the best interests of their client when they approach the very difficult task of cross-examining a victim, particularly a victim in a sexual assault case, family violence case and particularly if it's a child. I have not yet met a defence practitioner within my own practice area that I oversee, but also within the private profession at the Bar, who has said to me the task of cross-examining a child or a victim of a family violence or sexual offence, that it's a task they relish.

Highly trained and skilled advocates know that it is in their client's best interest to approach the task of cross-examination in a focused, well-prepared, thoughtful way that is confined and goes just to the issues in dispute and that does not unnecessarily intimidate or attack the credibility of the witness unless that is part of the case. Of course, attacks on credibility are always very sensitive and fraught and get raised often in this context. The credibility and demeanour of a witness is a relevant part of any criminal trial, but it should be done in a particular way and only where it is necessary to that particular defence.

MS ELLYARD: From your observation, what's the role of the rules of evidence or the judiciary in ensuring that that appropriate balance can be struck?

MS FATOUROS: This is where the evidence provisions have actually been strengthened and there are specific provisions now, both recent and over the last five years,

that go to particularly oppressive or improper or demeaning cross-examination or questioning, and there is a very significant role that both prosecutors and judges should play in holding practitioners accountable through those provisions. They have the power to do it and they should be doing it and they should be objecting more and intervening more, depending if it is the prosecutor or the judge. In my view, it sometimes doesn't happen as quickly or as readily as it should.

MS ELLYARD: Were you present to hear the evidence of the earlier witnesses today via videolink?

MS FATOUROS: I heard the first half, but not the second half.

MS ELLYARD: Perhaps you might not have heard this, but at paragraph 45 you deal with this issue. The Commissioners heard some evidence this morning from Professor Douglas about the thinking she has done about the possibility of the creation of new offences that might pick up aspects of family violence conduct that isn't presently covered by the criminal law.

Can I ask you just as a matter of general philosophy, I suppose, what your view is about the way in which offences ought to be framed to respond to any kinds of crime, but particularly family violence?

MS FATOUROS: This is easy to say, but very hard to do in practice, and that is the criminal law and access to the justice it can afford is all about the way that criminal offences are structured in terms of the Act and the thought processes that go into establishing a criminal offence. So the more complicated we make the establishment of criminal liability around particular types of conduct, the harder it is for prosecutors and

police to actually bring charges that are going to be sustainable, that they can prosecute easily.

So I think the job of policy makers and legislative drafters is how do you capture within a statute an offence that reflects the complexity of family violence and sexual offending? This is where the criminal law can be a blunt instrument in terms of dealing with the complexity of human relationships.

So, I think in terms of criminal offences we have such a broad suite of criminal offences both in State codes, Commonwealth codes, which cover everything from verbal and electronic threats all the way through to murder. To introduce new offences without a sort of proper evidence base and without a very careful policy process, we risk actually fragmenting the ability of the criminal law to hold perpetrators accountable.

There are good examples of this both through the provocation and then defensive homicide laws, but even rape laws and the laws of consent. We made the law of consent in the old offence - thankfully we now have a new offence which will hopefully cure this - but we made the consent provisions incredibly difficult and that operated with great injustice, in my view, in terms of making the ability to prove or disprove consent so complicated for juries to actually contend with. It's not right for the community or victims.

We now have a reasonable belief, largely objective, not entirely objective, consent provision and that's the right direction. But that's a good example of how, with the best efforts to actually strike the right balance in the drafting of offences or creation of

offences which both enable the presumption of innocence, the right to a fair trial, the burden of proof, the standard of proof to operate for accused, but for victims to also be protected by the criminal law and it shows you how complex it is in this area and I don't think the way to go at this point of the development of the law is to create new offences that make it more difficult rather than easier.

MS ELLYARD: You mentioned defensive homicide as another example of perhaps a reform that had a particular intention, but that was subverted in practice. I wonder would you expand on that from your perspective?

MS FATOUROS: I think we have to be a little bit careful because we sort of have to look at the history of provocation laws and how they have actually operated in a very gendered way and there has been really good, sound development or change in this area.

So, I don't want to say that it's entirely that the offence itself and the way it was constructed just failed dismally, because the reality is that women don't kill as often as men, so there aren't actually many cases which have tested the defensive homicide offence. But it has had in some cases the effect of being used not by those offenders who it was designed to actually assist.

MS ELLYARD: Perhaps can we just unpick that a little bit more. You mentioned the gendered use of provocation. Can you just unpick a little bit more what you mean by the way in which, from your observation or experience, the laws relating to provocation might have operated particularly in intimate partner environments?

MS FATOUROS: I can still remember the days when provocation

was designed to - it was often described in terms of a man who happens upon his wife in flagrante with another man, and the surge of emotion that comes with that results in a murderous rage that causes him to kill either his spouse or the other man.

Now, I'm being quite deliberately sort of colourful in the language, but if you read some of the very old case law, that was the way provocation was often cast and described. Thankfully we have come a long way since then, but some of that thinking still permeates the way defensive homicide sort of operates and that loss of control and the anger that comes in particular contexts.

I just think when you look at some of the cases of defensive homicide it basically was used by men committing violence against other men, in situations where the community was entitled to be concerned in terms of how it was accessed and what it meant in terms of reducing moral culpability.

MS ELLYARD: At paragraph 48 you refer to some changes that were made in 2001 with specific reference to victim impact statements. The Commission has heard a little bit from some of the lay witnesses about victim impact statements. Can you explain a little bit more, I suppose, what victim impact statements are for and the way in which their role has been strengthened since 2011?

MS FATOUROS: So, victim impact statements are a statement that victims can prepare to outline the impact of the crime on them and they are entitled either through the prosecutor, themselves or a representative to actually read parts of their victim impact statement out in court. Progressively the victim impact statement provisions have kind of been

enlarged and strengthened, because I remember many, many years ago that there was a very limited role for victims to play in the sentencing process. That has completely changed now.

There are some recent Court of Appeal authorities which sort of question whether the balance is perhaps not right and that there are some challenges that are created through these provisions, but certainly victims play a far more active role, and in my view rightly so, in the sentencing process through these particular provisions.

MS ELLYARD: One of the hats you wear is a Law Reform Commissioner and I think there's some current work being done through the Law Reform Commission in this area; is that correct?

MS FATOUROS: There is a very broad reference on the role of victims within the criminal trial process. The Commission will be reporting by September next year, so there's going to be very broad consultation. The consultation paper has just this week been released and it's on the VLRC's website. It's a very thorough look at even just the history of criminal trials and how the role of victims has changed even from - I'm talking over 100 years ago in terms of private prosecutions being brought by victims and when the State became involved in the process of prosecutions. So it's going to be a very broad reference and a very important one, particularly given all of the reforms we have sort of been touching on over the last 10 years and actually looking at the impact of those reforms and how victims are experiencing the criminal trial process now.

MS ELLYARD: May I turn then to the question of sentencing

which is another aspect of what we are looking at today. You are obviously a member of the Sentencing Advisory Council and you have a perspective there, but you also have a perspective as a prosecutor and now defence lawyer. Do you discern any change over the time you have been practising in criminal law about the way in which family violence related offences are viewed in sentencing terms?

MS FATOUROS: Absolutely, even since the inception of the family violence legislative scheme in 2008. So there's a sentencing advisory report that talks about the way contraventions or breaches are dealt with and there's been a shift even in a short time in terms of the sanction that's preferred for contraventions and we have gone quite dramatically from fines to imprisonment being far more likely. So that's one shift that's happened.

That's actually contrary to other trends within the Magistrates' Court in particular, and it's also contrary to what some other Australian jurisdictions are experiencing. I think I know Professor Douglas referenced work she has done in Queensland where it's the opposite to what's happening in Victoria.

But in the higher courts there's a shift happening there as well and there is at least three or four 2014 Court of Appeal judgments which very clearly provide authority and leadership in terms of the way family violence cases should be approached, the breach of trust involved in these cases, the fact that they are just as serious as any other assault or aggravated burglary or whatever the offence may be that's involved, and they make very sort of stern pronouncements around the approach to sentencing those quite serious examples of family

violence.

In fact, in one of the cases the President of the Court of Appeal also challenges the view put by defence counsel in that case that somehow the level of distress that the victim demonstrated in what was an aggravated burglary case was somehow less than it should be, and the Court of Appeal made very strong comments on that submission as well. So there's a lot of leadership coming from our highest court as well and there's clearly a shift happening there also.

I do want to sort of caution, though, and Professor Goodmark I think raised this earlier today, that where we want consistency in sentencing is what the High Court calls general consistency. It's consistency of approach and process which gives confidence to the community, not necessarily absolute consistency in outcome or sentence, because each case will turn on the combination of factors which are personal to the accused and the seriousness of the offending.

The law has to have the ability to tailor sentences through discretion and through lots of different options and it must have that flexibility, otherwise injustice will flow.

MS ELLYARD: May I take up on one aspect of that tailoring you have just talked about. The Commission has had some evidence, both through the public hearings and through its other inquiry processes, about the role of many women who find themselves in the criminal justice system and the reality that, whatever the nature of their offending, underneath that offending in many cases is a very large and distressing history of family violence, perhaps even

current family violence.

From your observation, to what extent is family violence a mitigating factor in sentencing where it is part of the matrix of factors that have driven someone, perhaps more likely a woman, to become an offender in her own right?

MS FATOUROS: The short answer is it can be a mitigating factor, but it won't always be a mitigating factor. I hate to answer like a lawyer, but it really depends on the circumstances of the case. In a recent appeal that I did for one particular client, her history of family violence as a victim was very important and it was taken into account and played that role in her defence.

But it's important to make a distinction. It's not gender that is the factor which creates the mitigation, just picking up on your point that more women will have backgrounds of family violence or sexual trauma. It's actually what's associated with gender that it's very important for us to make that distinction, because there is equality before the law and it's not the case that, just because you have been the victim of sexual or family violence, that that's somehow always going to mitigate your sentence where you commit offences. It would be sort of a perverse outcome that somehow it resulted in great leniency just because of that factor.

The reality is, though, that the overwhelming majority of victims of family violence and sexual assault are women and children. As we see more women come before the courts for serious offences and even breaches of family violence orders, we are going to be faced with the difficult task of managing to what extent their far more

likely biographies of family and sexual violence will mean in the sentencing process, and it is a difficult task because in some cases, like in the case of the client I was assisting recently, it was very extreme. Every relationship in her life had been marked by some form of sexual or physical violence. She had been sexually abused both by her father and by other carers in her life. It was very extreme in terms of her biography.

Then of course there are - it's a spectrum. So it really depends on the seriousness of the offence and the factors personal to the accused in terms of where that balance will be struck in the sentence.

MS ELLYARD: This then leads to a discussion of the role of therapeutic sentencing as opposed to pure punishment based sentencing. You have identified in your statement that you think that there's certainly a role for this in the family violence context and perhaps generally. Can I ask you first just to explain what you mean by a therapeutic approach and whether it 's inconsistent with or can stand with other approaches to sentencing?

MS FATOUROS: I think what we are seeing in terms of community corrections orders, what we are seeing in terms of specialist courts like the drug court, the assessment and referral court, what we are seeing through those approaches, which are classified generally as having both a therapeutic element and a punitive element, is that you can actually combine both, and depending on how you construct both the sanction or the process or the specialist court, you can achieve both therapeutic aims as well as punitive aims, always keeping in mind what the purposes of sentencing are, which in a very, very

truncated form in my statement I refer to punishment, deterrence, rehabilitation, protection. So if we just keep those four words in mind in terms of the purposes of sentencing.

So, I think we can achieve both and I think it comes back to this overarching statement of having flexibility, discretion to tailor outcomes and case management to the needs of the accused person. On that spectrum of therapeutic or rehabilitation based approaches, there is also restorative justice models. Although I haven't referenced it in my statement, I think we have to be brave and we are coming to the point where we have tried a lot of different approaches within the criminal justice system and we have to pilot more restorative models for the right cases.

There will always be a small cohort of cases where you have a high risk offender who has committed very serious offending where the only option is imprisonment. You will always have that very small group of offenders. But the reality is that the majority of offenders will fall into an intermediary space where they have committed serious offences, but there are also strong indications of us being able to intervene, rehabilitate, reintegrate them into the community and in fact even into their family.

Then of course the vast majority are at the lower end of the spectrum where we should really have lots of different options in terms of how we are going to interrupt the offending cycle or actually improve and rehabilitate them so they can never reoffend again.

MS ELLYARD: Did you hear this part of the discussion with the previous witnesses where restorative justice was

mentioned?

MS FATOUROS: No, unfortunately I didn't.

MS ELLYARD: One of the I guess potential tensions that arose out of the evidence that was given by the two previous witnesses was where does accountability reside. If you have a restorative justice model, which was described to the Commission as conceiving of what has happened as a harm rather than a crime, what are the potential risks that there's not going to be sufficient accountability from the community's point of view placed upon that offender or perpetrator for what he or she has done?

MS FATOUROS: I think that's the primary tension in restorative models or the primary challenge and it really comes down to - I did hear the part where Professor Goodmark I think talked about agency and women having more agency. I have worked with victims in very serious sexual assault cases, often historical cases, where what they want from the State process or the criminal process is not necessarily the conviction and imprisonment of the offender, but an acknowledgment of the harm done.

I have often had victims who say, "Look, I'm not sure I really want to go through this process that you've described to me of getting into the witness box, being cross-examined. I don't care about this. I just want an acknowledgment that he has hurt me."

Restorative models, particularly ones that have been tried in New Zealand, and New Zealanders are often very brave around trying new things, have actually operated in this area of sexual assault which is so complex and yet they have actually come up with a restorative model which actually works, but it's all about

triaging and identifying the cases and the parties it will work for, because it won't work for all cases.

I'm not sure if this is the old prosecutor in me, but there is a very significant role for the State to play, particularly around serious offending like sexual offending around children, where the accountability function of the criminal law and the symbolic role of punishment is vitally important and that cannot be left to just restorative models. But there is a place for us to actually explore restorative models.

MS ELLYARD: One of the essential features of the restorative model, as I understand it, is there needs to be acknowledgment by the perpetrator of the wrong that he or she has done and part of that might depend on the development of insight. One of the things you deal with in your statement is the potential role for men's behaviour change programs in the context of family violence matters. Can I invite you to comment on your observations in relation to those programs?

MS FATOUROS: A couple of months ago - I try and regularly go on tours of all of the Legal Aid offices and all of the Legal Aid offices have significant work to do both in family violence lists and criminal law summary lawyer duty lists. One young duty lawyer made a real impact when she described the day she had had in one of the Geelong lists where it was contravention, after applicant work, after contravention, after applicant work, one after the other, and she felt that in the respondent space she was just putting a bandaid on the problem. She said, "It's really deflating, Helen, to actually know that I'm probably going to see that person back here very soon. They haven't

really appreciated what's going on and what the intervention order is about. I've done the best I can, but there are simply no programs for me to refer them to."

In fact, in Geelong I was told by duty lawyers that it's over 12 months and you are not even guaranteed then to get a place within whatever men's behaviour programs are available.

So, I think it's almost a no-brainer that we have to do better in that space, but it's not just men's behaviour programs. It's also a whole lot of other programs that must link in with that type of intervention; drug and alcohol, if the person is suffering a mental illness or cognitive impairment. It can't just be one size fits all.

So we need a really significant investment in men's behaviour programs being rolled across out the state, but having lots of different, if you like, facets to deal with the different needs of offenders.

MS ELLYARD: At paragraph 72 of your statement and following, you offer your views on the improvements that the criminal law might experience in family violence matters and what some of those specific improvements might be. Can I invite you to comment, I suppose, firstly on what you see as the present limitations that are affecting the criminal law's ability to respond in an effective way to family violence matters?

MS FATOUROS: I actually think - I know there's been a lot of talk around the system being broken and I don't believe the system is broken, but the system is overburdened and under extreme pressure in the family violence space. I think we have the legislative settings reasonably right.

That doesn't mean that there aren't improvements or there are not things that we will see through more research and evidence in terms of how particular provisions are operating in practice, but on the whole largely right.

But when you look at how congested the system is and how the different professionals, whether it be magistrates, duty lawyers, police prosecutors, the pressures that they are operating under, we can't meet the promise of that legislative framework. So, I think that's the first issue.

The second one is, partly because of the resourcing issue but also because of the way specialist courts operate, we have real inconsistency. So, a victim or an accused in Melbourne will have a vastly different experience to a victim and accused in Bendigo, for example. That's just not on. It's really unfair. So we have inconsistency in terms of experience of judicial officers, the way lists are managed, whether it's a specialist court versus not specialist court. We also have geography playing a part.

I think the other issue is inconsistency between the way the different professionals, whether they be legal or not, actually operate within the family violence space. We are never going to achieve complete consistency, but I think that's both a training issue and a cultural change issue.

Then finally I don't think we are getting the intersecting points right. One of the complexities of family violence is that it straddles a lot of different jurisdictions. So, even within the criminal pathways you have summary, indictable - even that is complex, and

I heard a little bit of Magistrate Broughton's evidence and she highlighted that very well - but child protection, family law, all of the intersecting points, including the intersecting points with non-legal services, so mental health services, men's behaviour programs, they are all a little bit fractured and they are all not working as well as they could be.

I think they are the sort of areas from my perspective that we need to focus on improving and a big part of the improvement will be the right investment and resourcing.

MS ELLYARD: Do the Commissioners have any questions?

COMMISSIONER NEAVE: I have a couple, Ms Fatouros. I'm familiar with - you referred to the interactive program which was partly a computer program, but also partly some face-to-face conferencing and so on with those who participated, the prosecution and defence lawyers who participated. I wondered about who funded that program and whether the funding of that program is continuing and, if not, what are the challenges in terms of having a similar program in the area of family violence?

MS FATOUROS: The Legal Services Board funded that training and it was not ongoing funding. It was funding for the actual design and implementation of the training and funding for the evaluation of the program. The evaluation is, I think, available on the OPP website and it was a very positive evaluation of the impact of that training. But therein lies the challenge with all specialised areas of practice; it's the sustainability over time of the investment required to maintain training that shouldn't be just one off. It really should be repeated, improved. As

the system changes and improves, so too the training should actually change.

So my understanding, and I haven't unfortunately kept track of it through the OPP, is that that training is no longer being offered.

COMMISSIONER NEAVE: So the challenges for having similar training in the area of family violence are great.

MS FATOUROS: Absolutely. The reason I make the comparison between the sexual offence reform space and family violence is I would like to think that, because we did great work in that space as a system we can borrow and replicate with confidence, that within the family violence space it will take less time to effect that shift and change that we have seen in sexual offences.

Having said that, though, sustainability and investment over time are going to be key challenges. I do think, though, that there needs to be more collaboration between existing independent statutory agencies. I think there has to be a greater readiness to, even if we are not going to get funding that sort of sustains us over a long period of time, within our existing mandates we need to sort of figure out ways to work together to leverage off the good resources we have.

We are very lucky in Victoria. We have the Judicial College of Victoria, we have SAC, we have a whole range of, if you like, statutory agencies designed to gather evidence and research in an independent way to inform this kind of work. I think we can just perhaps make the connections a bit stronger. When we have done it, it's worked very well, like the sexual assault space, like the jury direction space.

So I think we should also not just wait for funding. We should also be active in leveraging off what we have.

COMMISSIONER NEAVE: Thank you. My other question relates to the specialist service that exists in the area of sexual assault. You have said that family violence permeates the work that Legal Aid does because it's relevant to so many aspects of its work. I'm just wondering whether a specialist service in the area of family violence, maybe in the prosecutions area rather than where you are now, would be useful, or would it be just too diffuse, would it cover too much?

MS FATOUROS: I think it would be too diffuse. I think one of the challenges with a specialist model is, as I say in my statement, its sustainability, but also it can inadvertently create a bit of a two-tiered system, and where we have sort of weaknesses in terms of accessibility to particular services it can actually accentuate those service gaps.

The challenge is how do you upskill and train and get a specialist approach within such a mainstream area of impact? So I think we can learn from the sexual assault space that we have to come up with some hybrid model where we can combine the positive elements of specialisation, but build them into the more mainstream structures. It may mean that you need a greater investment in the beginning of that process, which means that you do have more specialist models, courts, centres, approaches, but then you actually plan for longer term phasing out once you have brought the majority of the system and the professionals up to speed with the response required.

So, I think it's about long-term planning around how you achieve that specialist approach. There are great examples through multidisciplinary centres, through the various initiatives the police have undertaken in the sexual assault space. But, for example, at Victoria Legal Aid I have just finished restructuring the indictable crime program. We had a specialist offences team. It was a very small team. But we found that the vicarious trauma risks in doing that work day in and day out, particularly from a defence perspective, were too high to sustain in a specialist team.

We have now got a merged team where my expectation is that all legal professionals, given the pervasive nature of sexual offences as well, should be well trained and equipped to handle those cases. We shouldn't have to rely just on a very small team of specialists to do that work.

I suspect both the police and even the County Court have found this issue with highly specialised models of service delivery. They are all sort of blending and taking a more generalist approach now that we have had that very intensive effort to upskill, train, change reform.

COMMISSIONER NEAVE: Thank you very much.

MS ELLYARD: May I ask the Commission to excuse the witness and suggest that we just take a five minute break until 12 o'clock?

COMMISSIONER NEAVE: Thank you very much, Ms Fatouros. You are excused.

<(THE WITNESS WITHDREW)

(Short adjournment.)

MR MOSHINSKY: Commissioners, the next witness is Professor Freiberg. If he could please be sworn.

<ARIE FREIBERG, affirmed and examined:

MR MOSHINSKY: Professor Freiberg, you are an Emeritus Professor at Monash University?

PROFESSOR FREIBERG: I am.

MR MOSHINSKY: You also are Chair of the Victorian Sentencing Advisory Council?

PROFESSOR FREIBERG: I am.

MR MOSHINSKY: I understand you appear in a personal capacity, not representing the council?

PROFESSOR FREIBERG: Indeed. Yes, that's right.

MR MOSHINSKY: You have prepared a witness statement for the Royal Commission?

PROFESSOR FREIBERG: I have.

MR MOSHINSKY: Are the contents of your statement true and correct?

PROFESSOR FREIBERG: They are.

MR MOSHINSKY: Could you just briefly outline your main areas of academic work over your career?

PROFESSOR FREIBERG: I have spent the last 40 years basically looking at sentencing, over recent decades looking in the area of non-adversarial justice and regulatory theory. They are the main areas, but I have wandered far and wide in my researches.

MR MOSHINSKY: I want to start general, with some principles around sentencing and you deal with this at paragraph 16 of your statement. I was wondering if you could explain perhaps in lay person's terms what are some of the main principles around sentencing?

PROFESSOR FREIBERG: They are set out in the Sentencing Act and

that's what guides sentencers and they are an amalgam of the issues or the aims of retributional punishment to impose a just punishment in all the circumstances of the case. They are also about specific and general deterrence, specific to deter the individual in front of the court and general to deter other possibly like-minded persons from committing the same or similar offences. They provide a framework, a context for rehabilitation.

There's an important element there of denunciation; the courts make statements about community views about that kind of conduct and the overarching purpose is to protect the community. Sometimes these conflict, but in Australia the fundamental principle is that of proportionality, that the punishment should fit the crime and, subject to any statutory derogations, of which there have been quite a few, all the other factors, rehabilitation, deterrence and the like, need to fit within this broader framework of proportionality.

I think that's quite important when we are looking later on, if we are trying to increase the deterrence aspect or even rehabilitation, that needs to fit the framework of proportionality. So, depending on the seriousness of the offence with which you are charged, all those factors need to be reconciled both in terms of the seriousness of the offence and the personal circumstances of the offender. As judges will tell you, it's a very hard task.

MR MOSHINSKY: If we focus on the deterrence aspect of punishment, of sentencing, and I want to make clear that's only one of the factors you referred to, but if we focus on the deterrence aspect, what do we know about the impact

of the severity of the sentence as a deterrent?

PROFESSOR FREIBERG: We know quite a lot and, despite the beliefs of Parliament and many politicians, severity is one of the least important factors in deterrence. Deterrence is about communication. I know the Chair of the Commission was on the Court of Appeal and there are many statements made by Courts of Appeal about the importance of this particular judgment in relation to sending a message.

The reality is that most offenders are not aware of the Court of Appeal statements, they don't necessarily read the newspapers and they are not making rational judgments weighing up the relative merits of the majority and dissenting judgment of a Court of Appeal. I'm sorry to say that.

The other reality is that, when Parliament increases maximum penalties, that has a very marginal impact both on judicial sentencing practices - and we have done some work recently at the Sentencing Advisory Council showing that a 100 per cent increase in maximum penalties might reduce at best a 20 per cent increase in overall sentencing patterns.

The easy political response to a particular crisis, a particular outrageous offence, is to increase maximum penalties. That's not what the literature shows works. You have to communicate what the sentence is likely to be and the person has to compute that, the person receiving that message. It's about signalling.

The criminological evidence is overwhelmingly clear that it's about certainty of detection and not about the severity of the punishment, and also about the speed

with which the punishment is imposed. So if you do the calculus the argument is that if you have very low chances of detection, small chances of detection, then if you are an economist - and the economic criminologists make the argument - then low certainty, very high severity to make up your deterrence value.

On the other hand, if you increase the certainty of detection then severity can be decreased. In fact it can be decreased to what one might consider relatively low levels. Again, that's subject to proportionality and you don't want to deprecate the seriousness of the offence. But if you are about deterrence alone, forget the proportionality, then certainty and speed.

So if we have speed cameras, if we have onboard monitoring - in heavy trucks there's a lot of onboard monitoring where you are certain to be detected. There are many areas. If you are now thinking in terms of people convicted of drunk driving offences and the like, the monitoring devices, the telemetric monitoring devices, ankle bracelets that are being used that will provide immediate information to the surveilling police authorities, it's found that they are highly effective because the person knows that if they breach it they will be caught, and then the question of the sanction follows.

So many of the programs that I mention in my witness statement are really based on certainty and not severity. So my argument would be let's focus on the mechanisms by which we can both speed up the imposition of the sanction and increase its certainty.

MR MOSHINSKY: I might come back a little later to some of those specific programs that you deal with in your

statement, but if I can talk about the general principles of sentencing a little further. One of the lay witnesses who gave evidence earlier in these public hearings, and she was a witness on Day 9 whom we gave the pseudonym Lyndal Ryan, talked about after her partner - and I won't go into the detail of all of the violence that she experienced, but he was sent to prison, and I will just read what she said at confidential transcript page 69.

"His first prison sentence was two weeks, his second was five weeks with a two months suspended sentence. So there's no change at all. He told me he loved prison and met similar minded men and had a great time." Sending people to prison, is one of the factors in terms of the utility and effectiveness of that the experience that they receive in prison?

PROFESSOR FREIBERG: Certainly to some extent prisons have to be unpleasant places. That's the deterrent aspect. I don't place a lot of faith in the transformative elements of prison, although there are many good prison programs. It's not the ideal environment in which to deliver those programs. They are not also wonderful in terms of character building when you consider the group that's in prison is not the role models generally for people in prisons.

So I would see the role of prison in this context, where we are talking about swift and certain punishments, as the application of a short but unpleasant reminder that the particular action has had a consequence. Again I'm not talking about the longer term, the broader purposes of imposing imprisonment for serious offences of assault, of breach of intervention orders.

I think what's been missing is not so much the applicability of those prison sentences for serious offences, but what's missing in our system is the ability to provide short, certain, unpleasant sanctions, even if it is in a holding cell. I heard Assistant Commissioner Cornelius say that he doesn't want people sitting around having a cup of tea with the investigating officer, that that particular sanction of taking someone out of the community for a short while, it might be a for a day, it might be two days, and again this is what the evidence shows, is really a reminder - it's not transformative, it's partly punitive - but it's the reminder that certain actions will have swift and certain consequences.

So we can talk about sentencing more generally, and I think later on in my statement we discuss, and what Ms Fatouros also discussed is the major change from the use of fines to imprisonment in some cases where the seriousness of the offending had not been recognised - and I think that's important - and also the change to lower order sanctions such as adjournments where there is some transformative element such as a condition to undertake a program.

So, there's a sort of bifurcation occurring certainly in sentencing for breach, but again prison is not a long-term answer for anything.

MR MOSHINSKY: Perhaps can we turn to sentencing in the family violence context. The Sentencing Advisory Council reports which you attach to your statement, there's a number of major reports that have been done. Could you summarise what do they tell us about sentencing practices in Victoria and family violence cases?

PROFESSOR FREIBERG: We have looked mainly at the offences of breach and in fact we are about to undertake a new monitoring report. We are very conscious of the work of the Commission. We are trying to speed it up, so there will be an another monitoring report to see what changes have been made.

What we did find was that there was a change from what we considered to be an overuse of the fine, which was neither transformative, relatively weak as a punitive sanction, often had untoward side effects on the family. If you take money away from an already financially straightened family, it had a negative effect there and we considered it had no rehabilitative context as well.

So, because the fine is so commonly used - in the Magistrates' Court 50 per cent of most sentences there are fines - we suggested there that either it's got to be treated seriously, especially for repeat offenders and the use of imprisonment, or to be increased because it denounced the conduct and we also suggested that perhaps sentences which had a transformative basis, so a sentence that had a condition of attending a men's behaviour program, might be more effective.

We did a monitoring report - and I think Ms Fatouros mentioned that - that there were some really significant changes in sentencing patterns. That may have been as a result of the report. It may have been a result of the changing community attitudes. It may have partly been to do with, shall we say, an informal guideline that we ventured at the end of the report - and I have appended that to my witness statement, and I want to come back to that at the end of my statement - which set out a range of

factors which would indicate that the case was of low seriousness, medium to high seriousness and the kinds of sanction ranges that might be appropriate.

I understood at the time - and I haven't followed it up - that in the Magistrates' Court there was some awareness of that. It was one page; we got it down to one page. It was laminated, so you could have your coffee on it and impose a judgment at the same time. It was two in one; it was really great value. But it did provide not a checklist but guidance as to how to approach that. That may have been one of the factors contributing to the change. But we found that that was very, very important.

Can I say in my capacity as Chair of the Tasmanian Sentencing Advisory Council we are about to issue a report on sentencing for family violence down there and we have found the same patterns there of the - not excessive; that's a judgment - high use of fines and we will be making the same kinds of observations to the government there about the relative use of the sanctions in different circumstances.

MR MOSHINSKY: Could I take you to paragraph 47 of your statement where you summarise the findings of the Sentencing Advisory Council reports, and you were comparing two periods of time which are set out in paragraph 46.

PROFESSOR FREIBERG: Yes.

MR MOSHINSKY: The earlier period was from 2004/5 to 2006/7 and the later period was 2009/10 to 2011/12. Could you take the Commission through what were the main findings that you found about the change between the two periods?

PROFESSOR FREIBERG: Sure. In the early period fines were used

extensively, and we found that in the second period they were imposed in 25.8 per cent of cases. That was a decline of 30.5 per cent. That's a very dramatic change in that time.

What surprised us was the use of adjourned undertaking. One would think that if the offence were particularly serious of breaches - and this is what we were drawing attention to, that these were not minor technical breaches; although there's a range of breach offences, that this was a serious offence - the authority of the court was being flouted as well as all the harm that was being done to the victim. But it was explained to us that the adjourned undertakings, which is at the bottom of the sentencing hierarchy, were being used in conjunction with conditions that were attached to it which were then intrusive or onerous or we would like to think transformative. So it was a paradoxical finding, but in fact it was being used not just to dismiss the charge and, "Go away and behave yourself;" there was something added to it which wasn't being added before.

The same we found for repeat offenders in that the most serious sanction, imprisonment, had increased for the repeat contravention, and we believed that that was an appropriate response because repetition is an important element and we want to reduce that.

Again I make the point there that, while we have those outcomes, that doesn't necessarily relate to changes in breaching behaviour. If we look at the overall statistics we see family violence offences going up. So I would caution drawing a conclusion that those outcomes necessarily produced the right deterrent results. I think

it probably reflected an understanding of the seriousness of the offence and an attempt to create more transformative sanctions rather than what I would count as a nominal and ineffective sentence of the fine. So that's the bifurcation we have seen.

MR MOSHINSKY: Is it a fair summary that the general trend over the two periods was to increasing severity of sentences?

PROFESSOR FREIBERG: I think it's a bifurcation. At one end there was the severity; at the other end the use of more interventionary sanctions in a context that looks like they are becoming less severe. But, if I'm right, you may want to re-ask the magistrates whether they are using the adjourned undertaking to add conditions which they think might be remedial. As I say, we - conscious of the work of the Commission - have agreed to do another monitoring study as quickly as we can to see whether those trends have continued.

MR MOSHINSKY: Is there material available to assess whether sentences in family violence cases are different, more or less severe than in non-family violence cases, because there may be a perception amongst some in the community that family violence cases are perhaps treated less seriously by the courts?

PROFESSOR FREIBERG: Look, it is impossible to do those. If you set aside the offence of the contravention, which is identifiable, we don't have a mechanism in Victoria of taking an offence such as infliction of injury, serious injury, and identifying whether that's a family violence offence or not. Unless you went through all of those cases - and we don't have the capacity; I don't think anyone has done that - we are unable to say that in

Victoria.

However, in Tasmania they have a Family Violence Act which they brought in in 2004. Under that Act they define a family violence offence as any offence the commission of which constitutes family violence. In their definition - and this is in paragraph 52 - they then include already existing offences such as assault, sexual assault, threats, coercion, abduction, stalking.

What that does is in the police system, in the Department of Justice system it flags those offences separately. So in the report we are about to publish we were able to do some analysis of the difference between sentencing for the offence of assaults in a family violence context and assault in a non-family violence context. That was a unique opportunity to test your hypothesis there.

In fact we found that - and this is at paragraph 57 - the sentencing patterns for family violence assault and non-family violence assault were reasonably similar, except for the relationship of proportionate immediate custodial sentence. They were 8.3 per cent for non-family violence convictions of assault and 12.7 for family violence. So whether that's statistically significant, we had quite a few hundred cases there. I think that is a significant difference. What we didn't find was that once you went to gaol that the length of the sentence wasn't different. So you had a higher chance of being imprisoned, but you didn't go in for longer.

Fines for family violence convictions was lower than non-family violence; and probation, not all that different. So it made a bit of a difference, but you

certainly couldn't say that family violence assault offences were treated less seriously; in fact the contrary. If you take the custody rate, they were treated more seriously. So that might put to bed any myths about those cases being treated more leniently.

MR MOSHINSKY: Are those findings translatable to Victoria or is there any reason to think they are not translatable?

PROFESSOR FREIBERG: The answer is I have no idea, and I don't think we can do it under our current recording system.

MR MOSHINSKY: There has been some evidence about adopting a pro-arrest approach, and we had evidence from Assistant Commissioner Cornelius yesterday about a pro-arrest approach in the Dandenong region. We have also had some evidence this morning from Professor Goodmark from the United States about mandatory arrest policies in the United States. Are there any observations you can make at a general level about pro-arrest approaches?

PROFESSOR FREIBERG: I know there has been a long history in United States which pioneered this notion of pro-arrest. I'm not an expert on this . I tend to focus on the sentencing rather than the policing.

If it is a policy that mandates arrest, then I would oppose it on the grounds that I oppose any mandatory system which doesn't allow for sufficient discretion to treat the cases individually.

If it operates to send a swift and certain signal, if I can use that language, in the context of family violence offending and that that person will be detected and dealt with seriously - I hate to say firmly - to give credibility to the system, and certainly if it relates - and I didn't hear the evidence - to

breaches, I think breaches are a really central issue because of the question of the attitude of the offender - I hate to use the words the contempt of a court order - to a statement by the court of what their behaviour should be, then to the extent that it fits within a deterrent system which says a sanction, whatever it is, and if you count arrest as a sanction and if it is followed by a brief period of custody, whether it is four hours, eight hours, a day, if you count that as a swift and certain sanction then it may well have that deterrent effect that a delayed but longer sentence or longer sanction may have.

I did watch Assistant Commissioner Cornelius's evidence yesterday afternoon and he seemed to think that that experiment did reduce offending and re-offending behaviour and had a salutary effect. If that's the evidence - and I would want to see it properly scientifically assessed - then it is not so much a pro-arrest policy but a credibility enhancing policy in relation to certain offences, and that would make sense.

MR MOSHINSKY: Can I turn then to the topic of speed of punishment which you have adverted to already. You have referred to speed of punishment and certainty of the response. We have had some evidence yesterday about current sort of times in the Victorian system. There was evidence from Acting Inspector Rudd that it could take one to nine months to charge someone in a non-remand/non-bail situation. That was transcript page 2021. There was evidence from Magistrate Hawkins that it could take three to 12 months between the initial listing in the court and the contested hearing. That was transcript page 1947. So

that could be potentially, taking the higher figures, 21 months between the event and a contested hearing on a worst case scenario. What comments would you make about the efficacy of the system?

PROFESSOR FREIBERG: I rest my case. I heard that evidence yesterday afternoon. I hadn't heard the magistrate's evidence. But it's overwhelmingly depressing. This is as far from swift and certain. When you get to court, there's no certainty that you will be convicted. There is no certainty about the punishment that you will get, the sanction imposed. So here you have enormous length of time, and who knows what's happened in the meantime in terms of the behaviour of the offender. That's the worst possible outcome.

So we would then rely on imposing a severe sanction when it finally gets to court to make the point that, "This behaviour is unacceptable; this behaviour is not to be tolerated; that you are not to repeat this behaviour," and let that be a message out there to all the people who have read 2,000 pages of your transcript to say, "Yes, I get that message from the courts about what will happen to me."

It's a lifetime; 21 months, six months is a lifetime in a case and in an individual's life. So the answer is let's not try and ramp up the severity of the sanction to make up for the tragic failures of our system to be able to process people quickly.

MR MOSHINSKY: One system that you refer to in your statement is the Hope program, and you outline it at paragraph 29 and following. In paragraph 33 you outline some of the key elements of the Hope program. Could you just outline

for us how does that program work and what are some of the key elements?

PROFESSOR FREIBERG: This is a probation program that's been rolled out in the United States.

MR MOSHINSKY: If I can just interrupt you there. You refer to a probation program. That's a program that applies after there has been a conviction?

PROFESSOR FREIBERG: Probation is a sanction. It basically involves supervision of an offender. We had probation in Victoria until the mid-1980s, and it was then subsumed in the community based order and now re-subsumed in the community correction order which is our omnibus intermediate order between the fine and prison. That has a condition of supervision in it. Although we don't call it probation, that's what probation used to be, together with a range of conditions on that probation.

In the United States it will vary from state to state, but basically probation is a supervisory sanction following a conviction. Under that system - and I gather the judge will be here next Monday speaking to magistrates and to the public - they are given a warning in a group. A group of offenders will be given a warning that if they violate the probation, the conditions of probation, there will be a very short gaol sanction and it will happen quickly.

Many of those offences, as I understand it - and I don't have a close understanding; I have read the material - relate to drug and alcohol offences. So there's a question of compliance with abstinence conditions. In that sense it has some similarity with our drug court system, which is not a probation program but

it's an unactivated term of imprisonment of up to two years where there's very close correctional and judicial monitoring of offenders, certainly in their early stages. But urine analysis is done in the early stages every three days or so. So there's very close monitoring. That's about certainty of detection. That's what's proved very effective.

Under this system the offenders are given a colour code. They have to call the hotline every morning. If your colour comes up you have to rush off to court. If you have a negative response or if you fail to appear, a warrant will be issued. But, if you fail, you are brought before the judge within 72 hours. If you violate the probation, in you go for a few days and the sentences increase. It's also, as the judge makes clear, not just a straight punitive aspect because of the drug and alcohol problem, mainly drugs; there are rehabilitation programs. So these don't work on their own.

The evidence is that that seems to be effective in reducing arrests, that it's effective in reducing the number of probation revocations, in the use of drugs, missed appointments and the like. So it is showing quite positive results.

Can I say that at an earlier stage, a couple of years ago, we were looking at - not the council but I was looking at together with some others at a similar program based on a program in South Dakota, which I think preceded the Hope program or may have gone alongside it, where for drunk driving, especially repeat drunk driving, there was a system of monitoring through telemetric devices and other mechanisms under which, as soon as you were

detected, you would be brought back in and you would get a one day or a two day or a three-day sanction.

Again that was a probation system and it was found to be very effective in not only reducing the incidence of breaches but had a longer term effect. In those jurisdictions in fact family violence overall decreased, which was a finding that they did not expect to see.

We looked at that because there was a proposal in Victoria, and indeed in Tasmania, for the creation of a drive whilst disqualified/suspended and drug and alcohol problem. It was going to be a very specialised list in Frankston. We had set up the structure for it and it was going to be based on that swift and certain sanction. That was a sentencing court modelled on the drug court.

But the only flaw in that system is that, if you gave somebody a community based order, there is no provision for a swift and certain custodial sentence. The only way you can get people into custody is to charge them for the breach, and that may take six months if Corrections indeed takes them on breach.

The difference between that and the drug court is that because the drug court sanction is an unactivated term of imprisonment the person's imprisonment can be activated once they reach a certain level of breaching and they can be brought back in. So it fits within the Victorian jurisprudence.

The big problem for the application of the Hope program - and I have tried to explore it; I have to confess I haven't got the answer; of course the Commission will of course come up with the answer in its wisdom - is

how you can translate this program pre-sentence and post-sentence. So I don't want to get our hopes up on Hope, because it's been pressed and it's now become a very popular idea.

But, as with the drug court, as with the neighbourhood justice court, and I was involved in the development of both of those, including the legislation for both, we have to carefully translate the ideas that operate in the United States into our legal context and into our judicial culture.

So if we want to adopt it post-sentence then if the imprisonment was going to be the swift and certain sanction, even for a day or two days, we can't do it under our existing CBO system. You would have to change that. I'm not in favour of creating an immediate gaol sentence for a certain class of offences. It would have to be something else.

Where somebody has already been convicted of a breach of a family violence order, one of the other mechanisms might well be to use that arrest power - and here we come back to the long-winded answer to your question - if you use the arrest power and then detain people for 12, 18 hours while dealing with that breach you have a better power. In a sense it's using the bail power as a punitive mechanism.

I'm a bit nervous about using the bail power, but at least you can remand someone - you have the legal power. But, absent that legal power, we can't do it. The Americans of course have got an imprisonment rate of 720 per 100,000; we have 120, 100. I don't think we should follow that path.

There is another element there, if I may say. Apart from the jurisprudential problems, the administrative problems of putting people in gaol for very short periods - we know there are today 6,025 people in gaol; there are some hundreds in police custody; our gaol system is full - the last thing that Corrections would like is to have to process people through their full entry process, which may take a couple of days or three days, and then to have the person released. So we can't just assume that the correctional system, especially incarceration, is a free gift that we can use as we like. Our system is not set up to do that.

So I suppose my short view is we need to exercise a lot of caution before we jump in. But the basic principle of swift, certain and short rather than let's wait 18 months and then really whack them with something, I think that holds. The challenge for the Commission or for anyone researching this is how do we translate those criminological principles, the knowledge that we have from the Hope program, from the Dakota program, which I think the evidence is fairly powerful, into a family violence context.

As I said previously, we were trying to translate that into a repeat drink driving context where we found none of the existing sanctions was working. The system had failed. That's, again, where we come back to what Ms Fatouros was talking about and what I have written about extensively is the problem orientated courts, a whole new way of thinking about how we respond to serious repeat offending.

MR MOSHINSKY: Just to clarify one very small part of what you

said, is one of the distinctions between in the US probation system we are talking only about people who have already been convicted, that because the probation system is structured as it is if you breach one of the terms of the probation you are able to get an immediate sanction, which might be three days in prison, whereas under our community corrections orders if you breach one of the conditions you have to be charged with that and that may take many months to come to trial?

PROFESSOR FREIBERG: That's as I understand. Reading the comments of the judge there, apparently what they do is because he's supervising hundreds if not thousands of offenders at once - which is quite miraculous - they do it on the papers. So what happens is I think they lay the charge and then they fax it through to him or whatever they do and he will authorise the imposition of the sanction. So I think there is still a judicial imposition of a sanction. But it's not a long hearing. I think it's a specific breaching provision that they can use there.

I'm not going to say he rubber stamps it; I'm sure he exercises judicial discretion wisely over the thousands of cases he deals with. But it is understood by the offender and by everybody else that that's what will happen. So again it is a completely different breaching system.

MR MOSHINSKY: Can I turn then to one of the other topics which you deal with - - -

COMMISSIONER NEAVE: Just before you do, counsel, I just wanted to follow up on that. In the drug court do the actual charges for which people are convicted which then creates the whole regime, are they prosecuted more quickly? Are

people convicted more quickly when they get to the drug court? Is that why it sort of works?

PROFESSOR FREIBERG: No, I'm not sure that it's swift and certain there. I think their procedures take quite a while to get to the drug court. I think the drug court is more about what happens after sentence.

COMMISSIONER NEAVE: What about the possibility of deferring sentence; we don't have suspended sentences anymore, but deferring sentence? As I understand it in those circumstances conditions are imposed. But then the problem is, is it not, that the breach of the condition that's imposed is not yet a criminal offence - is not a criminal offence; is that the problem?

PROFESSOR FREIBERG: It's just brought back before the court for sentencing.

COMMISSIONER NEAVE: So again you have to come back and be sentenced then, and again you have the possibilities of delay.

PROFESSOR FREIBERG: Indeed. That can be a creative way of approaching it. But I think the prosecution would have to have a case sufficient for the judge or magistrate to make up their mind that a deferral is appropriate. So I think, given the overwhelming number of cases that come before the courts, whether the police prosecutors can have a sufficient case for the magistrate usually to make up their mind to defer, and then there can be judicial monitoring. It could be, "Look, if you do anything you come back before me." Again they have to be caught and brought back before the court.

But I think that's a very creative response, and certainly the Sentencing Council in earlier reports

recommended the expansion of the deferred sentence which we now have. It used to be restricted to certain age groups and certain courts. Available now. That's the direction we are looking at in Tasmania as well, of using that very flexible mechanism, sort of a quasi-suspended sentence. But you can't put people in gaol.

The difference also, by the way, with the drug court is that it's not for every minor infraction. They have a point system and when you get to a certain number of points - but, again, it's understood that when you reach whatever the number is, 10 or 12, you will then be taken into custody. But then again we were very careful in drafting that legislation many years ago. That comes off your sentence. It's a proportionality argument.

COMMISSIONER NEAVE: Just a follow-up. If you used the pro-arrest policy for breaches, that's a kind of de facto use of police powers to achieve something that otherwise would be done through the criminal justice system. There are some possible problems with that approach because it will be pretty difficult for the police to differentiate between - and I certainly don't want to talk about technical breaches because there are no such things - serious breaches and less serious breaches.

PROFESSOR FREIBERG: That was my caution about the use of the bail power. But even I think I heard yesterday that the process of arrest and the timing and how long it takes is problematic.

COMMISSIONER NEAVE: Yes.

PROFESSOR FREIBERG: So, from everything I have heard, we are as far from swift and certain in any of the aspects of it. What I did read in some of the earlier reading, I think it

was the emergency alarm - is that right - the Safety Cards were being very effective in dealing with offending conduct. Although I don't know a lot about that, if you look at electric monitoring bracelets, telemetric devices, Safety Cards, they are all built on that swiftness of detection or certainty of detection. I think that's what we ought to explore. But I do have reservations about arrest, about the use of bail. They may be the only tools we have at the moment. They may not be the ideal tools, but they certainly meet some of the criteria of swiftness and certainty.

COMMISSIONER NEAVE: Thank you.

DEPUTY COMMISSIONER FAULKNER: Can I follow on from that. I was going to get to it later, but you have just got to it, Professor Freiberg. Is there any research that suggests that there is any difference in terms of deterrence if you do use devices to restrict people's freedom? Obviously you can use various devices that interrupt people's lives that actually prevent them from doing certain things. In the same way as you said there's not much deterrence gained by increasing the severity of the sentence, do we know anything about the impact of devices?

PROFESSOR FREIBERG: I think the Hope program shows it's effective there, and the South Dakota drink driving program indicated that it was very effective in reducing the rate of recidivism and breaches.

DEPUTY COMMISSIONER FAULKNER: I haven't got my question across clearly enough. I'm talking about what you get as an outcome is not a day in prison; you get your freedom restricted through a bracelet or something else.

PROFESSOR FREIBERG: To the extent that that then produces some action from the supervising authority, whether it is police or Corrections, they are very effective. If it is absolutely certain - I haven't actually seen the exhibitions, but some of the things that I have seen about the telemetric devices, the ankle bracelets and now the alcohol and drug detection bracelets, they work off what you exude from your skin, the technology is quite remarkable. But it is expensive and it has to work.

But, yes, I think the evidence is very strong about certainty of detection does change people's behaviour. I don't want to go into the brave new world of robots and things, but that's where a lot of technical work is going on in offender monitoring. So I would certainly explore those possibilities rather than doubling the maximum penalty and waiting for 18 months.

DEPUTY COMMISSIONER FAULKNER: Thank you.

DEPUTY COMMISSIONER NICHOLSON: Professor Freiberg, your swift and certain principle - - -

PROFESSOR FREIBERG: I don't claim it. Beccaria claimed it 200 years ago.

DEPUTY COMMISSIONER NICHOLSON: Well, the principle. In your view does it apply universally across all profile of offenders? I have in mind the profile of an offender who, let's say, might be long-term unemployed, perhaps have a mental illness or that may in fact be camouflaged by excessive drug or alcohol use, might have a chaotic family life. Is swift and certain really going to make any difference to that person's life?

PROFESSOR FREIBERG: Probably as much as the statements from the Court of Appeal are going to make a difference to

their - I'm sorry, Commissioner. But, you know, the problem is that the profile of most offenders, if we look at the custodial population, major problems with drugs, alcohol, mental illness, acquired brain injury, intellectual disability, the whole range of people - that's why they are there, because all of the messages have failed completely and there are huge underlying factors, pathological factors, which mean that they have failed the system and the system has failed them.

So I'm not going to hold out that for every person that might commit these offences this is going to work. But it could probably send - to the extent that it does - a clearer message than the more abstract messages that might be sent by courts later on.

But, you are quite right, you have to look at the population you are sending the message to. If they can't process any message, then they are not going to process this one. That's the problem. We have to be fairly clear about the target audiences.

The main learnings about deterrence are it's a process of communication. What I think parliaments have forgotten is that communication is not a one-way street. They tend to think, "Because we have said, it shall be so." It's how it is heard. It's how people perceive the probability of detection. It's how people perceive the probability of conviction. It's how people perceive the severity of the sanction.

It may well be, like your earlier comment, counsel, "Oh, going to gaol. I'll meet my mates there"; or, as we see the evidence in many Indigenous communities, it's a rite of passage; or, as I have read in the

newspapers recently, for young kids it's actually much better than being at home. You get fed and it's more comfortable. It's what Bentham called the principle of lesser eligibility. We don't want our correctional system to be better than where you are now. It will draw people in. That doesn't happen a lot. But if we understand deterrence, specific and general, as communicative devices then we have to understand the process of communication, and that will differ from offender to offender.

MR MOSHINSKY: Can I ask you, Professor Freiberg, about some possible changes to our offence structure that might be considered in the context of family violence. You deal with one of these at paragraph 50 and following of your statement. There are a number of different options that might be considered, but one option might be to have an offence of "do not commit family violence" and pick up the extended definition of "family violence" in the Act which would include matters such as economic and psychological abuse, for example. What observations would you make about that issue?

PROFESSOR FREIBERG: I think most of the offences covered by family violence are covered by the criminal law. I didn't hear Professor Douglas's testimony, but I had a quick read of her statement. I think some of those offences would be very difficult to prove and I think reasonably exotic. I didn't look at them in great detail. But in Tasmania they basically cover all of the offences of assault, sexual assault. There's not much left over.

They did create the offences of economic and emotional abuse. Our findings were that there were no prosecutions or convictions for economic abuse and in the

years since 2004, so 11 years, eight prosecutions for emotional abuse. We couldn't get the sentences for those. But I think if you look at that 10-year history it made almost no difference at all.

In relation to flagging an offence as a family violence offence then, as I said earlier, it did have some effect on the custody rates but not the length of sentence. So sentencers did treat it more seriously.

What it did do was enable the system to flag those offences and also created or invoked a number of other powers: so the right of a police officer to enter premises without a warrant; the right to issue a police family violence order; the basis of a private non-police application for family violence order; a more stringent approach to bail. So it can act as a signalling device. But what it does in Tasmania is just embrace what exists. The two new offences, you would have to say, have not been effective in highlighting the problems of emotional and economic abuse.

So I would be fairly cautious. I might say the creation of new offences is difficult and I think it will create more problems for prosecutions. I think we have robust enough approaches making the law that we have now in terms of assault, stalking and the like work - and there are a lot of stalking offences - and also making sure that this major offence of breach is dealt with quickly, certainly and effectively.

MR MOSHINSKY: An alternative approach might be keep existing offences but create aggravated offences where there is a family violence component. Are there any general observations you would make about that approach?

PROFESSOR FREIBERG: Some jurisdictions have a whole list of aggravating and mitigating circumstances; New South Wales in their Sentencing Act. Judges don't like to be told what's aggravated. They tend to know these things. If you make it a specific aggravating factor, such as children were present - it's already in our Act; it's in other Acts - I think they could be taken into account.

I have another suggestion, if I may, and that's at paragraph 70. It's probably a good place to finish as we are coming up to lunch. This is my own particular bee in my bonnet that I have been wishing for decades.

I think we have seen the effectiveness, if I may, and I know Commissioner Neave was on the court that handed down what I consider to be a landmark judgment in the case of Bolton, and it's mentioned at paragraph 67. That related to the use of this new community correction order which was - - -

MR MOSHINSKY: Just to interrupt to explain you are now referring to the idea of guideline judgments.

PROFESSOR FREIBERG: Yes.

MR MOSHINSKY: Could you just explain what is a guideline judgment?

PROFESSOR FREIBERG: A guideline judgment is basically in Victoria a statement by a Full Court, five judges of the Court of Appeal. It operates differently in other jurisdictions. There are guideline councils which create these guidelines, or they may be legislative; but in Victoria a Full Court of five. It provides for the court to state the general principles that might be applied in sentencing for particular offences or, in the case of Bolton - which was a new order, a new community correction

order, which replaced suspended sentences and community based orders - it set out the principles that ought to operate because there was some degree of confusion in the court and disparity in the way it was being applied.

In a fairly lengthy 100-page judgment followed by a much shorter guideline, which was assisted in its development by the provisions of the Sentencing Act which provide for Victoria Legal Aid, for the Office of Public Prosecutions and the Sentencing Advisory Council all to make submissions to the court to assist it, providing an empirical basis and then, if you like, an adversarial system which we require to avoid High Court condemnation of advisory judgments, and then the court can consider an articulation of the principles which go beyond the requirements of any particular case. There were in fact three appeals where they had complained that the sentences, the COs, were excessive.

I think from the experience of Bolton's case - and I have to confess I was involved in the development of the law from 2004, when that law came in, to 2014 when the first guideline judgment - I believe that if the courts take their time to consider what the principles are and the relevant factors that courts in sentencing particular classes of offences might take into account, that would have a stronger influence on judicial behaviour while retaining judicial discretion, which I think is central, than increase maximum penalties, than aggravated offences, than a whole range of other mechanisms, and it has the credibility of the court.

The experience since December of last year - December 14, I think; a great day in Victorian legal

history - since that was handed down it has had a profound impact on sentencing practices. It has been developed by the courts as it goes on. But I can think of very few other judgments that have had as much effect on sentencing behaviour and practice and the approach to sentencing as that single guideline judgment.

So my argument is that, although we attempted an informal guideline and although the High Court has a number of reservations about sentencing procedure, and provided that Bolton withstands any High Court appeal - I don't know whether that's happening - that rather than looking, especially for the offences of breach and although most of these appear in the Magistrates' Court, I think there are mechanisms whereby I think it would be salutary for the Court of Appeal to turn its mind, and again with all respect rather than the grand statements in an appellate case saying, "Deterrence is important and these are serious offences," these are broad statements. When you get down to the nitty-gritty of what is a low range offence, what is a medium range offence and what are the factors that you need to tick off, that's more effective than saying, "Presence of children is aggravating" or "recidivism is aggravating." That's my hobbyhorse and I'm going to ride it until it dies.

MR MOSHINSKY: Those are the questions that I had, Commissioners.

COMMISSIONER NEAVE: I'm tempted to point out that the Court of Appeal has also pointed out the importance of publicity of sentences and said that the court can't do this all by itself.

PROFESSOR FREIBERG: Indeed.

COMMISSIONER NEAVE: Perhaps I should have restrained myself.

Can we break for lunch?

MR MOSHINSKY: Yes.

COMMISSIONER NEAVE: Thank you.

<(THE WITNESS WITHDREW)

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.00 PM:

<MAGISTRATE FELICITY BROUGHTON:

MR MOSHINSKY: Commissioners, we now have Magistrate Broughton here again, and I thank the Magistrate for coming back again today to address matters regarding criminal justice issues that we are discussing today. I just refer back to my statements on the earlier occasion that we won't be swearing in Magistrate Broughton in deference to her position as a judicial officer.

Can I ask you, Magistrate, first to perhaps address at a general level some observations about what is happening in the criminal jurisdiction, both in relation to family violence cases but also more generally.

MAGISTRATE BROUGHTON: The court is being crushed by demand. Demand is not something that's surprising I think to anybody who works in this field, but the particular aspects in relation to the criminal law, and particularly as it affects family violence, is that there are many more cases coming before the court, but there are also many more events that are associated with those proceedings.

What that means and by way of example is that there's been an extraordinarily large increase in the number of bail applications that are coming before the court. In terms of both applications for bail, applications for variation of bail and applications for revocation of bail, we recorded in total 22,744 in those three categories in the 2009/10 year. In the 2013/14 year that had increased to 37,649, which is about a 65 per cent increase.

You will have heard from Luke Cornelius yesterday in relation to what's happening at Dandenong and the

pro-arrest policy. If people are being arrested and the police aren't bailing them from the police station or just interviewing them and issuing a summons many, many months down the track, they come to court. They come to busy mention courts. Whether or not it's in the committal stream or in the summary stream of the court, so matters that are being prosecuted by the Office of Public Prosecutions, matters that are being prosecuted by the Victoria Police prosecutors, they are all ending up in busy mention lists in the Magistrates' Court. We have a flood of bail applications and that is increasing.

If bail is refused, then there's another application at a later stage for bail. We have large delays in our system. So you might have multiple bail applications that are being dealt with.

At the same time, if it's a case where there has already been an intervention order in place and it might be that the substantive charge is an application - a contravention of an intervention order is one of the charges, it may be that the intervention order provides that it's what we would describe as a limited or safe contact order, which does not exclude in this case the accused or the respondent to the order from the home. So, when the next incident happens and there is a bail application, there might be an application to vary the intervention order. That might come with the bail application, but if the event has happened overnight I might have been the after hours magistrate sitting, certainly not physically at court, but on call for the whole of Victoria from 5 pm at night to 9 am in the morning, and at 3 o'clock in the morning I will get an

application for a variation of the intervention order to change the conditions from the existing limited order to a full order with exclusion conditions.

Alternatively, I might be dealing with the bail application in my mention list at the Ringwood Magistrates' Court or the Melbourne Magistrates' Court, but the intervention order application might have gone to another court, so they might not be at the same court.

So the complexity of the issues that you are dealing with when you are not only dealing with the application but some of the cross-jurisdictional issues that you would be dealing with and the information that might be available to you at that point is very difficult to have before you and takes a lot of time. There's been a lot of talk about timing, but these criminal matters, increasing in number, increasing in the number of events and increasing in complexity and time, are having a quite crushing effect on the court.

MR MOSHINSKY: I wonder if you might be able to comment about the steps involved in a court process and whether that correlates with the steps involved that the family is going through?

MAGISTRATE BROUGHTON: Well, it doesn't. I think the evidence I gave - fairly shortly one example I gave yesterday demonstrates that. But for a family, what we know about family violence is that usually the violence will increase in severity over time, so there will be a number of incidents of increasing severity.

I don't think there's science about it, but certainly the social science would indicate about seven times, who really knows, but it's certainly many, many

times that people will leave and then reconcile. So the cycle, when I described yesterday that it's not a linear process, people come in and out, but the chronology for the family, obviously it is one after another. But in the court system and certainly the justice system it's often not a chronological path.

If, for instance, in the example I used where somebody is remanded and appears before the court the next day and it happens to be that there have been other incidents of violence and this happens to be, as we expect, more serious than, say, the three before, if the very first incident involved the police attending and they issued a family violence safety notice at that time and ultimately an intervention order was dealt with, say, for instance on 1 January of 2014, by the time of the incident that I'm dealing with, which might have happened on 30 September 2014, it would be unlikely that the charges which relate to the first instance on 1 January were even before the court.

If they are before the court, if I'm dealing with a matter which is in the committal stream which is prosecuted by the Office of Public Prosecutions and I'm at the Melbourne Magistrates' Court, then they do all of the matters for the whole of the metropolitan area. If it happens in, for instance, Ringwood, it's likely that the charges would have been listed at the Ringwood Magistrates' Court and the prosecutor that I have at Melbourne mightn't even know about the earlier brief when I am dealing with the bail application for the more serious incident that's happened overnight.

Equally, it may be that the intervention order

proceedings where the safety notice was might be at the Heidelberg Magistrates' Court on another date, and I have already discussed the difficulties with our IT system; with nothing talking to each other, we can't track that, we can't coordinate that, we are left with a manual system. So I'm left in court saying, "All right, what's happening with this? Have there been other incidents? If so, have they been charged? Where's the intervention order? What are the conditions?" If I'm going to bail somebody, I'm not going to bail somebody on orders that are inconsistent with an intervention order. If the court is making orders, we need to make consistent orders that are safe for the parties. "What's happening with the children? Was Child Protection involved? Are there family law orders?"

So those sets of proceedings often don't follow. I had one not so long ago, just a really very, very dangerous matter, a bail application. The charges in relation to the earlier incident had not been filed by the court. The bail application was ultimately adjourned part-heard before me. By that stage they had brought the charges before the court, but what I was able to do was get the intervention order application with the consent of the parties and the allegations which were the subject of the very first intervention by the police were extremely serious, but the charges hadn't hit the court.

MR MOSHINSKY: Can I take up this issue of timing and charging. We had evidence yesterday from Acting Inspector Rudd that in a non-remand/non-bail situation it might take one to nine months he said to charge, and then Magistrate Hawkins sitting with you indicated that it might take three to

12 months between when the matter hits the court and the final contested hearing takes place. Are you able to comment on the issue of timing and delay?

MAGISTRATE BROUGHTON: My experience is that that might be the scenario, but I have had many, many circumstances where it's much longer. One of the things that's been a problem is if an accused does not either appear on summons - so if, for instance, 11 months after the first incident the charges are finally brought before the court, he's charged on summons because they have longer to do it and you have a return date which is maybe January 2015, so the event's 1 January 2014, charges are filed in, say, November 2014, first court date, say, January 2015, he fails to appear. You issue a bench warrant and often there's extraordinary delay in the execution of the bench warrants. So, they execute the bench warrant. The accused is then bailed to come back before the court. Fails to appear.

I see this scenario happening frequently. I have developed a personal practice - and you just can't do it all the time, it's too busy - but at the end of the day when matters are before the court and the accused hasn't come before the court, you get a bundle of briefs or matters that are before the court where the prosecutor is applying for warrants, for the bench warrants.

I usually now say to them, "Well, which ones of these are family violence matters?" They all sort of try and work out which ones are the family violence matters. They haven't had time to look at it beforehand, they haven't looked at it beforehand. So, as we're going through, I'm looking at the charges trying to work out whether they are family violence matters and you are

seeing persistent breach charges in the middle of all that.

So, these are people who have had intervention orders, who have now been charged with offences and then have failed to appear and still nothing else is happening. At the same time I'm also saying, "All right, there is a persistent breach or there is a breach charge among all of these. What's happening with the intervention order?"

What we also know is that most orders are made for 12 months. So, in my scenario where the event happens on 1 January 2014, there's a safety notice that might be issued, he might consent to the order, which he usually does, and so the order is made middle of January 2015, it's usually a 12-month order, so by the time that he's failed to appear in January the order has expired and he's on summons, so there is no protection at that point and there is no accountability for that.

I would love a system when, if somebody fails to appear in a family violence matter and there's a warrant been issued, I would like to see that executed really promptly and we would get them before the courts quickly. I think in terms of a really crucial point that's a big one, but more often than not the orders have expired.

MR MOSHINSKY: We have heard some evidence yesterday afternoon from Assistant Commissioner Luke Cornelius about the Dandenong fast-track program. Is that a good model to deal with this issue?

MAGISTRATE BROUGHTON: It's a great model and it's having some fantastic results. The fast-track model, with the practice direction which was issued by the Chief Magistrate in December of last year, provided that from

the date that somebody was bailed, if it was a bail matter, it would come before the court in one week.

If it was a summons matter, and most of these matters are because there has been a protective order usually made at the start of the event, so in those matters the first listing is within four weeks and in the Dandenong trial it's been from the date of the issue of the summons.

We are expanding the fast-track model to the Broadmeadows and Shepparton courts. We don't regard this as a pilot. We don't like pilots because good pilots never get funded into a mainstream phase. So this is not a pilot; we want to roll this out. But the Broadmeadows and Shepparton practice direction, which has in fact now been issued and commenced this week on 3 August, the first listing is one week from the time the person is bailed, but in terms of the summons matters it's actually from the date of interview, and I think I observed yesterday we have no control over the time, really essentially from the incident to when the matter first hits the court.

But this practice direction in cooperation with Victoria Police is from the date of first interview, so that's going to bring it back quite a bit. You can see in the example that I gave you, even if it is a summons matter they are not going to be able to wait 11 months and two weeks before they file their charges, even if there's been an intervention order application either by way of safety notice application and summons or application and warrant. So that's quite an important change, but it's going to have an enormous impact in terms of resources. To be frank, I don't know how we are going to cope.

But, having said that, what we are seeing in terms of the fast tracking he has already identified in his statement and his evidence yesterday of some of the benefits in terms of the prosecutions. We are certainly seeing a real improvement. It's had huge resource implications in terms of dealing with these cases at court, but what we are actually seeing with it is that we are now winding back in terms of the time. Certainly on a bail matter or summons matter, it was taking six or seven months to get into court. The lists are really huge.

So the pilot has obviously brought that back and we have actually - the booked in contests, I think early last year we had over 200 contests across the board and now we only have about 38 contested hearings pending in the Dandenong Magistrates' Court. So, in terms of pending contested hearings it has really helped us dramatically reduce that, so it's having a real impact at that end too. The early intervention has been fantastic.

MR MOSHINSKY: So the reduction in the number of contested hearings, is that because people plead guilty earlier under the fast-track model?

MAGISTRATE BROUGHTON: Even with family violence matters, if you can get your complainant there to give your evidence, often the accused will plead guilty on the day. A couple of years ago, I remember I had a contested hearing which was booked in and the complainant hadn't attended, so the informant went and picked her up from home and she had reconciled with the accused and was clearly not wanting to participate, but the fact of her just turning up, he just pleaded.

So, getting people there and imposing the

authority of the court and system does really deliver value to safety and accountability for the families.

MR MOSHINSKY: Magistrate, can I ask you about the cross-over between the summary and the committal streams and the complexities that arise around that?

MAGISTRATE BROUGHTON: I just used the example then in terms of the incident that might have happened in the September of 2014 when you have these other trailing matters which are earlier, and what it means - a number of things happen in relation to that. Obviously there are different timeframes that apply in the committal stream and in the summary stream.

If you have a Victoria Police prosecutor and you are trying to negotiate these difficulties between the intervention orders and the criminal process and the bail and the conditions of those intervention orders, the Office of Public Prosecutions is not competent to prosecute civil matters. So you have to try to get the engagement of a Victoria Police prosecutor just in terms of dealing with the intervention order side of things.

Clearly when you have the OPP dealing with a new remand perhaps, say, on a filing hearing in a serious assault, then trying to put together the information in relation to these earlier summary proceedings, which is still hanging around out there, the example I used - I was quite shocked, to be perfectly frank, in relation to the case that I described yesterday, where these events where clearly there had been a committal process in relation to the charges which arose from the arson at the complainant's property and the criminal damage to both the partner or the ex-partner and the new partner's vehicle,

and that had gone through that process and he had been committed for trial on that, he was supposed to be having a trial and eventually that resolved through that process, and I have a case which has involved 10 breaches of an intervention order, plus the persistent breach which is an indictable offence; same complainant, same course of conduct and same accused. It was mad that those weren't picked up by the OPP at the time.

Other than the fact that if it was being booked in for a trial, I couldn't understand why that evidence wasn't going to be used in relation to the trial that was being booked in relation to the arson matter. It just didn't make sense. It struck me that it was just again another egregious example of the left hand not knowing what the right hand was doing and the danger that was involved.

From my point of view in dealing with a summary disposition of the persistent breach charge, as soon as I decided that I wasn't going to let this adjournment business continue on, I was quite happy to allow there to be another adjournment to get the material which would support the plea in mitigation, but actually with a pending proceeding my next question was going to be, "Victim impact statement. How is the victim going to feel about having two separate sets of proceedings, one in the Magistrates' Court, one in the County Court, in relation to a persistent course of conduct involving her of increasing severity over time?"

Other than the fact of course I'm then dealing with that, where's the victim in all of this? Where is the complainant at the point that this has already been

adjourned six or seven times, I think, when I looked at it. So, has anybody told her what's going on? What's happening about her safety in the meantime? Who have I got to talk to about that? And, by the way, the intervention order had expired, and on my matter he wasn't on bail.

MR MOSHINSKY: Can we turn then to the topic of sentencing which has been the subject of quite a bit of evidence already today. Can you outline for the Commission from a magistrate's perspective, if you are dealing with a family violence offence, what are the range of sentencing options available to you? How do you approach the sentencing task?

MAGISTRATE BROUGHTON: Of course, we have the full range of sentencing options, although one point I would make just in terms of the range of sentencing. With the indictable persistent breach charge, that of course attracts a five year maximum penalty, five years imprisonment is the maximum penalty. If you roll up 10 individual charges into a persistent breach, our maximum penalty for multiple offences is up to five years imprisonment. For a single offence it's a maximum of two years. So, in fact for three individual counts I would have up to five years, but for a persistent breach I only have two years. So I think that's an anomaly and I don't think that was properly considered in terms of the sentencing range for a magistrate exercise power in sentencing somebody for that offence if it's a standalone.

In terms of sentencing, we do have the full range. Of course, all of the sentencing factors you must take into account will be taken into account, but how you

get to that process will depend in part on what you have available to you. For instance, I noted what Arie Freiberg had to say this morning and I think his observation about the use of adjourned undertakings - if you are sentencing someone and you don't regard the community corrections order being within the appropriate range and you don't want to impose a fine because the fine often very seriously adversely impacts on the family, particularly if there has been a reconciliation, which there often is, so why are you going to make it harder for the victims? You are just not going to do that. It's stupid.

If somebody is working, you want to support the family essentially and what you want to do is make them accountable for their behaviour. So the adjourned undertaking is a way of imposing conditions to make sure that it will address the behaviour that's led to them being before the court.

MR MOSHINSKY: Professor Freiberg's inference when he referred in the Sentencing Advisory Council report to there being an increase over the period in the number of adjourned undertakings, and his inference was that that may well reflect that the magistrates are using that as a technique of imposing conditions, is that a correct inference?

MAGISTRATE BROUGHTON: Clearly I can't speak for all magistrates, but I think that's part of their thinking. People have thought very closely about the first Sentencing Advisory Committee report and the reflections that have been made about the impact of fines and the like. So, I agree that's very likely that that's in magistrates' thinking.

Clearly there were a lot of discussions yesterday about accountability and the availability of programs. Certainly you have a range of options available to you with community corrections orders and so they are certainly orders, and there was discussion about Bolton, we are being encouraged to use Bolton, so we are considering the principles enunciated in Bolton. But when we are sentencing, we like to tell people that they are accountable to the court for complying with the conditions that we impose.

I was interested certainly in Mr Reaper's evidence before the Commission not long ago, and I think he made the observation about men's behaviour change programs and that corrections developments in that area have been in part a response to expressions by magistrates about the unavailability of those programs and the need for better programs to address the risk factors and the rehabilitative needs of offenders in family violence circumstances. So that is a very welcome development, but there is another piece to that work as well and it's the accountability around that.

I was picking up on Judge Eugene Hyman's observations in the probation process. We use judicial monitoring with community corrections orders. That means that if you sentence an offender to a community corrections order, a sentence to be served in the community, they have to come back before the court to be supervised and monitored on their compliance with the order and particularly the conditions that we have imposed to address the offending.

The other part of that has been of course if

there haven't been programs available. You tell them they have to do the programs but, if they're not available, they come back in three months and they've done nothing, nothing has happened. That has been a very serious source of concern to judicial officers because if we impose conditions and we haven't got any confidence that the programs that address the offending are going to be delivered in a timely way, and I think I spoke yesterday more broadly about the timing issue and the question of the accountability that goes with the timing and our need to have priority placements so that that accountability can be ensured, that is a matter of very deep concern.

So I'm very interested in some of the work that Corrections has been doing. I have read all of their material and I have been very interested in their contributions to the Commission.

What is really an important part of that is the accountability loop back, because if people are not complying, then they need to get back into court on breaches quickly so that we can deal with them, and the delays that are involved in that in my view present, particularly in relation to family violence matters, a very, very serious risk.

But there are many other ways - before we actually get to sentencing, I gave the example earlier about the case where I took the plea. He's pleaded guilty and they wanted some more time to put together some material in support of the plea mitigation. Part of that, loosely described, that's a deferral, really, a deferral of sentence, and the court and particularly the Magistrates' Court has used quite creatively that notion

of the deferral of sentence, and it's picking up also on what Professor Freiberg had to say as well.

If you bail somebody and defer sentence, they have the opportunity to demonstrate to the court that they are going to engage in different behaviour, engage in programs and to be accountable for that. One of my common phrases to accused is, "Look, you can tell me that you are going to do things. What I'm interested in is what you do do and you being able to demonstrate to me what you've done. Don't tell me what you're going to do. Show me that you've done it."

The best way to judge somebody's rehabilitation, protection of the community, is by what they have done. We well know, in terms of our problem solving models at the court - I sit on the Koori Court and that's what happens in the Koori Court. The matter comes before the court. They plead guilty. There is rarely a case in the Koori Court where the sentence - nearly always it's deferred, and it's for the accused to engage in the suite of programs to support him to address his offending behaviour and to show the court that that can be done and what can be delivered. We have very good evidence that that's effective, with the accountability back to the court on supervision to make sure that that is being delivered and that's when we start to see some real results.

It picks up on the same thing that Judge Hyman was talking about. If you don't have accountability for people who don't step up to what's required, then it's a more dangerous situation. It aggravates the risk. You are better to do nothing than aggravate the risk, in my

view, because while their behaviour is deteriorating and they know they can get away with it, then the family is more at risk.

Can I make one other observation, though, in relation to the sentencing. The introduction of the judicial monitoring in a community corrections order, of course when you sentenced, that was it. Then they come back again later, before we had judicial monitoring. But the judicial monitoring is actually having a big impact in our court, too, just on the number of events. I talked about bail and varying the bail, varying the intervention order, people reconciling so they want to come back and have him back in the house, so you vary the bail for that and vary the intervention order for that; people are back and forth all the time. Then you sentence them and they are back and forth, too, because you are supervising them on judicial monitoring.

So when I talk about the number of court events, it is having a staggering impact on our court lists. You start off on a mention list and if I'm sitting at Ringwood - last time I sat, for instance, at Ringwood I may as well have been sitting in a family violence court. I had bail after bail application, variations, mentions; it's really, really, really busy.

MR MOSHINSKY: Can I just ask you just a couple of specific questions about what you have just been addressing. With the deferred sentence, is that used as a way of effectively imposing conditions such as attending certain programs?

MAGISTRATE BROUGHTON: Partially, but often when somebody pleads guilty they are not in a position to put the

material before you that might stop them going to gaol. So you will often have practitioners saying to you, "I would like the opportunity for him to be able to demonstrate that he's not the risk that he presents." So it is a genuine attempt to actually have the opportunity to put material before you in the plea in mitigation, because otherwise you are going to gaol them because they are just too much of a risk.

MR MOSHINSKY: Can I ask you about the judicial monitoring of the community corrections orders. If someone doesn't comply with the conditions, so for example they don't engage with a program, assuming one is available, or they otherwise breach some of the orders such as making contact when they weren't supposed to be making contact, what do you have available to you by way of consequences?

MAGISTRATE BROUGHTON: Unless they are charged with another offence by Victoria Police, and that may or may not happen. Say there's been another incident, so there's been contact. If it's been reported, there might be an application for variation of an intervention order, but it still might be months before there is a charge. Obviously with the fast-tracking that will help fix that, but there is no fast-tracking of breaches of community corrections orders in family violence matters, so it could take you a long time to get that before the court, and usually does.

MR MOSHINSKY: I wonder if you could address the topic of best practice. We have had some evidence earlier today from Ms Fatouros about some pilot programs. As a general topic, could you address that issue?

MAGISTRATE BROUGHTON: I think anybody who has been involved in any - well, certainly from the court's perspective there

are a lot of pilot programs that just don't get picked up. You build expertise, you build capacity, you build engagement and then they just stop. So that's a well-known phenomenon and it's why, with the fast-tracking, it is not a pilot, because we have had the family violence court division which is best practice, plus we need a bit more and we have talked about that in terms of the CISP model, but that was 2005. We are now to 2015.

But I think Ms Fatouros talked about the Interactive Legal Education Project, the ILEP. That was a very good project, a very good education project in the sexual assault area. It is an education project. It would have been good to engage the Judicial College of Victoria, which obviously is the lead body for judicial education, to progress that, the favourable pilot of that.

But even within the Judicial College, the whole area around family violence, it's a big issue. Building on that best practice so that you can use the base to go forward, rather than just see these things drop off, is a really big problem.

For instance, I have just become aware that I think my colleague, Magistrate Hawkins, yesterday talked about professional development being run by the Judicial College, two days of family violence training for all magistrates. So we take a third of all our magistrates, there are three sessions, the sessions are actually today and tomorrow. We had the first one in February. There's two sessions today and tomorrow and the third tranche of that will be happening early next year.

There is a very capable and uniquely qualified

staff member who has been employed to do that. Her contract finishes at the end of August and she won't be funded past that. So, the Judicial College's own capacity in this area is being impeded.

We have - it's in our submission and one which is personally for me quite devastating - we have what was our Indigenous or Koori family violence program. We renamed it and called it our Koori family violence and victim supports program. It was a pilot program. It was well evaluated. One of the most devastating parts of it for me is that we engaged with the Koori community to develop that program. My view in terms of work with the Koori community, particularly in the justice system, is don't put programs that you can't sustain. We have had too much disappointment in the justice system for us to be yet again engaging and then disappointing them. In any event, the long and the short of it was that the funding finished on 30 June and it's not to be continued.

It's that sort of thing, really just my level of frustration about something like that and really shame, if I can be blunt about it, that that wasn't able to be done. Those are the sorts of things that I find more than mystifying.

MR MOSHINSKY: Can I ask you about the intersection between the court process and the service system or the supports that exist. Is there interaction? At what point? How does that work?

MAGISTRATE BROUGHTON: One of the great things about the Victorian system - and obviously I have sat here talking about a lot of the problems. I think nationally we have a lot to be proud of. When I looked at the report

from Queensland, the Queensland taskforce on family violence, I thought a lot of the things that we take for granted in terms of there being an integrated system, we have that. It's just so overborne at the moment. But we have many elements of the community sector that we are deeply engaged in in the justice system and certainly through the court and the way that we organise our lists and the communication that we have with various services, the way they attend our court on certain days to engage with people.

The CISP program has been a fantastic, I suppose, more structured example of that. We have talked about the drug and alcohol services, the mental health services and family violence specific services, homelessness services, the financial counselling services; there's a suite of services that are in the community and the importance of those relationships and that engagement so that each part can play their part has been really crucial.

But, again, so much of it is manual processing. There are so many more efficiencies that could be developed to make that a much more effective system for them and for us.

MR MOSHINSKY: Just one final question from me. The introduction of the persistent breach offence as an indictable offence, apart from the sentencing, the two-year cap issue, if what could be charged as a few different persistent breach offences are rolled up into one, apart from that issue, has the introduction of that persistent breach indictable offence made a difference in any way?

MAGISTRATE BROUGHTON: I think it has been an important offence

because what it does is also characterises the course of conduct. Obviously we have a stalking offence, but it characterises what's going on in family violence in a very effective way. We are seeing it charged a lot more now. It's still to be seen how it is used in the context of the individual charges. I think it's important that we understand that the seriousness of a breach ought to be understood as being individually very serious. It is a court order and in a sense it's a contempt of the court order. So that means that it has to be dealt with very seriously.

So I think we have to be a little bit careful about its relationship between the individual charges and how things are rolled up to reflect the totality of the seriousness of the offending, together with the individual charges of standalone charges, whether they be assault, aggravated burglary or criminal damage or intentionally cause serious injury or whatever it might be. But I think the short answer is it's quite an important development.

I suppose the other thing that - I know that in terms of the maximum penalty and there being an indictable charge there was some discussion about whether it was appropriate because regrettably we also see a bit of game playing in the system. Sometimes people will - particularly if you go to a contested hearing and we might be dealing with the contest and then suddenly the accused withdraws his consent to summary jurisdiction.

So you might have had a case which has taken 12 months to get to a contest and then suddenly everybody is there, the victim is there, everybody is ready to go and they say, "Sorry, withdrawing consent to summary

jurisdiction." They have to get leave to do it, but what often then happens, of course, then it goes across to the filing system, the OPP has to be involved, you go through the whole committal process, then you get to the committal - it's a delaying tactic. We just need to be mindful.

Again, it's some of the game playing that people try to engage in and people have a right to a jury if that's what they want, so most of the time they will get it. But it's definitely a problem.

MR MOSHINSKY: I don't know whether the Commissioners have any questions?

DEPUTY COMMISSIONER FAULKNER: We had some evidence this morning about the cross-application process and how disadvantageous that can be in the whole system.

I suppose we had a couple of questions. First of all, from your observation is the use of cross-application increasing? Secondly, someone presented some evidence that in another jurisdiction when there is a cross-application process the magistrate is asked to determine who most needs protection and only allows one of the applications. I just wondered whether you had any view on either of those matters?

MAGISTRATE BROUGHTON: We see a lot of cross-applications. We see a lot of - it would predominantly be men who will make the cross-application, but I think I made the point that I'm seeing more men getting in first, if I can put it that way, because the whole issue of who the primary aggressor is is an important one.

It will not uncommonly be the case that an application will be made even at another Magistrates'

Court. So I might be sitting at, say, Melbourne, and somebody has been to Broadmeadows and the woman has made the application there and there is an interim order and as soon as he has been served with it, he's in at Melbourne, he doesn't even go to the same court, and of course we have to try to make sure that we know there is another application involving the same parties. They don't always reveal that.

So, again that manual processing and manual checking. We usually want to know, too, whether or not he has been charged with any offence as well, because it is not only in applications where it's the individual woman who makes the application, but it's where the police are making the application and sometimes just come and seek an order to be made and they do it on an ex parte basis. Again, it's impossible to really get stats on all of this. We are just so - it's a very difficult thing to do with our very modern 1985 IT system.

I suppose the other thing that flows from that, too, is certainly when the early work was being done by the Statewide Steering Committee to reduce family violence, at that stage there were probably about 30 per cent of our applications that were made by police. That's nearly 70 per cent now. I know there has been some discussion about what all of that looks like.

I think one of the things that hasn't been picked up so far is that if the police are making the application, often they have been to the incident. In the old days, women would make complaints. As time went on, it might be said, "We'll go to the Magistrates' Court and get yourself an intervention order," and up until the

early 2000s that was still happening. But you are often left with a word-on-word circumstance, and so nobody who had been there contemporaneously to actually collect the evidence, see what the scene was like.

So I think one of the things - this idea about empowering women to make applications, I think there has been comments about all of that. One of the things that's changed is really the evidentiary basis. I don't know if everybody has really picked up - I don't think in the family law jurisdiction they have picked that up. If the respondent doesn't turn up and it's a police application, the police have generally been there and they know the writing is going to be on the wall because there's a more contemporaneous account of what actually happened. But if a woman comes to court on her own after she has made some arrangements for her child, the crisis has happened last night, are they going to get to the court the next morning? Who is going to look after the kids while all of this chaos is happening? The police are generally there. They have a prosecutor at court. It's timely, and the evidence is more contemporaneous. So you have a much, much stronger picture.

That really affects people consenting, too, to the orders because otherwise they book it in for a contest, findings are going to be made and the police officer who attended is going to be there to give evidence about what he saw. "Oh, yes, I saw this splodge of blood on the wall. Yes, I saw the cot that had been damaged. This is what I saw." So I think that's a really important aspect of some of the things that we are seeing.

COMMISSIONER NEAVE: I have a question. I'm not sure,

Magistrate Broughton, whether you think it would be desirable to have a statutory provision of the kind they have in Queensland which - and I only understand this from a previous witness - actually requires a determination as to I think who the primary aggressor was. As I understood it, that was what the witness said.

MAGISTRATE BROUGHTON: I wouldn't regard that as being a useful addition to the powers that we have. It requires a lot of skill and judgment to make sure that you can try and achieve a good result for the family without running into the blunt instrument of the law and making findings where you don't need to.

In terms of encouraging, particularly, say, at the very first instance, if you have an incident that's happened overnight and you have your respondent there the next day, if you can encourage him through that idea that, "We listen to you, this is all very difficult, your behaviour has to stop, but we can do some things to actually assist you because you do want to be a good father, don't you?" "Yes, I want to be a good father." "We want to look after your children, we want to look after your family." And Julie, our respondent worker, I think the day before yesterday or yesterday, talked about that, really that engagement.

If you start using the blunt instrument of the law in these very fluid circumstances, then I think it produces much more danger for people. I don't generally regard that as being a good thing. I think we need more flexibility. I think we need a lot more creative and flexible ways to deal with people than we've got, not less.

COMMISSIONER NEAVE: I have one further question. You spoke about the fact that there's no fast-tracking for breach of CCOs, but you can have judicial monitoring, if a condition for judicial monitoring is part of the condition for CCOs. But the proceedings for the breach of the CCO might take a long time. I'm wondering how this works in a situation where you have either an adjourned undertaking or a deferral of sentence and something happens which is in effect a breach of the condition. How is that - I don't understand how that's followed up.

I wonder if you could perhaps address the adjourned undertaking first and then the deferral of sentence, and you have conditions and the person just doesn't go to the program, assuming there is one available, for example.

MAGISTRATE BROUGHTON: Certainly with the adjourned undertaking there is not much you can do. But before I'd put someone on an adjourned undertaking, I probably have deferred them because I want to make sure it's happening, that idea that I want people to actually engage in the behaviour change before it happens. But certainly if there is a breach of an adjourned undertaking, if there is another standalone offence, obviously it will come before the court and the contravention will usually come with it, but it is really at the lower end that we are talking about.

For my part, because it's at the lowest end, it's at the bottom of the sentencing range, if you have something which objectively is a bit more serious and you are wanting to go up but you are not at the CCO level, so you are not at the CCO level at the start, and if you're sort at a fine level with conviction but you're thinking

with all of the sentencing factors that can be demonstrated which would mitigate against that, then you want somebody to demonstrate that it's happened.

COMMISSIONER NEAVE: I'm really just trying to understand how you do it. In the context of a deferral sentence, and as you said you might not decide on the adjourned undertaking until you had gone through the deferral sentence process, presumably you would set a relatively short period, is that right?

MAGISTRATE BROUGHTON: No, sometimes six months. If you are doing a deferral for a men's behaviour change program, because of the demand issues I might tell them they have to ring five or six programs before they will probably get an assessment, and then the programs obviously can take maybe 20 weeks or whatever it's going to be, and so it will take some time.

COMMISSIONER NEAVE: So at least what's hanging over the person's head there is, if they commit a breach, when you come to sentence them then you can impose a harsher sentence than you would otherwise have done, because the prospects of rehabilitation have not been demonstrated to be good, for example. Is that how it works?

MAGISTRATE BROUGHTON: Yes, and if you bail them they certainly have to be of good behaviour, depending on the conditions you have put on the bail, and it might be to comply with the intervention order, that's usually what I tell them, because there's an intervention order in place so they have to comply with the intervention order, then if they do breach, then it's a contravention of bail as well, which is another offence.

COMMISSIONER NEAVE: So it's the combination of the deferral of

sentence and the bail. What about if it is an adjourned undertaking? You wouldn't have the person being on bail in that situation, would you, or would you?

MAGISTRATE BROUGHTON: No, once they are on the adjourned undertaking, they are sentenced. It's finished. If it is a 12-month adjourned undertaking, it will come back at the end of the 12 months, usually. That's the usual path. If there's nothing else to allege against them, then it will be dismissed.

COMMISSIONER NEAVE: In both of those situations, and I understand how the court has to be very creative because of the limitations of our sentencing process, but in neither of those situations do you really get the opportunity to do something swiftly if there's a breach, is that fair, except perhaps if there is a breach of bail, then you would.

MAGISTRATE BROUGHTON: If there is a breach of bail. But if there has been a contravention of an intervention order, then the police might have picked it up as a contravention, so it will come back before the court on another charge.

COMMISSIONER NEAVE: It's a bit random as to whether it comes back or not, I suppose is my concern. It might be the best you can do.

MAGISTRATE BROUGHTON: You are looking at the lower level as well and depending on what the offence is.

COMMISSIONER NEAVE: Thank you.

MR MOSHINSKY: If there are no further questions, I thank Magistrate Broughton for her participation and call the next witness.

COMMISSIONER NEAVE: Thank you very much indeed. You have been

of great assistance to us, and I think you've been back twice and the Magistrates' Court has certainly made a major contribution to this hearing process.

MAGISTRATE BROUGHTON: Thank you. My colleague, Ms Toohey, it was obviously too much for her. She was unwell, otherwise she would have joined us today too.

COMMISSIONER NEAVE: Thank you.

<(THE WITNESS WITHDREW)

MR MOSHINSKY: Commissioners, the next witness is Ms De Cicco.

<MARISA DE CICCO, recalled:

MR MOSHINSKY: Ms De Cicco, you have already given evidence earlier in the public hearings. For the purposes of today's topic, being topic 14, you have prepared a specific witness statement. Are the contents of that statement true and correct?

MS DE CICCO: Yes, they are.

MR MOSHINSKY: I just note, as you have already indicated on the previous occasion, that you are a Deputy Secretary of the Department of Justice and Regulation.

MS DE CICCO: That's correct.

MR MOSHINSKY: One of the topics that you deal with in your statement is the concept of different offences and whether different offences could be introduced. Could I start with that topic.

At paragraph 40 of your statement you indicate that there's been two previous bodies that have considered a standalone offence of committing family violence. Can you just briefly outline what the conclusions were of those previous bodies who considered that?

MS DE CICCO: As I indicate in my statement at paragraph 40, there were a range of challenges posed and some of the

evidentiary challenges, and I think previous evidence today at the Commission by Ms Fatouros and I think Professor Freiberg and Magistrate Broughton have indicated it's an issue where you have only the victim and the accused, and the issues surrounding just oath-on-oath evidence provided in respect of what has occurred in terms of the family violence.

Some of the other issues in the context of actually defining or conceptualising the exact parameters of a standalone family violence offence, I note in my witness statement that a number of the behaviours and a number of the harms that are caused in the context of family violence are already covered by existing criminal offences. I point to a couple of jurisdictions that have looked at some of the emotional harms or economic harms as being other sorts of subjects of specific offences.

So, there are difficult conceptual approaches that one would need to grapple with in terms of creating a standalone offence.

MR MOSHINSKY: At paragraph 43 and following you raise a possible model that could be considered of a new offence which I take it from your statement you think could sort of sit comfortably with the existing structure of offences in this area in Victoria. I'm just wondering if you could outline what that possible model looks like.

MS DE CICCO: It was really an offence based on some of the intentionally or recklessly causing injury offences that already exist in the Crimes Act. I note in my statement that these offences have a maximum penalty of 10 and five years respectively of imprisonment.

It could be an offence of causing injury through

family violence, which I note there. The definition of "injury" in the Crimes Act is already sufficiently broad to cover the issues that would emerge in terms of harm to physical injury or mental health, whether temporary or permanent. So it is something that might lend itself to the behaviours that are observed in the family violence context.

I do note in my statement that it would not criminalise anything new, but I think evidence already provided to the Commissioners suggested that this would give the family violence nature of the offence I suppose greater visibility. There's an issue there, too, about the affected family member and the fact that this would acknowledge the fact that this injury was caused in the context of family violence. So that is one potential avenue that could be available.

MR MOSHINSKY: On this model the new offence would be causing injury through family violence and it would pick up the existing definition of "family violence" which we have in the Act already.

MS DE CICCO: Indeed.

MR MOSHINSKY: And add as a requirement that the conduct be engaged in intending to cause injury to the family member or being reckless as to such injury being caused.

MS DE CICCO: Indeed. I'm suggesting that that might lend itself to a family violence offence as opposed to potentially the serious injury where you need a higher threshold of injury being caused, and I think I note somewhere in the statement that it's the lesser of the Crimes Act offences in terms of injury.

The other issue, I guess, that I note in my

witness statement that has emerged in evidence today from Professor Freiberg is some of the other standalone family violence offences don't extend the relationships as far as potentially are defined in the Family Violence Protection Act in Victoria. So they are more constrained to sort of more of an intimate partner or domestic partner. So that's another issue that we would need to have a think about in terms of a standalone family violence offence. These are all issues that would need to be considered.

MR MOSHINSKY: There's been some evidence, and you deal with this also in your statement, about the introduction in recent years of the three indictable offences, including persistent breach of an intervention order as an indictable offence. Can you explain briefly what led to those offences being introduced?

MS DE CICCO: The persistent breach offence was actually something that Victoria Police had sought. This is very much an area of the law where experience on the ground is very much informing reform as we go. So it's a very dynamic environment.

Victoria Police members had brought to our attention issues around the persistent breaches that were occurring and, I guess, the delays that could be caused if they had to be charged up on individual sort of breach bases. They noted a range of behaviours where persistent breaches were causing great distress, trauma and harm to affected family members and therefore needed to be dealt with with greater severity in the context of the maximum levels of imprisonment. So through discussion with the Victoria Police, with legal stakeholders, with the courts we crafted a persistent breach offence that sat above in

terms of maximum penalty of the existing breach offences.

MR MOSHINSKY: In paragraph 35 of your statement where you set out the three things that need to be proved you indicate there that the two other occasions have to be within a period of 28 days. Are you able to comment on why a period of 28 days was chosen rather than a longer period, for example?

MS DE CICCO: 28 days was selected as an appropriate time period, and again that was through discussion with police. From the perspective of the behaviours, what we were trying to capture were persistent breaches that seemed to be emerging almost immediately after the intervention orders were made. So an affected family member may have had an order made in the court and then breaches would persist immediately thereafter. So this is attempting to capture those with some immediacy.

MR MOSHINSKY: There has been quite a bit of evidence today about swift and certain justice programs. There's been reference to some United States examples, such as the Hope program. The US systems have this concept of probation and the programs utilise that scheme, which we don't have. Is there a mechanism that you might be able to alert the Commission to by which similar swift and certain programs might be introduced given our legal regime?

MS DE CICCO: I have had an opportunity to briefly review it. Looking at the model, it would seem something like a drug court model, whereas I understand the Hope program is more a grant of leniency sort of before a sentence is given in a particular offence, whereas with the drug court there are certain range of threshold conditions that need to be met in terms of the individual admitting guilt, issues

around the maximum penalty for the particular offence. But in those models there is a conviction. Then the Sentencing Act provides that they are able to be sentenced to a drug treatment order. That drug treatment order will have certain conditions attached to it, including treatment conditions. There could be residential treatment conditions. So there is quite a deal of supervision that attaches to it. So that's a similar sort of model. But Magistrate Broughton made the point just earlier the swift and certain justice is also the delay that might be between the time that the matter is detected and charged to the time that it is actually brought to the court.

MR MOSHINSKY: In the drug court model there's a sentence and then there might be a regime that's prescribed, such as attending a program.

MS DE CICCO: And there's a range of case management that sits with it. So the drug court is a specialist therapeutic court model. So the resources are there that surround the offender and there are a range of measures that are taken to facilitate the rehabilitation through that process.

MR MOSHINSKY: What happens if someone doesn't comply with the regime?

MS DE CICCO: Then they are brought back before the drug court to actually be dealt with. The drug court, because of its specialised nature and the more constrained intake, can deal with it in a more expedited manner. But it is a very small cohort that it deals with.

MR MOSHINSKY: I don't know if the Commissioners have any questions for the witness.

COMMISSIONER NEAVE: I'm thinking about your possible proposal

for a "causing injury through family violence" which would cover not only physical injury but also harm to mental health. In the current "recklessly causing injury", it doesn't have to be through family violence, you can theoretically, I think, charge a person for recklessly causing injury to mental health. I'm wondering whether you are aware of any cases in Victoria, or jurisdictions which have a similar offence, where there have been any charges for harming somebody's mental health.

MS DE CICCO: I'm not aware of them myself, but we could make some enquiries for the Commission.

COMMISSIONER NEAVE: It would be interesting, because one thinks of examples where you might engage in a sort of consistent process, not in a family violence context necessarily, to, for example, make somebody think that they are going mad or do something dreadful that harms their mental health. If it is not ever charged, it seems a little pointless to extend it and even confine it to the context of family violence. There doesn't seem to be much point. It's only a symbolic exercise. So if there were some evidence from here or elsewhere that that actually worked we would be interested in hearing about it.

MR MOSHINSKY: Commissioners, may the witness please be excused?

COMMISSIONER NEAVE: Thank you very much, Ms De Cicco.

MR MOSHINSKY: I wonder if we might have a five-minute adjournment before the next witnesses.

<(THE WITNESS WITHDREW)

(Short adjournment.)

MR MOSHINSKY: Commissioners, the next two witnesses are Ms Shuard and Mr Howard, if they could please be sworn.

<JANICE MARGARET SHUARD, sworn and examined:

<CRAIG DOUGLAS HOWARD, sworn and examined:

MR MOSHINSKY: Can I start with you, Ms Shuard. Can you please outline to the Commission what your current position is and your professional background?

COMMISSIONER SHUARD: I'm the Commissioner for Corrections Victoria. I was appointed in December 2012 to that role, and prior to that I was the Deputy Commissioner for Offender Management division, a position I held since 2006, up until being appointed as the Commissioner. As the Deputy Commissioner I had the portfolio of the serious sex offenders, the Adult Parole Board programs and the sentence management function within Corrections Victoria.

Prior to that, for two years I was the Director of the Corrections Inspectorate in Victoria, and I came from Western Australia before that after a long career in justice, both in adult corrections and juvenile justice.

MR MOSHINSKY: Thank you. Have you prepared a statement for the Royal Commission?

COMMISSIONER SHUARD: Yes, I have.

MR MOSHINSKY: Are the contents of your statement true and correct?

COMMISSIONER SHUARD: Yes, they are.

MR MOSHINSKY: Mr Howard, could you outline what your current position is and your professional background?

ASSISTANT COMMISSIONER HOWARD: Yes, I am the Assistant Commissioner for Security Intelligence at Corrections Victoria. I'm responsible for electronic monitoring services as well as security responses across the system. I gained that position in April 2013 and prior to that I had a 29 year career with Victoria Police.

MR MOSHINSKY: I would like to start at a high level, Ms Shuard, if I may, in terms of the role that Corrections Victoria plays in relation to offenders who have committed family violence offences, and there's broadly those in custody and those on community corrections orders, as I understand it. Just at a high level, what role does Corrections play in each of those cases?

COMMISSIONER SHUARD: Corrections firstly is charged with the responsibility of administering the order of the court. So that will be either an order of, when somebody is on remand, we will be holding them in custody whilst they are on remand until they are due back in court, or if they receive a sentence of imprisonment, obviously we do the assessment classification and safe placement of prisoners across the system so that they can get the services that they need and the programs to address their offending behaviour, as well as making sure that that placement is safe for them amongst the prisoner population. Also, I guess, placing them at the lowest security level that we can so that they can transition through the system and prepare for release. So, that's in the prison system, very briefly.

In the community corrections system we start by providing advice to the court. So we have officers in court that provide advice to the court after we do an assessment for someone's suitability for a community corrections order, and then we will provide advice around the conditions on that order that might be related to the course of their offending. Of course, the court then makes its decision about the length of the order and what condition should be on that order. Then it's our job to

supervise and administer that order, so case manage the offender while they are subject to a community corrections order. So case management, if you like, is the framework and vehicle which our staff use to engage with the offender so that they will fulfil those conditions of the order and acquit their responsibilities back to the court.

If that doesn't work out that way and the offender doesn't comply with the order, then we have a responsibility to return the matter to court on a contravention or a breach and the court then determines what should happen from there. As a part of that we administer a community work program. So, many orders have obviously hours of community work, either that on its own or, if it's a supervised order, they can have community work hours as well where we will send offenders off to particular community work sites or supervise them ourselves and ensure that they do the hours as ordered by the court as a part of their community corrections order.

We also link offenders in the community with the appropriate programs that address the offending behaviour and the programs that might be ordered by the court in terms of the treatment conditions that will be on the order. So it is really going through those conditions of the order and managing the person under a case management model, with the aim of them getting through that order and being able to access the services that will assist in reducing their risk of reoffending ultimately.

The last part is obviously - not the last part, but another part of our work now is the supervision of people subject to the post-sentence supervision scheme, so those people that have completed their sentence, but are

assessed by the court to still be an unacceptable risk of further sexual offending, and then we administer those orders as well and provide the treatment and conditions and administer those conditions for that small group of offenders who are subject to that scheme.

Corrections also provides a range of programs and services ourselves, as well as contract out those programs and services that address offending behaviour for people who are assessed as suitable and have the right length of sentence and need to undertake rehabilitation programs for them to participate in. So we will provide those, both in the sex offender area and the violent offender area and some other programs and we contract those programs as well both into prisons and we contract them for people to attend in the community in the drug and alcohol sector and the like, and we provide pre and post release transitional services for people within certain categories of offenders who come into prison and then when they're returning back into the community, to assist them in their transition back into the community, knowing that that's a risk period for people returning to the community. We supervise people on parole as well.

MR MOSHINSKY: Thank you. If I could just ask you a few more questions about the community corrections order part of that. In a situation where there's been a family violence incident and the community corrections order is imposed following a conviction for an offence; is that right?

COMMISSIONER SHUARD: Yes, it is.

MR MOSHINSKY: So, conviction for an offence involving family violence, can you give some examples of what the conditions might be on a community corrections order in

that scenario?

COMMISSIONER SHUARD: One of the areas for us is identifying first that it was a family violence offence. It's a breach offence, it could be a breach of an intervention order, but the particular understanding that it was related to the family violence context is what we have to know first, and there's no automatic way of finding that out.

There's three ways we will find that out. One will be either by self-disclosure through our assessment process in terms of the nature of the offence that the offender will self-disclose or that we will be able to glean that information. We will seek out the police summaries so that we ourselves or our staff can read the details of the offence and then know it was in the context of family violence, or in the higher courts obviously we will get access to the judge's sentencing comments. All of those sources of information will assist us to be able to identify that it was in the context of family violence.

Where we are doing an assessment, however, and that assessment involves what we would term restrictive conditions on a community corrections order, so restrictive conditions might be a condition where somebody might reside, for example, and we need to know when doing that assessment that there's not a current intervention order in place or that the offence wasn't in the context of the family violence.

So that's a part of our assessment, and their suitability, perhaps, for example to have a curfew at that address and then we have mechanisms through our intelligence area to be able to provide that advice

because they can access that information.

MR MOSHINSKY: I think you referred earlier to attending programs. Would typical conditions of a community corrections order include that a person attend, say, a men's behavioural change program?

COMMISSIONER SHUARD: Sometimes the magistrate will actually order the particular program because the magistrate will know, obviously, the circumstances by which the offence occurred. So they will know that it's in the context of family violence and they will order a particular program such as the men's behaviour change program. Sometimes the magistrate will just order that the person is assessed and treated as required by Corrections. So that means that that is subject to an assessment, a clinical assessment, to see what their level of risk and need is before they are referred to a program.

So, depending on the level of risk of a person firstly is about what intervention will take place, because the evidence will tell us that sending people to a clinical program that are of low risk can in fact increase their risk.

So we have a model by which we give interventions, if you like. That's different than what we will call a psycho-educational program that people undertake such as the men's behaviour change program, which low risk offenders can participate in. So it depends really what the magistrate orders of what sort of program. Sometimes they don't know what they need, and so therefore it is assessment and treatment and then we undertake that assessment and then we will say, "This is the type of treatment that best suits the person's risk

and need."

MR MOSHINSKY: Might the conditions on a community corrections order also mirror conditions in an intervention order; for example, not to have contact with a particular person or come within a certain distance of a house?

COMMISSIONER SHUARD: That is a restricted condition, so they can have that, what we would call exclusion or inclusion zones, yes.

MR MOSHINSKY: You referred to the case management by Corrections of people who are on community corrections orders. What does that involve? For example, would that case management pick up if the person had dropped out of the men's behavioural change program, assuming that had been ordered?

COMMISSIONER SHUARD: Yes, firstly the case management starts with an assessment. So we have an assessment tool which we apply to offenders and, as I said, that assessment tool will then tell the case manager firstly what is the level of risk of reoffending based on that tool and what are the needs of the individual. So they are then lined up with what are the conditions of the order and what do we need to do with that person.

So the supervision and case management is the vehicle or the process by which our staff engage with the offender and then talk to them and motivate them in terms of what they need to do to fulfil the conditions of the order and in sequence they should participate in those things.

So, for example, a person that has a mental health condition and is unwell when they first turn up to us, that might be the first thing that we need to deal

with, is get them to a general practitioner and get their mental health condition dealt with first, before we can send them off to a treatment program, because the effectiveness of the treatment program or even the person's capacity to be able to participate in that program could be impaired by their mental health condition at that time that's treated.

That doesn't take away our responsibility to ensure that we get a report back that the person has been to the GP or participated in what they need to participate in, and then we contract offenders, if you like, where we say, "The next men's behaviour change program is on at this time and you are now ready to go," and then we get reports back that they're turning up.

MR MOSHINSKY: Does the case management get - I'm just trying to get a sense of how closely the case is managed. If an individual, for example, had an alcohol issue, would the case manager have sufficient contact with the individual to realise the person perhaps has lapsed?

COMMISSIONER SHUARD: It depends. The order could have a testing condition on it or an abstinence condition on it. If a person had - if alcohol was related to their offending, it may well be that the court sets a condition on the order that they are subject to testing for alcohol or an abstinence condition that says, "While you are on this order you can't use alcohol." So it would only be if that was a condition of the order would we then ensure - we would undertake some testing in that regard.

MR MOSHINSKY: If someone doesn't comply with any of the orders we have just been discussing, whether it's attending a program or going to a GP or the testing requirements, for

example, what happens then?

COMMISSIONER SHUARD: We have a compliance framework that guides our staff around what action they should take. So remember it's a combination of good case management and compliance and ensuring the offender is acquitting the conditions of their order as set by the court. So that compliance framework will look at what might be the reasons, so work with the person or the reasons that they haven't turned up to their program or haven't turned up to their community work or what they were required to do, whether the reason is an acceptable reason or an unacceptable reason. A medical certificate, for example, could be deemed an acceptable reason for not turning up, or the fact that "I missed the bus" might be acceptable, but the compliance framework guides the staff around the number of I guess non-compliances versus what the person is doing to progress on their order.

So if they have been going well and they have been turning up for their appointments and doing everything right and then they stop coming, then the case manager is to consider all of those facts and what might be causing that. Have they relapsed back into drug abuse, if that's their issue? They might decide to deal with it by re-engaging the individual in drug treatment.

So it's not one non-compliance, straight back to court. It is a combination of assessing the risk to the community. That relapse back into drug abuse may mean that the risk has escalated in terms of the person reoffending and it might mean they are a high risk offender and their previous offence was at the serious end. So the compliance framework balances those aspects

out, but there comes a point where, if a person is not complying with their order, then we are obligated to take the matter back to court. So that means getting authorisation from a senior officer to breach the order on the basis that the person is not turning up to supervision, they haven't been to their community work, they are not going to their treatment program and an escalation of risk.

The numbers of those will be different, depending on the level of risk that the person has, how far they are through their order, have they done well or is it at the very beginning of their order and they are not complying straight away, and then we will then issue breach proceedings, which really effectively mean we activate a contravention or a breach of the order and have a summons issued that they have breached the order.

We do allow offenders or encourage offenders, even when they are being breached for non-compliance with their order, to stay engaged with us and stay under our supervision. It is in their interest to do that and I suspect - I don't know, but I suspect - that it's looked at favourably by the court when they go back if they stay engaged. It's better for the offender from our perspective because they can continue on their order even though the action caused the breach.

MR MOSHINSKY: If you determine that you need to start breach proceedings, what does that look like in terms of timeframes to get that back and actually heard?

COMMISSIONER SHUARD: Firstly we have to make every effort to get the person re-engaged and then, if we can't do that, then somebody makes a decision to breach. There is one

more step in between. We can have what's called an administrative review hearing. That's a new provision under the community corrections order where we can have it dealt with by - it's a review hearing internally within community corrections and the offender is brought before the regional director or the regional general manager to discuss their non-compliance and put them on a compliance plan, and they do have some limited options available to them to be able to get the person back on track.

But if that hasn't worked or we haven't used that, and you don't have to use that option, then it is a matter of firstly trying to contact the person, making sure you know where they are and then breaching and then issuing a summonses, and the summons has to be served.

MR MOSHINSKY: What's the timeline for those steps and then for the matter to actually be heard by the court?

COMMISSIONER SHUARD: Back in the court, I would think that's probably more than three months. I'm not entirely - I don't have the exact timeframe of what that would be, but it is months. It's not the next day. Then if they don't turn up to court, then of course it's a matter for the court to issue a warrant.

MR MOSHINSKY: There's been reference today to judicial monitoring of community corrections orders. I understand under the legislation the court may include that as a condition. How common is that to have judicial monitoring?

COMMISSIONER SHUARD: I did hear that evidence and I don't have the exact proportion. We do monitor that, of how often judicial monitoring is used, on what percentage of orders, but I can certainly provide that information separately.

I would be guessing, but I think it's somewhere around 10 per cent, but it's very variable depending on the magistrate and the court. I will provide that advice back.

MR MOSHINSKY: In terms of time, how quickly the system moves, between someone not complying with their conditions of a CCO and perhaps the person being charged for breach, how quickly does the system detect that they are not complying and reach a decision to charge for breach?

COMMISSIONER SHUARD: In one of the attachments it has timeframes around it. Our staff are required to investigate a breach within a certain period of time, so within I think about five days, it depends upon the person's risk how quickly, and then do something about it.

MR MOSHINSKY: In terms of if there is judicial monitoring and they haven't complied with the conditions, how quickly does that get picked up and brought back before the court in that judicial monitoring scenario?

COMMISSIONER SHUARD: In judicial monitoring, the offender is required to attend court so that the magistrate can check where they are at on their order.

MR MOSHINSKY: So there is a regular review?

COMMISSIONER SHUARD: Judicial monitoring is not a separate process to our case management and compliance management through the community corrections system, so it doesn't stop us bringing a breach back or dealing with non-compliance; it runs alongside that. So the magistrate themselves wants to know has the person attended the program, have they done their community work or whatever they are monitoring. It's not separate to. It doesn't mean the community corrections case manager doesn't do

their case management and compliance with the condition of their order. It's just it keeps our people as accountable as the offender.

MR MOSHINSKY: Is the intention that if there is, between reviews by the judge or magistrate, if there is a non-compliance, it will be brought back to the court if that occurs?

COMMISSIONER SHUARD: Within the framework that I spoke about before. So one single non-compliance doesn't result in something coming directly back to court, unless of course the magistrate says at the time of sentencing, "If you don't do this, I want to see you straight back in my court," then our staff will comply with that.

MR MOSHINSKY: Let's say there is non-compliance and it is brought back before the magistrate. What are the options available at that point?

COMMISSIONER SHUARD: To the breach?

MR MOSHINSKY: Yes, in terms of consequences.

COMMISSIONER SHUARD: They deal with it as a breach offence. So it's over to the magistrate, the range of sentencing that the magistrate has.

MR MOSHINSKY: So could that be dealt with promptly at that point or it doesn't; it gets dealt with in a matter of months, as you indicated earlier?

COMMISSIONER SHUARD: When it comes back to court on a breach, obviously it takes the time it takes to get things listed in court, to have the evidence prepared and then the prosecution. So all of those things have to occur and then it's entirely when you can get the matter back into court.

MR MOSHINSKY: I wanted to move on then to another topic, which

is the one you referred to in part earlier, which is to what extent does Corrections know that an offender has committed a family violence offence? In terms of the material that's available to Corrections, I think you indicate in your statement that with the cases that are in the Magistrates' Court where there wouldn't be sentencing remarks, there's no systemic way of knowing whether an offender is a family violence offender.

COMMISSIONER SHUARD: There is currently no automated way for our people to know that the offence has been committed in the context of family violence. So there is various ways that we can source that information, but we don't have an automated way to say that anybody that walks through our door, that this is a person that committed this offence in the context of family violence.

MR MOSHINSKY: So it might become apparent through self-disclosure as one mechanism?

COMMISSIONER SHUARD: That's one way, yes.

MR MOSHINSKY: Are the police records reviewed as well, which might make it apparent?

COMMISSIONER SHUARD: Yes, the offender's criminal history is another way; the police summaries when we get access, so our staff contact the informant and get hold of the police summary. Obviously in the higher courts we can get the judge's sentencing comments.

COMMISSIONER NEAVE: Can I just follow up on that. It would be easy, would it not - perhaps I'm wrong - to have a tick box or something, even if it had to be done manually, an automatic provision of information to you to indicate this is a family violence offence?

COMMISSIONER SHUARD: Yes, Commissioner, particularly because

self-disclosure is not something that our experience has been with offenders who commit offences in the context of family violence are likely to self-disclose. So it's not common for them to come up and tell us that.

COMMISSIONER NEAVE: Taking another example, suppose a prisoner has a health condition, how would you be made aware of that? I understand the prisoner might disclose it, but is there any other way you would become aware of that automatically on some information that's provided to you automatically?

COMMISSIONER SHUARD: No, not necessarily, but everybody that comes into our system in the prison system obviously goes through a medical assessment and the like and if there was a need for us to know because of the way that they needed to be treated, but generally no.

COMMISSIONER NEAVE: So in the higher courts I'm familiar with the prisoner return form which is completed when someone is sentenced. It would be easy enough, I would have thought, to put a tick box on that. Is there something you get when somebody is sentenced in the Magistrates' Court that you could add, as I said, a tick box to or something along those lines?

COMMISSIONER SHUARD: We certainly have to get a sentencing warrant because that's the amount of time we legally hold the person, so we need to do our sentence calculation from the sentencing warrant.

COMMISSIONER NEAVE: So it would be on that document that you could easily have a tick box?

COMMISSIONER SHUARD: Yes.

COMMISSIONER NEAVE: Thank you.

MR MOSHINSKY: Just following on from that, is the practice

that when a magistrate is sentencing there's the opportunity for them to note any custody management issues, if they are sentencing the person into custody? Is there opportunity for the magistrate who is sentencing someone into custody to note any custody management issues such as mental health issues or health issues?

COMMISSIONER SHUARD: To advise us?

MR MOSHINSKY: Yes.

COMMISSIONER SHUARD: I'm sure they would tell our people or tell people at the court if they were troubled about anything.

MR MOSHINSKY: So, for example, if the person was a diabetic, the magistrate - there's a process for them to indicate that to Corrections?

COMMISSIONER SHUARD: Well, a person doesn't come directly into Corrections, of course. They go into police custody or into the Melbourne Custody Centre from the Melbourne Magistrates' Court, so it's not a direct admission into prison. It's into police custody first, other than in the higher courts where it is into Corrections, but it comes through police custody. So the custody officers would be told and that information would be passed from one to the other.

MR MOSHINSKY: In paragraphs 28 and 29 of your statement you refer to a manual process of looking at the Corrections Intelligence Unit material or the Corrections Intelligence Unit staff can then manually interrogate the LEAP database, and then in paragraph 30 you indicate that it's a manual process and therefore it's not being done for existing prisoners prior to the start date of January 2012. Is there a reason why it's not being done for

prisoners who came in before that date?

COMMISSIONER SHUARD: It's simply a resource issue. You will see in my statement there's certain offenders that we are routinely doing it for, so serious violent offenders that are going out to parole, that our intelligence unit people will source through the LEAP system on whether or not there's been intervention orders in place. That's really important because our staff are making an assessment on the suitability of the house that a person might nominate to go out on parole and we want to know, if they are going to that house, firstly that that's a safe place for the other people that they are nominating to go to.

That's one of the reasons that we do it. As I said, it's the same reason we would do it for somebody on a community corrections order that had a curfew condition that was going to stay at a house. We want to know that it is safe for the other people. If we are recommending that as part of a community corrections order, then that's a safe place for people to go to.

ASSISTANT COMMISSIONER HOWARD: If I could add to that. The agreement to obtain that information commenced at about that date. From that time forward it's related to a distinct group of individuals who are at the high risk end and the resource that we have in place to do that manual check is limited, so we filter it down to those that we need to do it for, bearing in mind particularly around intervention orders you can't just do a single check on a single day because the intervention order could be made at any day forward, from that point forward.

So, one of the challenges for us with the number of offenders that we've got or coming into the system, is

to know on any given day. So what we call a pull process, where our staff go into another system and try and pull that back out, that has great limitations to it, rather than an automated system which we could call a push system that says that if there is a flag that occurs around a particular record, it indicates to us that that flag now currently exists.

MR MOSHINSKY: Is this check of the LEAP database to pick up family violence offences for all new prisoners since January 2014?

ASSISTANT COMMISSIONER HOWARD: No, a distinct group of offenders.

MR MOSHINSKY: It is only some.

ASSISTANT COMMISSIONER HOWARD: Yes.

MR MOSHINSKY: Would it be advantageous for Corrections to know for other offenders if there were family violence incidents?

ASSISTANT COMMISSIONER HOWARD: Without a doubt. What we are checking for at the moment is intervention orders because they are the priority. What we are not checking for across the board is family violence related offences. What we have spoken about there is that LEAP generally won't necessarily give you that direct indication, neither will a criminal history. It's the summaries, it's the sentencing comments we need to draw from the text, the circumstances around the offence type, be it assault or damage, that indicates it is related to a family violence related matter.

COMMISSIONER SHUARD: As part of our assessment process, however, where people are assessed for their treatment needs, from 1 July this year where we identify that their

offending is in the family violence context is in what we call our system for recording their treatment needs. If we identify family violence, they get a flag now that shows that their offence has occurred in the context of family violence. That way it allows our treatment interventions then to ensure that family violence is part of the treatment pathway.

MR MOSHINSKY: But if I am understanding you correctly, you don't even at that point routinely check LEAP to see whether there is a number of intervention orders against the person, for example?

COMMISSIONER SHUARD: We can't check LEAP, the general duties staff can't check LEAP. That's where the intelligence people can.

MR MOSHINSKY: But that check isn't done at that point to assess treatment needs to see whether there might be a string of intervention orders already in place from past years against the person?

ASSISTANT COMMISSIONER HOWARD: Generally speaking, they will check for intervention order at the request of a CCS, but what they are not getting from that particular process is whether the offending is family violence related. That's an assessment that they are doing from the other material that they have available.

MR MOSHINSKY: Just about the programs that are made available to particularly people in custody, one of the points you make, Ms Shuard, in your statement at paragraph 42 is that, if serious violent offenders, they must have three or more months remaining of their sentence to be eligible for offending behaviour change programs, and in paragraph 43 you say general offenders must have at least six months

remaining to the date they are eligible for parole or 12 months remaining until the end of their sentence to be eligible for those behavioural change programs.

Is there any program to front-end, essentially, the behaviour change program so that offenders do it at the beginning of their sentence? This suggests perhaps they are doing it at the end.

COMMISSIONER SHUARD: No, we now do our assessment at the beginning of the sentence when people come in. That's a change of the model. But that does allow us now to give us more time that the assessment is done at the beginning of the sentence and then we provide the program through there. That's for violent offender programs or other behaviour change programs. The only ones that are done at the end of the sentence is sex offender programs, and there's a reason for that, which is because what they learn in the sex offender program is better - there's better outcomes for them to then be released and continue with what is called maintaining change or to be able to practice those skills that they learn. But we do it at the front end of the sentence, the assessment, and then we put people on lists to go to programs.

MR MOSHINSKY: One of the challenges you indicate in your statement is that the programs have a certain length and the sentence may be shorter than that length. Has there been any consideration of re-working programs so that they are over a shorter duration in time so that more offenders might have the opportunity to do that?

COMMISSIONER SHUARD: Our programs, so the construction of our programs are evidence based, so what is the most effective intervention for what period of time. That's the type of

program that we provide, is that these programs can't be shortened or lengthened depending on a person's sentence. What we do know from the evidence, however, is that starting a program and not completing it will increase somebody's risk of reoffending. So therefore we won't allow people to start programs that we know they don't have enough time on their sentence to complete it.

COMMISSIONER NEAVE: Would it be fair to say that, given that the sentences imposed for breach of intervention orders, their terms of imprisonment tend to be relatively short, that in many cases offenders just wouldn't qualify for a program while they are in custody? I know you are proposing a new program, but would that be a fair comment?

COMMISSIONER SHUARD: There's two things. One is if you are on a straight sentence, then there is not a lot of incentive to participate in programs. There is an added incentive if you have a parole period because the Adult Parole Board will be very mindful of your requirement to have done a program before they will consider release for parole, but if you are on a straight sentence there's not a lot of incentive.

In fact, for male prisoners involved in family violence there is a level of disincentive not to participate in programs, in that in the hierarchy of prisoners those people that commit offences against partners or children are not regarded very well by the rest of the prison population and most of those offenders would be in mainstream and not in protection, as known sex offenders can be in protection arrangements. So the revealing that they are a family violence perpetrator by attending a program comes with its risks for those

prisoners.

COMMISSIONER NEAVE: Thank you.

MR MOSHINSKY: In paragraph 14 of your statement you indicate the average sentence length across the prison population is 10.6 months. Do you know if you have available or do you know what the median sentence length is?

COMMISSIONER SHUARD: No, I don't have that, but I can certainly get it.

MR MOSHINSKY: I would like to turn next to situations where Corrections monitors people, for example for alcohol. You adverted to some of the different ways that could happen under a community corrections order. I was just wondering whether one or other of you might be able to outline how you monitor what options there are?

ASSISTANT COMMISSIONER HOWARD: Breath testing is one option, or electronically monitoring the individual, and that involves an electronic device that transmits 24 hours worth of monitoring data back to us to indicate whether there's been any consumption over that period of time.

MR MOSHINSKY: Is that called SCRAM?

ASSISTANT COMMISSIONER HOWARD: Yes.

MR MOSHINSKY: You have provided, I think, and hopefully it's been given to the Commissioners as well, a one-page fact sheet on SCRAM?

ASSISTANT COMMISSIONER HOWARD: Yes, I think it's a two-page.

MR MOSHINSKY: Two-page, sorry. That fact sheet, is that a confidential document?

ASSISTANT COMMISSIONER HOWARD: No, that material would be available from a provider's website if you were to see it.

MR MOSHINSKY: Can you explain to us how the SCRAM technology works?

ASSISTANT COMMISSIONER HOWARD: Yes. The device is fitted to an individual and what it does is it detects transdermal alcohol content. So, on the basis that a certain percentage of alcohol consumed dissipates through the skin as what we call insensible perspiration, which means non-apparent perspiration, the device takes that into a chamber, pumps it against a fuel cell, and that fuel cell determines the level of alcohol that's contained within that vapour. It takes those readings on a regular 30-minute basis and then every 24 hours uploads from the device to a monitoring unit within the home that 24 hours of readings and then provides that back to a central point, who then return it back to us if there are confirmed indications of alcohol consumption or other alerts relating to strap tamper or strap removal.

MR MOSHINSKY: So is that used for people on a community corrections order who have a no alcohol condition?

ASSISTANT COMMISSIONER HOWARD: There has been no community corrections order conditions associated with the use of those bracelets.

MR MOSHINSKY: So who uses those bracelets?

ASSISTANT COMMISSIONER HOWARD: Predominantly parolees.

MR MOSHINSKY: And Corrections monitors the use of those bracelets?

ASSISTANT COMMISSIONER HOWARD: Yes.

COMMISSIONER SHUARD: Only the High Court, the County Court and the Supreme Court can order electronic monitoring on a community corrections order. It can't be ordered out of the Magistrates' Court under the current legislative framework.

MR MOSHINSKY: Are you able to give some indication of the cost

involved of that system?

ASSISTANT COMMISSIONER HOWARD: Currently at the moment it's over around $4,000 a year per offender, and I say at the moment because it's US technology and it's dependent upon currency exchange. So from today forward it's expected that there will be some cost increase associated with it.

MR MOSHINSKY: You also referred to breath testing. How does that regime work and who is put on to that regime?

ASSISTANT COMMISSIONER HOWARD: It would just be an order that requires a person to be breath tested on a scheduled basis, so attend for breath testing, or if there was an indication that there was alcohol present, so they smelt of alcohol, they could be required to undergo a breath test by a community corrections officer.

MR MOSHINSKY: I see. In I think the Hope program there is some system where you ring each day and find out what colour code you have and you have to be tested depending on what the answer is. Do we have a system like that in use?

ASSISTANT COMMISSIONER HOWARD: Not to my knowledge.

MR MOSHINSKY: In other words a randomised testing. We don't do that?

ASSISTANT COMMISSIONER HOWARD: We could have randomised testing, yes, and that could be part of the schedule. The schedule could be random or it could be scheduled in terms of set intervals. It could be either way, depending upon which way you want to use breath testing as a tool.

MR MOSHINSKY: The breath test regime where you have to turn up at certain intervals to be tested, is that used for people on a CCO, community corrections order?

ASSISTANT COMMISSIONER HOWARD: Yes.

MR MOSHINSKY: Is that also only the higher courts or is that available to other courts?

ASSISTANT COMMISSIONER HOWARD: No, that's not considered electronic monitoring. So that's alcohol testing in the same way as there would also be drug testing as part of on order.

MR MOSHINSKY: Thank you. Can I turn then to drug testing. Are there regimes that apply for drug testing and how do they work?

ASSISTANT COMMISSIONER HOWARD: Yes, that's a urine analysis, so there will be a requirement for scheduled urine analysis samples to be provided and they are sent to a laboratory and tested against a regime of drug types that we have requested the test to be conducted against.

MR MOSHINSKY: There's also been reference today to the potential use of GPS technology and you have provided another sheet which is headed "Electronic monitoring fact sheet" which deals with GPS technology. Is that page confidential?

ASSISTANT COMMISSIONER HOWARD: No, that's available from suppliers' websites, that information.

MR MOSHINSKY: Could you just explain how GPS technology works?

ASSISTANT COMMISSIONER HOWARD: So GPS again is a bracelet that's worn by a particular individual. It monitors their GPS location on an ongoing basis and then transmits that back to an electronic monitoring centre via mobile telephone network. It is usually applied for the purposes of exclusion and exclusion zones. Inclusion zones usually relate to curfews, so must be at home between certain hours, and exclusion zones relate to specific locations where the individual is not allowed to be in accordance

with the conditions on their order.

MR MOSHINSKY: In what circumstances are people subject to this technology currently?

ASSISTANT COMMISSIONER HOWARD: Both parolees and individuals who are subject to extended orders or supervision orders, serious sex offenders.

MR MOSHINSKY: Are there any comments you can make about the potential use of this GPS technology in the context of family violence offenders?

ASSISTANT COMMISSIONER HOWARD: Only that the technology will tell you potentially where you are, it won't tell us what you are doing. In terms of exclusion zones, there might be some application if there is a particular exclusion zone. That exclusion zone then becomes apparent to the individual offender or the person who is being monitored. It would need to be as part of a condition on an order. The reason it would need to be as part of a condition on an order is because this is a compliance regime and there needs to be a response to matters of non-compliance. So, the deterrent effect in terms of any of the electronic monitoring is significantly undermined if the response to non-compliance is not swift, prompt and has a deal of efficacy.

MR MOSHINSKY: Thank you. Commissioners, those are my questions.

DEPUTY COMMISSIONER NICHOLSON: You have talked about, when you have people on community correction orders, sending them to services and programs. I was wondering do you purchase those programs or how are they funded?

COMMISSIONER SHUARD: Some we fund ourselves and provide, so we have our offending behaviour program people that provide

programs. Some we contract the services, so we go to agencies in the community like Relationship Australia and agencies such as that, that we contract the program and get them to provide it across Victoria. Then others we fund an access way into the program such as the drug and alcohol programs through ACSO COATS. So, there's a variety of mechanisms for people to get the programs that they need.

Others we make referrals to programs that are generally available to community members. So, we run a model that says that we like people to access programs in the community when they are on a community corrections order that can be enduring beyond the end of the order in case that person then relapses after their order has finished and they can re-access that service that will support them.

DEPUTY COMMISSIONER NICHOLSON: But your department doesn't fund those?

COMMISSIONER SHUARD: Not once the order is completed.

DEPUTY COMMISSIONER NICHOLSON: During the order?

COMMISSIONER SHUARD: During the order we contract those programs for people to go to.

DEPUTY COMMISSIONER FAULKNER: One of the things that we have been contemplating is the notion of how priorities are drawn for universal services. Some of the people along the way have said to us that, "I probably need this offender to be in gaol before they'll get any treatment." Is there any response that you would like to give to that, that somehow the further you penetrate the correctional system the more likely you are to get help?

COMMISSIONER SHUARD: We do know that people on community

corrections orders do compete for - have the same waiting lists as anybody else in the community. So, mental health services, for example, you will go through the same pathway as anybody else in the community to get that mental health service. So if there is a waiting list and there's not ready access to that, you will be treated the same as any community member.

I guess the difference is that when somebody comes into prison we do have those services available. We are funded to provide a mental health service for people that are unwell that come into the corrections system or a health service, for example. If they have not accessed just general health services in the community and they need those general health services, then they will get them within a correctional system. But in the community, because you are on an order, it won't give you to all of those. To some programs it will that we run ourselves or that we fund, but to general mental health services, for example, it doesn't necessarily give you an access that's better than other people in the community.

DEPUTY COMMISSIONER FAULKNER: So it's the ones that you fund that there would be a valid argument to say that, in some ways, "If I needed that service, I might be better off on an order than I would otherwise."

COMMISSIONER SHUARD: There's lots of other things that come with the order that has obligations, so I don't quite know whether people would see it that way, but the ones that we, as I said, that we fund. But the drug and alcohol sector, for example, what they will get is an assessment, but then they still have to access the local service. We don't provide that service across the State of Victoria,

and one of the things about the community corrections order, we like to think that people can have an order with all of the variety of conditions, it doesn't matter which court it comes out of, it doesn't matter if you're in the country or in the metropolitan area. So Corrections doesn't provide that service across the board, but there are some programs that are Corrections specific.

DEPUTY COMMISSIONER NICHOLSON: If I could follow up on that. What happens in an instance where the availability of the service you refer them to has a long waiting list beyond the community corrections order?

COMMISSIONER SHUARD: So, there is an assessment and treatment component. We will do our best to get people into that treatment program, but if they can't get into that program that's why we look at some of those waitlists and see what we need to fund ourselves to be able to improve those services, so to change programs, but they wouldn't get that program.

DEPUTY COMMISSIONER NICHOLSON: So you don't have a capacity to purchase according to the needs of an individual. You just purchase certain programs?

COMMISSIONER SHUARD: Our regional service delivery does have some brokerage funding so that they can purchase according to an individual, but it's not a big amount of money.

MR MOSHINSKY: If there are no further questions, may the witnesses please be excused?

COMMISSIONER NEAVE: Thank you very much.

MR MOSHINSKY: That completes the evidence for today, Commissioners.

<(THE WITNESSES WITHDREW)

ADJOURNED UNTIL FRIDAY, 7 AUGUST 2015 AT 9.30 AM