Bench Book/
Family Violence Bench Book.

Judicial College of Victoria

A Bench Book on the Family Violence Protection Act 2008. Contains information on intervention orders, sentencing for offences involving family violence and theory concerning family violence.

Family Violence Bench Book

The Judicial College is grateful for the contributions, review, and guidance provided by the Editorial Committee. During the writing of the inaugural edition, its members were Judge Paul Grant, Magistrate Cathy Lamble, Magistrate Kate Hawkins, Magistrate Pauline Spencer and Magistrate Jane Gibson. This work was produced by Julia Cook, Joanna Fletcher, Matt Weatherson, Mereana White, Emily Wilson, Maria Fan and Kerryn Cockroft. The assistance of Monash University law students Ms Yu Xuan Peh, Ms Emma Ward and Dr Emma Kong is greatly appreciated.

Feedback or suggestions for improvement are welcome and may be emailed to info@judicialcollege.vic.edu.au.

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Last updated: 26 October 2023

1 Purpose and scope of Family Violence Protection Act 2008

1.1 Family violence

In the second reading speech to the Family Violence Protection Bill 2008 (26 June 2008, Hansard 2645), the Attorney-General emphasised that the broad definition of family violence is intended to cover the full range of behaviours that can be involved in family violence and to provide examples to aid interpretation:

> [It] will mean that the dynamics and patterns of family violence will be better recognised by the justice system and lead to better protection.

Definition of family violence and safety

Family violence is broadly defined to cover:

(a) physical or sexual abuse;
(b) economic abuse;
(c) threatening or coercive behaviour;
(d) behaviour that in any other way controls or dominates a family member and causes them to feel fear for their safety or wellbeing or for that of another person (only the word safety is defined);
(e) causing a child to hear, witness or be exposed to family violence.

(*Family Violence Protection Act 2008* ('FVPA') s 5(1))

Safety means safety from family violence.

(FVPA s 4)

Section 5 further expands on the sorts of behaviours that are included in the definition of family violence. The following expand but do not limit the definition:

(a) assaulting or causing personal injury to a family member or threatening to do so;
(b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
(c) intentionally damaging a family member's property, or threatening to do so;
(d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
(e) causing or threatening to cause death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

Behaviour does not need to constitute a criminal offence to come within the scope of family violence. The Act clearly articulates that the scope of family violence is much broader than that in old Act, the CFVA or the criminal law.

The *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* also inserted additional examples of behaviour that may constitute family violence, including:

(a) using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to enter into a marriage;
(b) using coercion, threats, physical abuse or emotional or psychological abuse to demand or receive dowry, either before or after a marriage.

(FVPA s 5)

Conduct which is intended to ascertain the address of a person may constitute behaviour "towards" that person that is "emotionally or psychologically abusive" or "threatening" or "in any other way controls or dominates" the person and causes the person "to feel fear for the safety or wellbeing" of the person".

[*YY v ZZ & Anor* [2013] VSC 743 at [66]]

It has been suggested that behaviour can be "towards" another person "if it is focused on, or targeted at, or directed to, that person". To attempt to obtain a person's address is conduct which focuses on, is targeted at, or is directed to, that person. In that context, it is significant that s 74(3) of the FVPA specifically contemplates that family violence may occur even if the perpetrator and the affected family member are located in different jurisdictions.

[*YY v ZZ & Anor* [2013] VSC 743 at [66]]

Examples of family violence in s 5(2) of the Act such as assaulting, intentionally damaging, depriving, or threatening conduct, carry connotations of positive intent. However, the respondent does not need to intend to abuse the victim. Actions such as sending text messages, making phone calls, and turning up unannounced at the victim's home can still constitute emotional or psychological abuse if the impact of the actions causes the victim to feel emotionally or psychologically abused.

[*DPP v Cormick* [2023] VSCA 186, [81]–[82]]

Likewise, a person may control or dominate a family member and cause that family member to fear for their safety or wellbeing (or that of another person, such as a child) without the specific intention to cause that fear.

[*DPP v Cormick* [2023] VSCA 186, [81]–[83]]

Economic abuse

Economic abuse is behaviour that is coercive, deceptive or unreasonably controls another person without that person's consent in one of two ways:

(a) by denying the other person the economic or financial autonomy they would have had but for the behaviour;
(b) by withholding or threatening to withhold financial support necessary for the reasonable living expenses of a person or their child where there is an element of dependence to meet those expenses.

(FVPA s 6)

This section also provides some useful examples of economic abuse:

(a) coercing a person to relinquish control over assets and income;
(b) removing or keeping a family member's property without permission, or threatening to do so;
(c) disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
(d) without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
(e) preventing a person from seeking or keeping employment;
(f) coercing a person to claim social security payments;
(g) coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
(h) coercing a person to sign a contract for the purchase of goods or services;
(i) coercing a person to sign a contract for the provision of finance, a loan or credit;
(j) coercing a person to sign a contract of guarantee;
(k) coercing a person to sign any legal document for the establishment or operation of a business.

In relation to the impact of economic abuse on victims – see the discussion in 5.2.1 What is family violence?

Emotional or psychological abuse

Emotional or psychological abuse means behaviour towards another person that torments, intimidates, harasses or is offensive to the other person.

This refers only to the actual effect of behaviour on the affected family member. There is no requirement that the respondent must intend this effect or for the response of the affected family member to be assessed as 'reasonable'.

(FVPA s 7)

The defence of honest and reasonable belief that the conduct would not torment, intimidate, harass or offend the affected family member is available to the respondent. The onus will be on the respondent to prove that the response of the affected family member was not reasonable.

[*DPP v Cormick* [2023] VSCA 186, [89]]

A number of examples of emotional or psychological abuse are provided in the Act. The examples provided were drawn, in part, from findings of research into family violence that shows that these forms of emotional or psychological abuse are particularly common in violent relationships (Explanatory Memorandum 4).

This section also provides some useful examples of emotional or psychological abuse:

(a) repeated derogatory taunts, including racial taunts;
(b) threatening to disclose a person's sexual orientation to the person's friends or family against the person's wishes;
(c) threatening to withhold a person's medication;
(d) preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity;
(e) threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.

Additional examples in section 5 also provides that using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to demand or receive dowry, either before or after a marriage, or to enter into a marriage, may constitute family violence.

While many of these examples of behaviour constituting 'family violence' use words carrying a connotation of positive intent – such as assaulting, intentionally damaging, depriving, threatening – it is not the case that conduct is not abusive unless its purpose is to abuse. As a matter of fact, emotional or psychological abuse can occur without the perpetrator intending to intimidate, harass or offend.

[*DPP v Cormick* [2023] VSCA 186, [82]]

In relation to the impact of emotional or psychological abuse on victims – see the discussion in 5.2.1 What is family violence?

Threatening

Threatening behaviour for the purposes of s 5(1)(a)(iv), s 5(2) or s 6(b) is not defined in the Act. *Kirby v Phelan* [2003] VSC 43 considered what constituted a threat as part of the test to impose an intervention order under the CFVA. The respondent had admitted in evidence to taking an axe intending to smash the affected family member's car. Bongiorno J at [12] said:

> The concept of a threat is not without its difficulties. In usual parlance it means something said by one person to another or something done by one person in the presence of another which conveys some notion of an intention to inflict harm of one kind or another. But there may be situations where the term could be appropriately applied to conduct not fitting that description. It may well be that there are circumstances where things done, even alone, could constitute a threat…

While this decision concerned the CFVA, these principles should continue to apply under the FVPA.

Causing a child to hear, witness or be exposed to family violence

Behaviour that causes a child to hear or witness, or otherwise be exposed to the effects of family violence is itself 'family violence'.

(FVPA s 5(1)(b))

The respondent does not need to *intend* that the child hear, witness or be exposed to family violence. It is sufficient if any of these things result from the respondent's actions. This point is made clear by the examples of behaviour provided in the Act (Explanatory Memorandum clause 5).

This section also provides some useful examples of causing a child to be exposed to family violence:

(a) overhearing threats of physical abuse by one family member towards another family member;
(b) seeing or hearing an assault of a family member by another family member;
(c) comforting or providing assistance to a family member who has been physically abused by another family member;
(d) cleaning up a site after a family member has intentionally damaged another family member's property;
(e) being present when police officers attend an incident involving physical abuse of a family member by another family member.

National and International studies are increasingly revealing the devastating impacts that domestic violence can have on children, both as the primary victim of the violence and also witnessing violence, or the effects of violence, between parents. The impact of family violence is difficult to assess, but some studies indicate that childhood exposure to family violence causes similar behavioural and developmental problems as growing up in a war zone.

[Helene Berman, 'The Relevance of Narrative Research with Children who Witness War and Children who Witness Woman Abuse' in Robert Geffner et al (eds) *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention and Policy Development* (2000).]

In relation to the impact on children of being exposed to family violence – see 5.3 Children.

Use of examples

The Act provides many examples to assist in the identification of family violence. Examples are not exhaustive and can extend but *do not limit* the meaning of the provision (s 36A *Interpretation of Legislation Act 1984*).

The Judicial College of Victoria has curated a collection of resources which provide a deeper exploration of the complex dynamics of family violence, explain coercive control and its significant impacts, and address some of the myths and misconceptions of family violence: Family Violence resource page.

See the further discussion in 5.2.1 What is family violence? in relation to the legislative definition of family violence now more closely reflecting:

- Victims' experiences of violence;
- The broad social science understanding of family violence adopted by the other significant agencies which respond to family violence.

'Technology-facilitated abuse'

Technology-facilitated abuse is a form of controlling behaviour that involves the use of technology as a means to coerce, stalk or harass another person. Examples include monitoring or stalking someone through any type of surveillance device (such as a tracking system or spyware), sending abusive texts, emails or messages via social media, and sharing intimate photos of someone without their consent.

Technology-facilitated abuse is not specifically named in the *Family Violence Protection Act 2008*. Instead, the Act examines the conduct and consequences, and so where technology is used to emotionally and psychologically abuse (s 5(1)(a)(ii)), threaten (s 5(10(a)(iv)), coerce (s 5(1)(a)(vii)), or control family members, it will fall within the scope of the Act.

For further information, see the discussion in 5.2.1 What is family violence?

Last updated: 16 November 2023

1.2 Purpose and principles

The *Family Violence Protection Act 2008* ('FVPA') was developed to meet perceived inadequacies in the justice system's response to family violence because the particular dynamics and effects of family violence are poorly understood. The Act introduces clear purposes and principles to reduce confusion amongst practitioners and ensure that family violence is treated seriously and dealt with consistently.

Purpose

The explicit purpose of the Act is to:

(a) maximise safety of people who have experienced family violence;
(b) prevent and reduce family violence to the greatest extent possible; and
(c) promote the accountability of perpetrators.

(FVPA s 1)

Principles

The preamble provides the social policy context and recognises:

(a) four principles (statements of beliefs or values) underpinning the Act; and
(b) five features of family violence from research findings.

(FVPA Preamble)

Principles about and features of family violence

The four statements of beliefs or values in the preamble are:

(a) that non-violence is a fundamental social value that must be promoted;

(b) that family violence is a fundamental violation of human rights and is unacceptable in any form;
(c) that family violence is not acceptable in any community or culture; and
(d) that, in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.

The five features from research findings, specifically recognised in the preamble, are that family violence:

(a) is predominantly committed by men against women, children and other vulnerable persons;
(b) has a serious impact on children who are exposed to the effects of it;
(c) affects the entire community and occurs in all areas of society;
(d) extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse; and
(e) may involve exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over time.

(FVPA Preamble)

The inclusion of explicit purposes in the FVPA, principles underlying the purpose and features of family violence aims to ensure that decision-making is based on a common understanding of the issues involved and to promote consistency of approach in dealing with family violence.

The purposes of the Act should be used as guidance whenever the Act is interpreted or applied.

[s 35(a) *Interpretation of Legislation Act 1984*; Review of Family Violence Laws, Victorian Law Reform Commission, 3.86]

Significance to interpretation of the Act

Both the preamble (as part of the whole context of the Act) and the purpose can be referred to by the court when interpreting specific sections of the Act, even if the section in question is not ambiguous. The purpose of the legislation can be considered in determining whether there is more than one possible construction of a section and the preamble may shed further light on that statutory purpose (s 35(a) *Interpretation of Legislation Act 1984*, *Mills v Meeking* (1990) 169 CLR 214, *Wacando v Commonwealth* (1981) 148 CLR 1).

The effect of the purpose of the Act is that in every application of the FVPA, decisions should promote the safety of affected family members, the reduction of family violence and the accountability of perpetrators.

Links to broader reform and communications

Both the preamble and purpose directly reflect the aims, principles and knowledge about family violence that has informed reform across Victoria – reform that has included but also extended well beyond the justice system. The concepts included in the preamble and purpose also formed a significant part of the Government's 'Enough' communications campaign to raise awareness of the Act so court users may well be familiar with these ideas and ideals.

Human rights and the FVPA

The *Family Violence Protection Act 2008* raises important human rights issues that may influence judicial decision makers who must interpret and apply the legislation. Some of these issues are examined in the sections below.

Charter of Human Rights and Responsibilities 2006

Under s 8(3) of the *Charter of Human Rights and Responsibilities 2006*, every person is equal before the law and is entitled to equal protection of the law without discrimination. Recognition of gender as a feature of family violence may therefore have human rights implications. While recognition of gender imbalance as a feature of family violence may limit the right to equality, s 8(4) allows for differences in treatment to achieve substantive equality. Courts applying the FVPA will need to balance the principles of gender equality and substantive equality while recognising that the overriding purpose of the Act is to promote the safety of affected family members and children.

The *Charter* also provides that all statutory provisions should be interpreted to promote compatibility with human rights, and that international law, including international case law, may be used to assist the interpretation of legislation consistently with human rights.

[*Charter of Human Rights and Responsibilities 2006* s 32]

International human rights obligations

The Victorian government is under an obligation arising from international law to promote the eradication of family violence arising from Australia's ratification of treaties such as the:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Elimination of all Forms of Discrimination against Women; and
- Covenant on the Rights of the Child.

States must take all measures necessary to prevent and punish abuses of human rights. This includes an obligation to exercise due diligence to respect, protect and fulfil each individual's human rights. When a State knows or ought to know about family violence and fails to take appropriate steps to prevent family violence, the State itself is responsible for the breach of the affected family member's rights (in addition to the personal responsibility of the perpetrator)

[Review of Family Violence Laws, Victorian Law Reform Commission, 3.5–3.11]

Australia is also a party to the First Optional Protocol of the International Covenant on Civil and Political Rights and the Optional Protocol of the Convention on the Elimination of all Forms of Discrimination against Women. These protocols allow a person to bring an individual complaint to the relevant treaty body where a State breaches its obligations under the relevant treaty.

Before bringing an individual complaint, a person must generally exhaust all available local remedies. This means that a person must first apply under Victoria's family violence laws and exhaust any appeal rights before bringing a complaint to the international treaty bodies.

International treaty bodies cannot override Victorian courts or compel Victorian courts to grant or revoke an intervention order. However, decisions on individual complaints may ultimately be relevant to the interpretation of the *Family Violence Protection Act 2008* due to the obligation to interpret the Act compatibly with human rights in the *Charter*.

Protecting children from family violence

Numerous studies have documented the disastrous effects of family violence on children. These effects can arise if the child is the primary victim of the violence or if he or she observes family violence or the consequences of family violence on another family member (see Review of Family Violence Laws, Victorian Law Reform Commission, 4.27).

The FVPA has introduced additional protection to ensure children are shielded from direct and indirect family violence. The impact of indirect family violence and what that may constitute is discussed in the section relating to 2.5 Children.

On making interim or final order

When a court makes an interim or a final intervention order it must consider whether there are any children in the family that require protection (FVPA s 52A and s 73I). The court must give paramount consideration to the safety of children subjected to family violence in addition to the affected family member when imposing conditions in an intervention order (FVPA s 80). Sections 53AA, 53AB, 73I, 77, 77A require a court to have regard to whether a child has been subjected to family violence (or in some instances, violence which would be considered family violence if the child and respondent were family members) and if so, to make appropriate orders.

Whether to prohibit or allow child contact

The FVPA requires a court to consider whether allowing the respondent to have contact with the child will or may jeopardise the safety of the child or the protected person. Section 91 of the Act acknowledges that child contact arrangements can not only result in children being exposed to family violence, but may also place the adult protected person at risk of further violence (for example, at child handover). An intervention order must include a condition prohibiting contact between the child and the respondent if there is such a risk to the safety of the adult protected person or the child (FVPA s 93).

If child contact poses a risk to the safety of the adult protected person or the child then the judicial officer may wish to consider whether there are any conditions that might manage such risk (for example, a condition that all communications are by communications book only; that handovers happen at a police station only; or that at changeovers the respondent remain in his vehicle at all times).

If child contact cannot take place safely

If child contact cannot happen safely then the court should include a condition prohibiting child contact (a Courtlink s 93 condition), with any modifications the judicial officer considers necessary.

If the intervention order is then inconsistent with a family law order the judicial officer may need to exercise the power under *Family Law Act* 1975 s.68R to revive, vary, discharge or suspending an existing family law order. See 2.6.2 Power to modify Family Law Act orders for more information.

If child contact is going to be prohibited then the judicial officer may wish to include an exception that allows the respondent to have contact with the adult protected person through a lawyer so that any future family law applications can be pursued.

If child contact can take place safely

If child contact can happen safely (with or without particular conditions to manage risk) then the appropriate Courtlink condition to include is the "s.92" exceptions. The judicial officer may wish to modify the standard s.92 condition to manage risk (for example, to remove the ability to communicate by text message if past FV allegations have included abuse in text messages). See 2.2.3.4 Safety of children for further information on s 92.

Inconsistency between orders – family violence, family law and child protection

A family violence intervention order or a recognised DVO may be inconsistent with child protection or family law orders. While intervention orders and recognised DVOs prevail over any child protection orders, the Children's Court has authority to revoke or vary any existing orders on its own initiative when considering making child protection orders (FVPA s 173).

The FVPA requires a court to consider whether allowing the respondent to have contact with the child will jeopardise the safety of the child or the protected person. Section 91 of the Act acknowledges that child contact arrangements can not only result in children being exposed to family violence, but may also place the AFM at risk of further violence (for example, at child handover). An intervention order must include a condition prohibiting contact between the child and the respondent if there is such a risk to the safety of the AFM or the child (FVPA s 93).

A family violence intervention order may be inconsistent with child protection or family law orders. While intervention orders prevail over any child protection orders, the Children's Court has authority to revoke or vary any existing intervention orders on its own initiative when considering making child protection orders (FVPA s 173).

The FVPA defines "child protection order" as any order which the Family Division of the Children's Court has jurisdiction to make under s 515(1) of the *Children, Youth and Families Act 2005*.

Child protection orders include the following orders made when the court finds that a child is in need of protection:

(a) an order requiring a person to give an undertaking;
(b) a supervision order;
(c) a custody to third party order;
(d) a supervised custody order;
(e) a custody to Secretary order;
(f) a guardianship to Secretary order;
(g) a long-term guardianship to Secretary order;
(h) an interim protection order.

[*Children, Youth and Families Act 2005* s 275(1)]

A child is in need of protection if:

(a) the child has been abandoned by his or her parents and after reasonable inquiries—
    (i) the parents cannot be found; and
    (ii) no other suitable person can be found who is willing and able to care for the child;
(b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
(e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
(f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

[*Children, Youth and Families Act 2005* s 162(1)]

The interaction between child protection orders and family violence intervention orders are considered in more detail in 2.7 - Interface with Children, Youth and Families Act 2005.

Where a Family Law Act order and a family violence intervention order are inconsistent, the Family Court may declare the intervention order invalid to the extent of the inconsistency (*Family Law Act 1975* s 68Q). However, the FVPA directs that a court considering an intervention order must exercise its powers to revive, vary, discharge or suspend any Family Law Act orders to avoid inconsistency with the intervention order (FVPA s 90). At present, there are some doubts about whether the Children's Court can exercise this power.

[See *Children's Court Research Materials*, 4.3]

Family Law Act 1975 orders are examined in 2.6 Interaction with family law.

Article 3.1 of the *Convention on the Rights of the Child* requires courts of law, as well as administrative and legislative authorities to treat the best interests of a child as a primary consideration in all actions involving children. Article 9 declares that children should not be separated from their parents and that States should respect the right of a child to maintain direct contact with both parents, unless it is in the best interests of the child.

Although Australian family law and international law presumes that both parents will have contact with their children, this is clearly displaced by the FVPA and the *Convention* where contact with a parent who is the respondent in an intervention order jeopardises the safety of child, or the child's other parent.

Rights of child perpetrators of family violence

Exposing children to the criminal justice system is undesirable and both Victorian law and International law state that criminal sanctions should only be used as a last resort against children.

[*Children, Youth and Families Act 2005* ss 410(1)(c), 412(1)(c); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice,* Rule 11; *Convention on the Rights of the Child,* Article 37(b)]

The FVPA imposes additional safeguards when the respondent to an application for an intervention order is a child:

- all applications against a child respondent must be heard in the Children's court if practicable (FVPA s 146);
- when making final intervention orders by consent against a child respondent, the court must still be satisfied that the order is warranted (FVPA s 78(2));
- a court may only impose an exclusion condition in relation to a child if it is satisfied that the child will have appropriate alternative accommodation, care and supervision (FVPA s 83(3)).

The concepts included in the preamble and purpose, the research that underpins them and the broader Victorian family violence reform context are all discussed in 5 - Social context.

Last updated: 29 March 2018

1.3 People covered by the Act

Family members

A 'family member' of a person means:

(a) a current or former spouse or domestic partner (defined in s 9);
(b) a person (as well as a child of that person) who has or has had an intimate personal relationship (not necessarily sexual) with the relevant person;
(c) a relative or former relative (defined in s 10), including a person who is a relative under Aboriginal or Torres Strait Islander tradition or contemporary social practice;
(d) a child who normally or regularly resides or resided with the relevant person; or
(e) a person whom the relevant person regards or regarded as being 'like a family member' if that is reasonable having regard to the circumstances of the relationship (a 'family-like relationship').

(FVPA s 8)

Domestic partners

Domestic partners are defined in s 9(1) of the FVPA as:

(a) people who are in a registered relationship with one another under the *Relationships Act 2008*; or
(b) people who are not married but are in a relationship as a couple where one person provides personal or financial commitment and domestic support for the other person.

In order to determine whether people who are not in a registered relationship are domestic partners, the court must take into account all the circumstances of the relationship, including the following matters referred to in s 35(2) of the *Relationships Act 2008:*

(a) the degree of mutual commitment to a shared life;
(b) the duration of the relationship;
(c) the nature and extent of common residence;
(d) whether or not a sexual relationship exists;
(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(f) the ownership, use and acquisition of property;
(g) the care and support of children;
(h) the reputation and public aspects of the relationship.

Family-like relationships

In the second reading speech (26 June 2008, Hansard 2645), the Attorney-General explained that this category of family member was designed to cover relationships that are not strictly family but which are so close that the dynamics of the relationships are family-like and violence in the relationship has similar features to family violence.

Where a person is claimed to be in a 'family-like relationship' for the purpose of the Act, the court will need to determine whether it is or was reasonable to regard the relationship as family-like, having regard to the criteria in s 8(3) and considering the relationship in its entirety.

The relevant criteria are:

(a) the nature of the social and emotional ties between the people;
(b) whether they live or relate together in a home environment;
(c) the reputation and cultural recognition of the relationship as being like family;
(d) the duration of the relationship and frequency of contact;
(e) any dependence or interdependence;
(f) provision of responsibility or care, whether paid or unpaid.

(FVPA s 8(3))

Carers

While carers are explicitly excluded from the definition of "domestic partner" (FVPA s 9(3)), the relationship between a carer and a person with a disability is listed as an example of a "family-like" relationship under s 8(3). In addition, s 8(3)(h) states that the provision of care, whether paid or unpaid, is a factor that affects whether a relationship is family-like. The result is that carers may be regarded as family members if it is reasonable to do so in all the circumstances.

(FVPA s 8(3) and the example at the end of that section)

Note that examples are not exhaustive and can extend but *do not limit* the meaning of the provision (s 36A *Interpretation of Legislation Act 1984*).

People of culturally diverse backgrounds

The definition of family member does not specifically address the issue of relationships not recognised as family relationships in Australian culture but that may be considered family relationships by people of other cultural backgrounds. However, such relationships may be 'family-like' having regard to the criteria in s 8(3).

Tenants and Boarders

Previously, the definition of family member in the CFVA included a person who is or was ordinarily a member of the household. Courts held that merely sharing a house (for example, under a tenancy agreement or understanding) was not sufficient to create a relationship for the purposes of the family violence jurisdiction and that some further bonds were needed (*Kingsland v McIndoe* [1989] VR 273).

This approach is now reflected in s 9(3)(b) of the FVPA, which states that two people are not domestic partners merely because they are co-tenants.

Relatives

A relative of a person includes any of the following, whether by marriage, or adoption, or whether the relationship is of whole-blood or half-blood:

(a) the person's father, mother, grandfather or grandmother;
(b) the person's son, daughter, grandson or granddaughter;
(c) the person's brother or sister;
(d) the person's uncle or aunt;
(e) the person's nephew or niece;
(f) the person's cousin.
(g) The definition also encompasses:
(h) relatives of domestic partners as if the domestic partners were married; and
(i) persons, who under Aboriginal or Torres Strait Islander tradition or contemporary social practice, are the person's relative.

(FVPA s 10)

Associates

An associate of a respondent is a person so closely connected with the respondent that the respondent can influence their actions either directly or indirectly.

An associate of an affected family member is a person who provides the affected family member with assistance or support.

An associate does not need to be a family member of the respondent or the affected family member.

(FVPA s 4)

If a court has made a final family violence intervention order, the court can also make associated orders:

- against associates of a respondent if they have committed family violence and are likely to do so again;
- to protect associates of an affected family member if the respondent has subjected them to family violence and is likely to do so again.

The power to make associated orders only arises when the court makes a final order; it cannot make an interim associated order. In addition, an associated final order is not affected if the original final order is varied, extended, revoked or otherwise ends.

(FVPA s 76)

If urgent protection is required for associates of the AFM or from associates of the respondent, applications for interim orders can be made under the *Personal Safety Intervention Orders Act 2010.*

The provisions relating to associates were included in the Act in response to VLRC concerns about violence by proxy. This can occur when the respondent induces another to assault or harass the protected person, or attempts to control the protected person by targeting her friends or family.

[VLRC, Final Report, 8.27–8.44]

The associated order process widens the scope of the family violence intervention order process. Without these orders, intervention orders between non-family members are made under the *Personal Safety Intervention Orders Act 2010*.

Separate regime for non-family members

Intervention orders against non-family members are generally sought and made under the *Personal Safety Intervention Orders Act 2010.*

The court may hear applications for family violence intervention orders together with applications under the *Personal Safety Intervention Orders Act 2010* for stalking intervention orders if:

- the applicant or respondent requests; or
- the court considers that it is in the interests of justice to do so.

Before hearing the applications together, the court must be satisfied that the applications are sufficiently related and it is appropriate for them to be heard together.

(FVPA s 176B)

A family violence intervention order, a recognised DVO made by a court and a variation or extension of a recognised DVO by a court prevails to the extent of any inconsistency with a personal safety intervention order.

(FVPA s 176C)

Brief description of personal safety regime

From September 2011, the *Personal Safety Intervention Orders Act 2010* replaced the system of stalking intervention orders established by the *Crimes (Family Violence) Act 1987* and continued by the *Stalking Intervention Orders Act 2008*. Under the *Personal Safety Intervention Orders Act 2010*, individuals are protected from future acts of prohibited behaviour or stalking (as defined under the Act).

In appropriate circumstances, parties involved in interpersonal disputes may be referred to mediation services to attempt to resolve the dispute underlying the alleged inappropriate behaviour, in order to achieve a permanent resolution.

Further, many acts that constitute prohibited behaviour or stalking under the *Personal Safety Intervention Orders Act 2010* will also constitute criminal offences under other legislation.

For further information, please refer to the Personal Safety Intervention Orders Bench Book.

Relationship between Family Violence Protection Act 2008 and Personal Safety Intervention Orders Act 2010

Part 9A of the *Family Violence Protection Act 2008* sets out the relationship between that Act and the *Personal Safety Intervention Orders Act 2010*.

Any number of applications for family violence intervention orders can be heard together with any number of applications for personal safety intervention orders if the court considers that they are sufficiently related and it is appropriate that they are heard together.

Similarly, any number of applications for the variation, revocation or extension of recognised DVOs may be heard together with any number of applications under the *Personal Safety Intervention Orders Act 2010* if the court considers that they are sufficiently related and it is appropriate for the applications to be heard together.

The court may hear applications together on the application of applicants or respondents or if it considers it in the interests of justice to do so.

(FVPA s 176B)

If the court is satisfied that an affected person and a respondent to personal safety intervention order proceedings are actually family members, or where parties consent that they are family members, the court may strike out the personal safety intervention order application. Alternatively, the court may decide to continue to hear the application as an application for a family violence intervention order.

The court can make multiple determinations to continue hearing the application as an application for a family violence intervention order during the proceeding. This may happen where multiple applications are being heard at the same hearing or where at a later hearing, more information about the relationship between the parties comes to light.

(FVPA s 176E)

If the court making such a determination is the County Court or Supreme Court, the Magistrates' Court or Children's Court cannot reverse that determination.

(FVPA s 176F)

Where a court determines to continue to hear an application for a personal safety intervention order as an application for a family violence intervention order under s 176E(2)(b), the application for the personal safety intervention order is taken, as far as possible, to be an application for a family violence intervention order.

This is possible because the two systems of intervention orders are procedurally very similar. It thereby provides flexibility to enable matters to be heard under the correct regime.

It is, however, important to note that, once a *final* personal safety intervention order is made, any applications for the variation, revocation or extension of such an order *cannot* be switched to become an application for the variation, revocation or extension of a final family violence protection order.

(FVPA s 176D)

Acts under personal safety legislation considered done under family violence legislation

Where an application for a personal safety intervention order is determined to be an application for a family violence intervention order, anything that has been done under the *Personal Safety Intervention Orders Act 2010* is taken, to the extent possible, to have been done under the *Family Violence Protection Act 2008*.

(FVPA s 176G)

In particular, if a summons or a warrant to arrest has been issued under the *Personal Safety Intervention Orders Act 2010*, it is taken to have been issued under the *Family Violence Protection Act 2008*.

(FVPA s 176G(2)(a), s 176G(2)(b))

Any bail conditions set under the *Personal Safety Intervention Orders Act 2010* continue to apply under the *Family Violence Protection Act 2008* and any direction to surrender a firearm or other weapon given under the *Personal Safety Intervention Orders Act 2010* is taken to be a direction under the *Family Violence Protection Act 2008*.

(FVPA s 176G(2)(c), s 176G(2)(d))

In contrast, an order made under the *Personal Safety Intervention Orders Act 2010* allowing a child to be present in court does not continue to apply.

(FVPA s 176G(3)(a))

Any mediation conferences conducted under *the Personal Safety Intervention Orders Act 2010* will continue to be protected by the confidentiality provisions contained in Division 8 of Part I of the *Evidence (Miscellaneous Provisions) Act 1958*.

(FVPA s 176G(3)(b))

Where firearms, weapons or articles have been seized pursuant to a search warrant issued under s 117 of the *Personal Safety Intervention Orders Act 2010*, if the court later determines to continue to hear the application as an application for a family violence intervention order, those firearms, weapons or articles are treated as if they were seized under the *Family Violence Protection Act 2008*.

(FVPA s 176H)

Where firearms, weapons or articles have been surrendered pursuant to a search warrant issued under s 117 of the *Personal Safety Intervention Orders Act 2010*, if the court later determines to continue to hear the application as an application for a family violence intervention order, those firearms, weapons or articles are treated as if they were surrendered under the *Family Violence Protection Act 2008*.

(FVPA s 176I)

Where firearms, weapons or articles have been seized by police under s 120 of the *Personal Safety Intervention Orders Act 2010*, if the court later determines to continue to hear the application as an application for a family violence intervention order, those firearms, weapons or articles are treated as if they were seized under the *Family Violence Protection Act 2008*.

(FVPA s 176I)

If the court determines to continue to hear an application for a personal safety intervention order as an application for a family violence intervention order, any existing interim personal safety intervention order must be revoked. The court may make a new interim family violence intervention order if there are grounds to do so.

(FVPA s 176J)

If, at a hearing for an application to vary or revoke an interim personal safety intervention order, the court determines to continue to hear the application as an application for a family violence intervention order, it must revoke the interim personal safety intervention order and may make an interim family violence intervention order if there are grounds for making such an order, taking into account the application for the variation of the interim personal safety intervention order.

(FVPA s 176K, s 176L)

If, at a hearing for a final personal safety intervention order, the court determines to continue to hear the application as an application for a family violence intervention order, it must revoke any existing interim personal safety intervention order and may make an interim family violence intervention order if there are grounds for doing so. The court may also make any order the court could make in a proceeding for a family violence intervention order, or continue to hear the matter as the interests of justice require. This clause is designed to provide enough flexibility for the courts to make the orders that are appropriate in the circumstances of the case.

(FVPA s 176M)

Where an interim personal safety intervention order is revoked under s 176J, s 176K, s 176L or s 176M, that revocation has effect as a revocation of an interim personal safety intervention order under the *Personal Safety Intervention Orders Act 2010*, effective as of the time of the revocation.

(FVPA s 176N)

If the court determines to continue to hear an application for a personal safety intervention order as an application for a family violence intervention order, it must explain to the respondent and affected family member the effect of the determination and, if there is an interim order in force, the effect of the determination on the interim order. A failure by the court to explain a determination under this clause does not affect the validity of the order.

(FVPA s 176O)

Last updated: 13 February 2018

2 Intervention Orders

2.1 The intervention order process

2.1.1 Family Violence Intervention orders

A family violence intervention order is a court order designed to protect a person from family violence. The order requires the respondent to engage or refrain from engaging in the conduct specified in the order. The Act defines a *family violence intervention order* as either a *final order* or an *interim order*. A final order is defined as an order under ss 74, 76, 77, 77A or 77B and includes:

- a final order as varied under ss 100, 119(2)(c) or 173(2); and
- a final order as extended under ss 106 or 107; and
- a final order that is confirmed on appeal to the County Court or Supreme Court.

These definitions mean that the Magistrates' Court retains jurisdiction over final orders that are confirmed on appeal to the County Court or Supreme Court and that parties can appeal an order as extended or varied.

The definition excludes an order that is made on an appeal to the County Court or the Supreme Court by an applicant or an affected family member.

An interim order is defined as an order made under s 53, 53AA or 53A, including an interim order as varied under s 100 and any interim variation under s 101.

(FVPA s 11)

Interim orders are designed to provide urgent, short-term protection for people threatened by family violence, while final orders providing longer-term protection.

In addition to a Victorian family violence intervention order, a person may be a respondent to or a protected person under a 'recognised DVO' under the *National Domestic Violence Order Scheme Act 2016*. The National Scheme Act commenced operation on 25 November 2017.

Last updated: 29 March 2018

2.1.2 Jurisdiction

The FVPA gives jurisdiction over family violence intervention orders to the Magistrates' Court and the Children's Court.

Following the commencement of Part 4 of the *Family Violence Protection Amendment Act 2017* on 29 March 2018, the Koori Court Division of the Magistrates' Court and County Court have jurisdiction over hearings related to family violence intervention orders in certain circumstances. Previously, the contravention of family violence intervention orders was excluded from the jurisdiction of the Koori Court. This expansion to the jurisdiction of the Koori Court Division applies regardless of when the contravention occurred.

[*County Court Act 1958* ss 4DA, 4E, 4EA, 102]

[*Magistrates' Court Act 1989* ss 4EA, 4F, 4FA, Sch 8 cl 55]

Magistrates' Court

The Magistrates' Court has jurisdiction to deal with any intervention order application.

(FVPA ss 3, 42)

The Specialist Family Violence Court Division

In 2004, the Family Violence Court Division of the Magistrates' Court was established by the *Magistrates' Court (Family Violence) Act 2004*. It was limited in its location to Ballarat and Heidelberg, and any new locations required addition through the regulations.

In 2018, the Family Violence Court Division was reconstituted as the Specialist Family Violence Court Division by the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*. The key differences were that:

Specialist Family Violence Court Division locations may be set by notice in the Government Gazette, rather than by regulation. The Minister must consult the Chief Magistrate before publishing such a notice in the Gazette.

In determining whether the Specialist Family Violence Court Division is the 'proper venue', the court must have regard to where the alleged family violence occurred, the place of residence of the relevant parties, the safety of the parties and other considerations the court thinks relevant. There is no longer a requirement that the conduct or place of residence of a party occurred in a prescribed postcode.

[*Magistrates' Court Act* 1989, ss 3, 4IA, 4IB)

The Specialist Family Violence Court Division has the jurisdiction to deal with the following matters, if the matter is within the jurisdiction of the Magistrates' Court, and arises from or includes allegations of family violence by a person:

(a) family violence intervention orders (interim and final) and counselling orders under the *Family Violence Protection Act 2008*;
(b) proceedings under the *Vexatious Proceedings Act 2014* in relation to intervention order legislation;
(c) declarations under the *National Domestic Violence Order Scheme Act 2016*;
(d) civil proceedings for or with respect to damages for personal injury;
(e) matters arising under the *Family Law Act 1975* (Cth) or the *Child Support (Assessment) Act 1989* (Cth);
(f) proceedings for or with respect to the trial of a person for a summary offence or an indictable offence that may be heard and determined summarily;
(g) proceedings for or with respect to the committal for trial of a person for an indictable offence;
(h) restitution or Compensation orders under the *Sentencing Act 1991* that arise from an offence referred to in paragraph (f);
(i) applications under the *Victims of Crime Assistance Act 1996* if the the act of violence is family violence;
(j) breaches of Family Violence Intervention Orders or Counselling orders, including any offence constituted by such a breach; and
(k) any other jurisdiction given to it by or under this or any other Act.

[*Magistrates' Court Act 1989* s 4IB]

Children's Court

The Family Division of the Children's Court shares jurisdiction with the Magistrates' Court to deal with any application under the FVPA in which the affected family member, protected person or respondent is a child at the time of the application. A child is defined as a person who is under the age of 18. Where practical, any intervention order application where the respondent is a child should be heard in the Children's Court.

(FVPA ss 4, 42, 146)

Related applications and orders

The Children's Court also has jurisdiction to deal with related applications and related orders. This jurisdiction applies if:

- the Children's Court has jurisdiction because the affected family member, protected person or the respondent was a child at the time the application was made; and
- the application has been made or transferred to the Children's Court; and
- an affected family member, protected person or respondent for a related application or a related order is an adult.

The Act defines the following two terms:

> **Related application** means an application for an order on the grounds of the same or similar circumstances, and includes an application to vary, revoke or extend an order.
> **Related order** means an order made on the grounds of the same or similar circumstances.

(FVPA s 147)

Section 147 ensures that the Children's Court has jurisdiction to deal with related applications that are made or transferred to the Children's Court, even if the related application only concerns adults. This may be suitable when there are separate applications involving an affected family member who is a child, an adult affected family member and an adult respondent. The Children's Court could hear all matters together and make orders in relation to application between the parent affected family member and the respondent.

The effect of s 147 is that the Children's Court has jurisdiction to make orders for related applications, even if the related application only deals with adults.

Applications related to child protection proceedings

The Children's Court has jurisdiction to deal with applications under the FVPA which are related to a child protection proceeding in the Children's Court, where each affected family member or protected person and each respondent for the application is an adult.

(FVPA s 147A)

An application is related to a child protection proceeding if:

(a) the child who is the subject of the child protection proceeding is the child of, or is under the care and supervision of, the affected family member or protected person, or the respondent for the application; and
(b) the application under the FVPA raises issues which relate to the safety of the child which are the same as, or similar to, the issues which form the basis for the child protection proceeding.

(FVPA s 147A(3))

Last updated: 08 April 2019

2.1.3 Police response to family violence

Police responding to family violence may:

- arrest a person for a criminal offence (though this will not initiate the intervention order process);
- issue a family safety violence notice; or
- apply to the Magistrates' Court for the registrar to issue:
    - a summons requiring the respondent to attend at court; or
    - a summons and for the after-hours magistrate to make an interim intervention order; or
    - a warrant.

Family violence safety notices

Family violence safety notices offer police an alternative procedure to provide temporary protection for an affected family member, her property and her children. The safety notice provides similar protection to an intervention order. The notice can be initiated and issued by police on the spot without applying to the court.

A safety notice also constitutes an application for a family violence intervention order for the protected person against the respondent, and a summons for the respondent to appear on the first mention date.

The first mention date for the application for the intervention order initiated by a safety notice must occur within five working days of when the family violence safety notice is served.

(FVPA s 31)

Originally, the first mention date needed to occur within 72 hours of the family violence safety notice being issued. This was extended to 120 hours by the *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012,* and again to five working days by the *Family Violence Protection Amendment Act 2014*. The Second Reading Speech to the amending Act explained that the extension would give affected family members and respondents more time to obtain advice and make decisions before attending court.

[Second Reading Speech to the *Family Violence Protection Amendment Act 2014*, Hansard, Legislative Council, 20 August 2014, 2621]

When a police officer issues a family violence safety notice, that officer, or the officer who originally applied for the notice, must:

- ask the respondent to provide an address for service of documents; and
- advise the respondent that if a police officer is unable to locate the respondent to serve them with a document under the Act, the officer may, under s 207, seek information about the respondent from public sector organisations

(FVPA s 33)

The first mention hearing must be conducted at the proper venue of the court. This should usually be the proper venue for the final hearing, rather than the proper venue for an interim order.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 12.01]

Family violence safety notices cannot be issued for associates of the protected person or against associates of the respondent.

Application for a family violence safety notice

A police officer who attends a family violence incident may apply for a safety notice if:

(c) the police officer has reasonable grounds for suspecting the respondent is an adult; and
(d) the police officer has no reasonable grounds for suspecting the respondent has a cognitive impairment; and
(e) the police officer has no reasonable grounds for suspecting there is a Family Law Act order or child protection order in force that may be inconsistent with the proposed terms of the family violence safety notice, after making reasonable enquiries of the respondent, the affected family member and any other adults at the scene of the incident; and
(f) the police officer believes on reasonable grounds there is no family violence intervention order in place between the affected family member and respondent; and
(g) (da) the police officer has no reasonable grounds for suspecting there is a community correction order under the Sentencing Act 1991 in force that may be inconsistent with the proposed terms of the family violence safety notice; and

(h) the police officer believes on reasonable grounds that, until an application for a family violence intervention order can be decided by the court, a family violence safety notice is necessary—

(i) to ensure the safety of the affected family member; or
(ii) to preserve any property of the affected family member; or
(iii) to protect a child who has been subjected to family violence committed by the respondent.

[FPVA s 24]

An application for a family violence safety notice is made to another police officer above the rank of Sergeant and can occur in person, or by fax, telephone or other electronic communication.

[FPVA s 25]

The police officer determining the application must hear from the responding police officer and may, if practicable, hear from the respondent or the affected family member. The officer may only issue the order if he or she:

(a) is satisfied that the responding police officer's grounds for forming the relevant opinions listed under points 1, 2, 3 and 4 above are reasonable;
(b) believes on reasonable grounds that there is no family violence intervention order in place between the affected family member and the respondent;
(c) believes on reasonable grounds that the safety notice is necessary to ensure the safety of the affected family member, preserve his or her property or protect a child who has been subjected to family violence by the respondent.

[FPVA s 26]

The purpose of safety notices is to provide urgent and temporary protection for the affected family member from family violence until the court can consider making an interim or final order. Safety notices may be valid even if there is insufficient evidence to support a final order.

[*Zion-Shalom v Magistrates' Court of Victoria (No 2)* [2009] VSC 477]

Interaction between safety notice and non-Victorian DVO

The FVPA contains a number of provisions which specify the interaction between the family violence safety notice process and the existence of a 'recognised DVO' under the *National Domestic Violence Order Scheme Act 2016*.

A recognised DVO is:

(a) an interstate DVO made in a participating jurisdiction; or
(b) an interstate DVO or a foreign order taken to be a recognised DVO under section 36(1) of the National Domestic Violence Order Scheme Act 2016; or
(c) a foreign order that is a registered foreign order in any participating jurisdiction, and includes a corresponding New Zealand order registered under Part 10;

(FVPA s 4)

Under s 26A, a police officer can issue a family violence safety notice regardless of whether there is a recognised DVO in relation to the same respondent and protected person. If a police officer believes that there is a recognised DVO made by a court in relation to the same parties, the police officer must make reasonable enquiries to determine whether there is a recognised DVO before the first mention date.

If there was a recognised DVO in place, the family violence safety notice expires:

(a) on the first mention date, if the application for the family violence intervention order is withdrawn on the first mention date; or
(b) if the court varies or extends the recognised DVO on the first mention date – when the order is served on the respondent

(FVPA s 30)

A person who is subject to both a family violence safety notice and a recognised DVO must comply with both orders if possible. If that is not possible, the respondent must comply with the family violence safety notice.

(FVPA s 40)

For this purpose, the fact that the respondent's conduct was permitted under a recognised DVO is not a defence to a charge of contravening a safety notice (or contravening a safety notice intending to cause harm or fear).

(FVPA ss 37(4), 37A(6))

Conditions on a family violence safety notice

A safety notice may include any of the conditions in FVPA ss 81(2)(a)–(f), including:

(a) prohibiting family violence;
(b) excluding the respondent from the affected family member's residence;
(c) directing the respondent to return property to the affected family member, or allowing the respondent access to reclaim property from the residence;
(d) prohibiting the respondent from approaching or contacting the affected family member;
(e) prohibiting the respondent from being near particular addresses; and
(f) prohibiting the respondent from inducing others to engage in conduct prohibited by the order.

The safety notice cannot revoke or suspend a weapons approval or exemption, or a firearms authority (compare s 81(2)(g), (h)).

Service and filing of a family violence safety notice

As soon as possible after a safety notice is issued, a police officer must serve copies of the notice on the respondent and the protected person.

(FVPA s 34)

If a family violence safety notice form is subsequently corrected under s 28, the corrected form must also be served on the respondent and protected person.

(FVPA s 34)

Family violence safety notices must be served personally on the respondent.

(FVPA s 202(2)(a))

For other documents, they may be served by giving a true copy of the document to the personal personally, or in accordance with an order for alternative service made by a court under s 202A(1). Any document that is required under the FVPA to be served on a person who is a child must be served personally.

[See FVPA s 202(2)(b))

The police officer serving the notice must explain the notice to both the respondent and the protected person and take reasonable steps to ensure each person understands.

(FVPA s 35)

FVPA s 35(2) and (3) contains a list of matters that must be included in the explanation. Subsection (4) specifies that any failure to adequately explain the safety notice does not invalidate the safety notice. Failure to explain may, however, affect the respondent's criminal liability for contravening a safety notice (see 4.2 Contravention of a family violence safety notice).

If a police officer issues a family violence safety notice, that police officer, or the police officer who applied for the notice, must ask the respondent to provide an address for the service of documents. The respondent is not required to comply. Additionally, that officer must advise the respondent that a police officer may, under s 207, seek information about the respondent from public sector organisations in order to enable the officer to locate and serve the respondent.

(FVPA s 33)

The safety notice must be filed with the Magistrates' Court as soon as practicable after it is issued. While the Children's Court cannot receive a safety notice, the Magistrates' Court may transfer proceedings commenced by safety notice to the Children's Court if it is appropriate to do so.

(FVPA ss 34, 148; *Magistrates' Court (Family Violence Protection) Rules 2018* r 12.01(3)(a))

Police cannot issue a safety notice for more than one respondent or more than one adult protected person, but can include an unlimited number of children. If the after-hours service receives an invalid safety notice, it will notify the police officer applicant and may suggest that the police should issue and serve separate safety notices for the protection of additional adults.

Commencement and duration of a family violence safety notice

A safety notice commences when it (or a safety notice form) is served on the respondent.

Safety Notice Form

If a police officer applies for a family violence safety notice by telephone, fax or other electronic communication, the police officer who receives the application issues and files the family violence safety notice. That officer must be of the rank of sergeant or above. The applicant police officer must then complete and certify a family violence safety notice **form**, which they may serve on the respondent and the protected person. The protection offered by the notice is operational once the form is served.

This process allows police officers to obtain urgent protection for affected family members without having to leave the scene of a family violence incident. The attending officer can apply for the safety notice and also certify and serve the safety notice form without having to leave the scene.

As soon as practicable after the issue of the safety notice, the safety notice and the safety notice form must be compared and any material discrepancies rectified.

(FVPA ss 27, 28)

Duration of safety notices

A safety notice lasts until either:

- the court refuses to make an intervention order at the first mention; or
- if the court makes an intervention order (an interim or a final order) at the first mention, the time when that order is served on the respondent.

(FVPA s 30)

At the first mention, the court may make an interim order where a safety notice has been issued and the court is satisfied on the balance of probabilities that there are no circumstances that would justify discontinuing the protection of the person until a final decision can be made. See 2.2.1 Interim intervention orders for further information of making interim orders.

(FVPA s 53(1)(c))

At the first mention, if the court does not make an intervention order, the safety notice will cease. The court has no authority to extend or vary a family violence safety notice.

If there was a recognised DVO in place when the safety notice was made, the family violence safety notice expires:

(a) on the first mention date, if the application for the family violence intervention order is withdrawn on the first mention date; or
(b) if the court varies or extends the recognised DVO on the first mention date – when the order is served on the respondent

(FVPA s 30)

Safety notices and sufficient evidence

Applications for interim orders must be supported by oral or affidavit evidence, unless:

(a) the application is made under s 44 by telephone, fax or other electronic means and the court waives the requirement of oral or affidavit evidence; or
(b) the application is made by the issue of a certified family violence safety notice.

(FVPA s 55(1))

Use of a certified family violence safety notice in substitution for oral or affidavit evidence was introduced by the *Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Act 2010*. The explanatory memorandum states that this provision was added to address 'difficulties and inefficiencies' that arose, particularly when neither the police applicant or the affected family member are present or available at the first mention hearing. While certified family violence safety notices will generally be sufficient evidence for the making of an interim order, if the court is considering whether to refuse to admit or limit the use to be made of the notice under s 65(3), it must first consider whether it is reasonably practicable to obtain oral or affidavit evidence.

(FVPA s 55(3))

The reference in s 55(3) to excluding or limiting the evidentiary value of a certified family violence safety notice arguably implies that the court has the power to adjourn the mention hearing, and extend the family violence safety notice, if it considers it necessary and reasonably practicable to obtain oral or affidavit evidence. Otherwise, the protection offered by the safety notice would lapse due to an evidentiary ruling the applicant could not necessarily have anticipated, given the evidentiary status the Act gives to safety notices. However, it remains unclear whether this is permissible, as s 30(1)(b) of the Act states that a family violence safety notice expires if the court refuses to make an interim intervention order on the first mention date.

See 2.1.4.3 Initiating applications.

See 2.2.1 Interim intervention orders.

Contravention of the conditions endorsed on a safety notice is a criminal offence. See 4.1.2 Contravention of a family violence safety notice.

Last updated: 20 November 2019

2.1.4 Applications

An application for a family violence intervention order may be made:

- during business hours, to the proper venue of the Magistrates' Court or Children's Court, by anyone who is eligible to make an application; or
- after business hours by police, either by:
    - issuing a family violence safety notice; or
    - through the Magistrates' Court's after hours service.

The proper venue is defined in s 3 of the *Magistrates' Court Act 1989* and s 3 of the *Children, Youth and Families Act 2005*. The proper venue for an interim order is any civil registry of the court.

Note - The *Family Violence Protection Amendment Act 2014* amended s 24 of the Act to permit police to apply for a family violence safety notice at any time, rather than just outside of court hours.

Last updated: 2 November 2014

2.1.4.1 Who is eligible to make an application?

Any of the following people may apply for a family violence intervention order:

If the affected family member is an adult:

- a police officer; or
- the affected family member; or
- anyone else with the affected family member's written consent.

If a police officer applies for an intervention order without the consent of the affected family member, the court is restricted in what conditions may be included in the intervention order (FVPA s 75). See 2.2.2.2 Conditions of final intervention orders.

If the affected family member is a child:

- a parent of the child; or
- anyone else with the written consent of the parent or with the leave of the court; or
- if the child is aged 14 years or old, the child may apply with the leave of the court.

Note that *parent* is defined in s 4 to include:

(a) a person who has responsibility for the long-term welfare of the child and has, in relation to the child, all the parental powers, rights and duties that are vested by law or custom in the guardian of a child; and
(b) a person with whom the child normally or regularly resides.

If the affected family member has a guardian under the Guardianship and Administration Act 2019:

- the guardian; or
- anyone else with the leave of the court.

(FVPA s 45)

A *guardian* is defined in s 4 as:

> Guardian, in relation to a person, means (except in the definition of **parent**) a guardian under the **Guardianship and Administration Act 2019** or an attorney who has power for personal matters under an enduring power of attorney under the **Powers of Attorney Act 2014** who has power, whether specifically or generally-

(a) to make decisions, take action, consent or do things for the person under this Act; or

(b) to decide where or with whom the person is to live or with whom the person is to have contact.

Under the *Guardianship and Administration Act 1986*, VCAT can appoint a guardian for a person with a disability over the age of 18 if satisfied that, because of the disability, the person does not have decision-making capacity in relation to a personal matter. The guardian may operate in a plenary or a limited capacity, and is not concerned with the finances or the estate of the represented person (that is the role of an *administrator*).

Under the *Powers of Attorney Act 2014*, a person may appoint an eligible attorney to do anything on behalf of the person that a person can lawfully do by an attorney. In making an appointment, a person can confine the powers of an attorney to personal matters only, financial matters only, or to only matters specified in the instrument of appointment.

Where an application is brought by a purported guardian, the Court will require evidence that the applicant is a guardian and that the guardian or attorney's powers cover either of the matters in paragraph (a) or (b) of the definition of guardian (above).

Associated orders

The following people may apply for an associated order:

- an associate of the protected person;
- a person would who be entitled to apply for an order under s 45 if the associate were an affected family member.

(FVPA s 76)

An associate of the affected family member is a person who provides the affected family member with assistance or support. The associate need not be a family member. Due to their close relationship with the affected family member, an associate of the affected family member may be subjected to violence by the respondent as a way of controlling the affected family member by proxy.

[VLRC, Final report, 8.39 (264)]

The court cannot make interim associated orders, and can only make a final associated order after making a final order for the affected family member. See 2.2.2.1 Power to make final intervention orders for further details.

Written Consent

A written consent from the affected family member or the parent of a child affected family member must contain the following details and be filed with the court:

- the name, address, date of birth, occupation and gender of the applicant;
- the name, address, date of birth, occupation and gender of the person providing consent;
- if the person giving consent is not the affected family member or protected person, that person's relationship to the affected family member or protected person;
- a description of the application.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 4.06:
Children's Court (Family Violence Protection) Rules 2018 r 4.05]

These requirements also apply to applications for associated orders (see 2.2.2.1 Power to make final intervention orders) and applications to vary, revoke or extend intervention orders (see 2.3 Changing orders).

If the applicant is a police officer, consent of the affected family member is not necessary before applying for an intervention order or for the court to make an intervention order (FVPA s 75). However, unless the affected family member is a child, is cognitively impaired, or is a represented person and the guardian consented, the Act limits the conditions that the court can include on an intervention order applied for without the affected family member's consent. If the affected family member consents, this consent must be in writing and must be filed with the court. The written consent must provide the details listed above.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 4.06(1)(b):
Children's Court (Family Violence Protection) Rules 2018 r 4.05(1)(b)]

If the applicant is a police officer and the affected family member is an adult consenting to the application, the applicant should file the affected family member's written consent with the court.

Applications requiring leave

The court must grant leave before the following people may apply for an intervention order:

- a affected family member who is a child aged 14 years or more;
- a person who wishes to apply on behalf of an affected family member who is a child, other than a parent of the child;
- a person other than the guardian of a person represented under a guardianship order who wishes to apply on behalf of that person.

The court must not grant leave to an affected family member aged 14 years or more unless it is satisfied the affected family member understands the nature and consequences of the intervention order.

The court may grant leave to another person to apply on the behalf of an affected family member who is a child, or an affected family member who has a guardian, if it is satisfied it is in the best interests of the affected family member to do so.

(FVPA s 46)

The court should consider the following matters when deciding whether to grant leave:

- the reason the child wishes to be the applicant;
- the child's age and maturity;
- the nature of the allegations;
- the relationship between the child and the respondent;
- whether any other person could apply for the child;
- the need to promote positive relationships between the child and the child's parents and other family members;
- in relation to Aboriginal children, the need to maintain and build connections to their Aboriginal family and community;

- the effect of participation in the application on the child's safety and development;
- the possible harmful effects of delay if the child is not allowed to apply;
- any other matters the court considers relevant.

The court should often discuss these matters with the parties present in court in an informal matter and, once the issues are identified, may require the child or others present to give evidence as a witness.

Court processes can be very confronting and traumatic for children. Circumstances where a child is applying on his or her own behalf require particular sensitivity towards both the child and any parent who is present. Judicial officers can also refer to the *Bench Book for Children Giving Evidence in Australian Courts* (Australasian Institute of Judicial Administration, Updated March 2020) and the Judicial College of Victoria's Victims and Witnesses resource page.

Failure to grant leave where it is required

In *Remess v Rabe* [2006] TASSC 105, the Tasmanian Supreme Court held that failure to obtain leave to apply where it was required by the *Family Violence Act 2004* (Tas) was a procedural omission and not a jurisdictional defect in circumstances where it was open to the court to grant the applicant leave.

Courts have the power to grant leave after the event and to act as if it had granted leave at an earlier time. In some cases, this does not prejudice the parties and is more efficient than requiring a party to bring fresh proceedings to cure a procedural irregularity.

[See *Berowra Holdings v Gordon* (2006) 225 CLR 364; *Booth v Ward* (2007) 17 VR 195; *Hartley Poynton v Ali* (2005) 11 VR 568]

Applications for more than one affected family member

The FVPA recognises that there may be more than one person requiring protection arising from the same incident(s) of family violence. Generally, the court registrar will issue one application per applicant because in many circumstances, it is preferable to have a separate intervention order for each person affected by the family violence.

However, an application for an intervention order by a parent of a child may include an application for her child if the applications arise out of the same or similar circumstances. An application including both a parent and child as affected family members may be heard separately if the applicant or respondent applies and if the court thinks fit, having regard to the advantages of hearing the matter together.

(FVPA s 47)

The court should also consider the following matters when determining whether to hear parent and child applications separately:

- the convenience of the parties;
- any conflicts of interest between the parent and the child; or
- any specific concerns that would justify severing the application and transferring the child's application to the Children's Court.

[*Children's Court Research Materials* 6A.7.2]

The Act allows the court to:

- hear any number of applications for intervention orders at the same time if the court thinks fit (FVPA s 63);
- make an interim order for more than one affected family member where the relevant test for making the order applies to each affected family member (FVPA s 56). The court should consider whether it is more advantageous to make one or multiple interim orders.

Last updated: 30 November 2020

2.1.4.2 Where is an application made?

Applications for family violence intervention orders must be made at the 'proper venue' of the Magistrates' Court or the Children's Court (as defined in *Magistrates' Court Act 1989* s 3 and *Children, Youth and Families Act 2005* s 3).

(FVPA s 42)

Proper venue

Section 3 of the *Magistrates' Court Act 1989* contains detailed provisions for determining the "proper venue". These provisions divide the proper venue into five groups:

- Proceedings for interim orders;
- Proceedings within the jurisdiction of the Family Violence Court Division;
- Proceedings within the jurisdiction of the Specialist Family Violence Court Division (after 29 March 2019);
- Proceedings within the jurisdiction of the Neighbourhood Justice Centre;
- Proceedings under the *Family Violence Protection Act 2008* or the *National Domestic Violence Order Scheme Act 2016*

These definitions are picked up by the definition of *proper venue* in s 4 of the FVPA.

Interim Orders

The proper venue for an interim order is *any* civil registry of the Magistrates' Court.

(*Magistrates' Court Act 1989* s 4, definition of proper venue, paragraph (d))

An interim order is:

- an interim intervention order; or
- an interim variation or extension of an order.

(FVPA s 11)

A court must accept an application and conduct a hearing for an interim order even if the venue is not the most appropriate one. Once the court determines the application for an interim order, the court can transfer proceedings to the proper venue for the next return date.

Proper venue and proceedings where the Specialist Family Violence Court Division has jurisdiction

The proper venue for the purpose of the Specialist Family Violence Court Division (except for interim orders) is:

- the venue of the Court at which the Specialist Family Violence Court Division may sit and act that the Court determines, is the most appropriate venue for the matter, having regard to the following:
- the location of the alleged incident of family violence;
- the residence of the respondent at the time of the alleged incident of family violence; and
- the place of permanent or temporary residence of the affected family member; and
- the safety of the parties; and
- any other considerations the Court thinks relevant.

[*Magistrates' Court Act 1989* s 4, definition of proper venue, paragraph (ca)]

The Specialist Family Violence Court Division consists of those courts which are specified in the government gazette.

[Government Gazette G23, 9 June 2005]

Proper venue and the Neighbourhood Justice Centre

If the proceedings are a type where the Neighbourhood Justice Centre has jurisdiction, the proper venue is:

- the proper venue, as determined in accordance with the normal rules for criminal proceedings, civil proceedings, family violence interim orders or proceedings within the jurisdiction of the Family Violence Court Division; or
- a venue where the Neighbourhood Justice Centre may sit and act.

[*Magistrates' Court Act* 1989 s 4, definition of proper venue, paragraph (e)]

The Neighbourhood Justice Centre has the jurisdiction of the Magistrates' Court and the Children's Court under the FVPA if:

- at least one of the parties resides in the municipal district;
- at least one of the parties is homeless or is an Aboriginal person with a close connection to the municipal district, and the court considers it is appropriate to deal with the matter at the Neighbourhood Justice Centre;
- the whole or a material part of the matter arose in the municipal district;
- the whole or a material part of the allegations of family violence occurred in the municipal district.

[See *Magistrates Court Act* 1989 ss 4M – 4O and *Children, Youth and Families Act* 2005 ss 520A – 520C]

The "municipal district" is a district specified by the Attorney-General in the Government Gazette. Currently, the only district specified is the City of Yarra.

[Government Gazette G21, 21 December 2006]

Proper venue and the Children's Court

Section 3 of the *Children, Youth and Families Act 2005* contains analogous provisions to determine the proper venue for the Children's Court. The above statements apply, with two key changes:

- interim orders are not treated differently in the Children's Court. The proper venue for an interim order is the proper venue for the final order; and
- the Specialist Family Violence Court Division does not exist in the Children's Court.

The explanations above for the proper venue apply in the Children's Court with any necessary changes to reflect these differences.

Interactions between proper venue provisions

The *Magistrates Court Act* does not list any hierarchy for determining proper venue for a family violence proceeding. This suggests that if a proceeding overlap multiple definitions, a court may use whichever definition leads to the most appropriate venue.

Transfer of proceedings

The Magistrates' Court can transfer proceedings to the Children's Court and the Children's Court can transfer proceedings to the Magistrates' Court where it is considered, in all the circumstances, more appropriate for the matter to be heard in the other court.

(FVPA s 148)

Last updated: 08 April 2019

2.1.4.3 Initiating applications

Applications for a family violence intervention order can be initiated in the following ways:

- Application by the affected family member or a third party
- Application by a police officer
- When a family violence safety notice is issued
- When an interim intervention order is issued by the courts

Applications generally

Applications must:

- include the information prescribed by rules made under this Act; and
- if the applicant is a police officer, be made on oath or by affidavit or be certified
- if the applicant is not a police officer, be made on oath or by affidavit or by declaration of truth.

(FVPA s 43(1))

Unless the rules of court otherwise provide, applications by the affected family member, a police officer or a third party may be made by telephone, fax or other electronic communication.

(FVPA s 43(3))

Before the commencement of the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*, all applications were generally required to be made in person at the court registry. The exception was for police who could make applications by telephone, fax or other electronic communication, but only where:

- the application was made outside normal business hours; or
- the distance to the nearest court venue made it impracticable to apply in person

After commencement, all applications for a family violence intervention order can be made by telephone, fax or other electronic communication, without any restrictions as to time or location, but still subject to the rules of court.

See 2.1.4.3.6 Historical Applications for further information.

Applications by the affected family member or a third party

The applicant must supply detailed information proscribed in the court rules. In the Magistrates' Court, this is done by completing the form entitled 'Information for Application for an Intervention Order'. This form includes details about the applicant and information on the history of violence against the affected family member. The Children's Court has developed a similar form for its jurisdiction.

[Magistrates' Court (Family Violence Protection) Rules 2018 r 4.03; Children's' Court (Family Violence Protection) Rules 2018 r 4.02]

An applicant who is the affected family member or a third party must make an application on oath or by affidavit or by declaration of truth.

The *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* introduced the option for applications to be made with a 'declaration of truth'. This novel process is distinguishable from an oath, affirmation or affidavit, as it does not need to be witnessed or executed before a third party.

The declaration of truth must comply with the following requirements:

(a) It must include the applicant's full name and date of birth; and
(b) It must include an acknowledgment that the content of the application is true and correct to the best of the applicant's knowledge and belief; and
(c) It must include an acknowledgment that the applicant knows that making a declaration of truth that the applicant knows to be false is an offence with a penalty of 600 penalty units or 5 years imprisonment or both; and
(d) It must otherwise comply with any requirements of the rules of court (if any); and
(e) It is not required to be witnessed by, or executed before, any other person.

(FVPA s 43(4))

The declaration of truth will be embedded into the online FVIO application form and will be included in Courtlink. Anyone who knowingly makes a false statement in a declaration of truth commits an offence with a maximum penalty of 600 penalty units or 5 years' imprisonment or both (see 4.1.7 False declaration of truth for more information).

After receiving an application for a family violence intervention order, a registrar will interview the applicant. The registrar will conduct the risk assessment and will generate a formal application on Courtlink which often contains less information about chronology, history and the description of events than the applicant provided due to space constraints. The applicant also provides information for statistical purposes that is not recorded on Courtlink. This application must be sworn or affirmed by the applicant (except where the applicant is a police officer, who may certify an application). The original handwritten information form is kept on the court file. The risk assessment is place in a brown envelope at the back of the court file. The assessment is confidential and not admissible as evidence.

[Magistrates' Court (Family Violence Protection) Rules 2018 r 15.01; Children's Court (Family Violence Protection) Rules 2018 r 14.01]

The presence of the information form and the risk assessment on the court file can give rise to difficulties when the respondent applies to inspect these documents. Section 18(4) of the *Magistrates' Court Act 1989* gives a party the right to inspect any part of the register that relates to the proceeding. In *HWT v Magistrates' Court* [2000] VSCA 242 at [37], Charles JA (Tadgell and Chernov JJA concurring) doubted that originating process forms part of the register. Section 18(1) states that the register consists of the "all the orders of the Court and of such other matters as are directed by this Act or the Rules to be entered in the register". As there is no requirement in the FVPA to enter the information form and the risk assessment on the register, it is strongly arguable that the respondent does not have the right to inspect the applicant's information form. In any event, the court would have implied jurisdiction to restrict access to confidential or sensitive documents, where this is necessary to ensure the safety of a party in the course of conducting proceedings.

See 3.9 Requests for information for details on related matters, such as subpoenas in family violence matters.

Applications by a police officer

An applicant who is a police officer must make an application on oath or by affidavit or be certified. Certification requires the application to be signed by the officer and include the officer's name, rank and station.

(FVPA s 43)

Applications initiated by family violence safety notice

A safety notice constitutes an application for a family violence intervention order for the protected person against the respondent, and a summons for the respondent to appear on the first mention date.

A family violence safety notice that has ended under FVPA s 30(1)(b) continues to be taken to be an application for a family violence intervention order until the court finally determines the application or the application is withdrawn.

(FVPA s 31)

For further information, see 'Family Violence Safety Notices' in 2.1.3 Police response to family violence.

Applications initiated by interim intervention order by the Court

Under Part 4, Division 2A, courts can make interim intervention orders in any bail or criminal proceeding if "satisfied, on the balance of probabilities, that the interim order is necessary to ensure the safety of the family member pending a decision about a final order".

(FVPA ss 60B, 60C)

This own motion order is taken to be an application and summons for a family violence intervention order, with the Chief Commissioner of Police as the applicant.

(FVPA s 60J)

Where the own motion order is made in the County Court or the Supreme Court, the proceeding for the final order is transferred to the Magistrates' Court or the Children's Court for determination.

(FVPA s 60K)

Separately, in interim intervention order proceedings, the Magistrates' Court or the Children's Court may make an interim intervention order for a child on its own initiative.

The court must include the child as a protected person if the court made an intervention order for the affected family member and the child's need for protection is substantially the same. Otherwise the court must make a separate intervention order for the child as a protected person.

However, the court are not required to make the order if satisfied that it is not necessary to do so to protect the child or ensure the safety of the child pending a final decision about the application.

(FVPA s 53AA)

If an intervention order for the affected family member was not made, the court may make an interim intervention order for the child, if:

- the child has been subjected to family violence committed by the respondent; and
- the court is satisfied, on the balance of probabilities, that the interim order is necessary to ensure the safety of the family member pending a decision about a final order.

(FVPA s 53AB)

Last updated: 10 December 2019

2.1.4.3.1 Evidentiary Requirements for interim orders

Interim intervention orders are designed to provide urgent, short-term protection for an affected family member. The orders may be made ex-parte, without notice to the respondent and without giving the respondent a full hearing.

Applications for interim orders must usually be supported by oral evidence or by affidavit.

The court may waive this requirement where:

1. The applicant is not a police officer and the application was made by a declaration of truth, provided that the court has considered whether it is practicable to obtain oral evidence or an affidavit before making the interim order; or

The application is made by the issue of a family violence safety notice certified under s 153(1), provided the court first considers whether it is reasonably practicable to obtain oral evidence or affidavit evidence; or
A police officer applies by electronic communication, provided that:

(a) the court has considered whether it is practicable to obtain oral evidence or an affidavit before making the interim order; or
(b) the application is made before 9 a.m. or after 5 p.m. on a weekday or on a Saturday, Sunday or a public holiday and the application was certified.

(FVPA s 55)

Where an interim order is made on an application made by electronic communication by a police officer, the court must inform the police officer of:

- the terms of the order;
- the duration of the order; and
- the date, time and venue of the first mention.

(FVPA s 58)

Last updated: 31 July 2019

2.1.4.3.2 Application and summons

The applicant must specify whether he or she seeks a summons or a warrant to arrest the respondent, and the reasons why a warrant is sought (Magistrates' Court (Family Violence Protection) Rules 2018 r 4.03).

Where the registrar issues an application and summons, if there is no request for an interim order, the return date will usually be set to allow time for the respondent to be served with the application and summons.

Last updated: 31 July 2019

2.1.4.3.3 Application and warrant

The request for issuing a warrant must be made in writing and must be made on oath, by affidavit or, in the case of a police officer, certification. The court cannot issue a warrant in the first instance if the application was only supported by a declaration of truth.

(FVPA s 51)

The magistrate or appropriate registrar may issue a warrant to arrest an adult respondent when the court believes on reasonable grounds that a warrant is necessary:

- to ensure the respondent attends court at a mention date for the application.
- to ensure the safety of the affected family member;
- to preserve any property of the affected family member;
- to protect a child who has been subjected to family violence committed by the respondent

In deciding whether to issue a warrant, the magistrate or registrar must not consider whether or not the respondent is, or has been, subject to a direction or detention under Part 3, Division 1 (Police Holding Powers) of the Act.

(FVPA s 50)

The magistrate or registrar may issue a warrant regardless of whether or not the applicant requests one.

A magistrate is most likely to issue a warrant if it appears preferable to bring the respondent before the court to ensure he understands the order and to enable access to support services.

Where an application and warrant for the arrest of the respondent is issued by the magistrate or registrar, the matter will generally not be brought before a magistrate for consideration on that day, but deferred to the return date of the arrest warrant.

"Appropriate registrar" is defined in s 4 of the FVPA as the registrar for that court or at the proper venue of the court.

Last updated: 31 July 2019

2.1.4.3.4 Bail following warrant

Once a respondent has been arrested pursuant to a family violence intervention order warrant, the *Bail Act 1977* applies as if the respondent were an accused charged with an offence to which section 4 of the *Bail Act* applies. The respondent is entitled to bail unless the prosecutor satisfied the bail decision maker that:

1. there is a risk that the accused would, if released on bail—
    - endanger the safety or welfare of any person; or
    - commit an offence while on bail; or
    - interfere with a witness or otherwise obstruct the course of justice in any matter; or
    - fail to surrender into custody in accordance with the conditions of bail; and

the risk is an unacceptable risk.

[Bail Act 1977 s 4E]

Occasionally, the court will specify conditions for the grant of bail in accordance with s 62 of the *Magistrates' Court Act 1989*. A person accepting these conditions may enter bail without the need for a bail hearing. Otherwise, the police must bring the arrested person before a court or bail justice immediately to determine whether he or she shall receive bail and the conditions of bail.

If it is not practicable to bring the person before a court or bail justice immediately, a police officer of the rank of sergeant and in charge of a police station must inquire into the person's case and may grant bail in accordance with the *Bail Act 1977*.

When issuing a warrant, the court or registrar should consider the information the applicant provided about the respondent's violence if that is available. The court should consider whether to include bail conditions on the warrant, unless the warrant is only necessary due to the risk that the respondent may abscond. The court should use similar conditions to those in an intervention order to mitigate the risk to the affected family member, her children and her property until the court determines whether to issue an intervention order.

Bail conditions on a warrant under s 50 prevail over an inconsistent child protection order under s 515(1) of the *Children, Youth and Families Act 2005*.

(FVPA s 175)

Last updated: 31 July 2019

2.1.4.3.5 Interim hearing

If the applicant requests an interim order, the matter is brought before a magistrate to determine whether to grant the interim order usually on the same day the application and summons is issued by the registrar.

The court may grant an interim order:

- Ex parte; and
- before the respondent is served with the application and summons.

(FVPA s 54)

There is an Interim hearing checklist to guide judicial officers.

See 2.2.1 Interim intervention orders for further information on making interim orders.

Last updated: 31 July 2019

2.1.4.3.6 Historical Applications

Before the commencement of the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*, all applications were generally required to be made in person at the court registry. The exception was for police who could make applications by telephone, fax or other electronic communication, but only where:

- the application was made outside normal business hours (see below); or
- the distance to the nearest court venue made it impracticable to apply in person

Remote applications by Police Officers

Previously police could only submit applications by telephone, fax or other electronic communication if the following conditions are met:

1. the officer intended to apply for an intervention order; and
2. the officer sought an interim order pending determination of the final order; and
3. either:

- the application was made outside normal business hours; or
- the distance to the nearest court venue made it impracticable to apply in person.

(FVPA s 44 (as in force before 31 July 2019))

When a police officer made a remote application, he or she had to complete an application form on oath, by affidavit or certify. This application was filed before the first mention date.

The rules of the Magistrates' Court and the Children's Court were inconsistent with the Act on this matter. The rules:

- restricted remote applications to facsimile only (and not by telephone or other electronic forms of communication); and
- did not distinguish the procedures for making and filing applications and required applications to be made by being filed at the proper venue.

This inconsistency did not relevant in most cases, as the rules reflected existing and routine practice.

[Magistrates' Court (Family Violence Protection) Rules 2008 r12.01; Children's Court (Family Violence Protection) Rules 2008 r 11.01]

Last updated: 31 July 2019

2.1.5 Non-compliance with court rules

Rule 2.01 of both the *Magistrates Court (Family Violence Protection) Rules 2018* and *Children's Court (Family Violence Protection) Rules 2018* provides a failure to comply with the rules is an irregularity and not a nullity. Rule 2.01 also gives the court power to allow amendments to promote compliance and to make general orders to deal with a proceeding. Rule 2.02 provides that the court may dispense with compliance with the Rules altogether (subject to any requirements of the FVPA).

Establishing jurisdiction to hear applications

Even though the rules encourage the court to overcome non-compliance, r 2.01 does not negate the possibility of void proceedings, for example, where the court did not have jurisdiction to hear the application.

Jurisdiction to hear an application is established when an eligible person (under s 45) makes an application for an intervention order. Eligible person includes an affected family member, and an affected family member is defined as a person who is the subject of an application for an intervention order. There is no requirement for the court to determine whether the affected family member and the respondent are family members before hearing an interim application.

For the purpose of interim orders, the tests do not necessarily require the court to finally determine whether a family relationship exists. This is only necessary when the court makes an order to:

- ensure the safety of the affected family member, as safety means safety from family violence; or
- to protect a child who has been subjected to family violence;

In each case, the definition of family violence requires behaviour that is directed towards a family member.

In *Zion-Shalom v Magistrates' Court & Ors* [2009] VSC 477, Justice Harper held on an appeal from the Magistrates' Court that the issue of a family violence safety notice by an appropriate member of Victorian police granted the court jurisdiction to hear and determine the application. The court did not have to determine whether the respondent and the person to be protected by the application were in fact family (or family-like) before making an interim order.

The question of whether non-compliance with the other provisions of regarding applications for intervention orders renders the application or any order arising from it invalid depends on whether the non-compliance renders the proceeding void or is merely an irregularity.

If there were a defect in a proceeding that could render the proceeding null but the facts still support a valid proceeding, courts are reluctant to find the proceedings void because that would lead to a duplication of the proceeding. In *Re Testro Bros Consolidated Ltd* [1965] VR 18, Sholl J said at 34–35:

> If the Court is of opinion that leave, had it been applied for, would have been given, why should it not decide, if it wishes, to treat as regular and effective, proceedings over which ex concessis it has jurisdiction, and dispense with the need merely to repeat them?

Family violence safety notices

While the Magistrates' Court after-hours service attempts to advise police officers of errors in family violence safety notices, the after-hours service cannot control the issue of safety notices by police.

The court at first mention may find that a family violence safety notice was improperly issued or invalid, in which case it will not be open to the court to make an interim intervention order under s 53(1)(c) (as there will be a ground to justify discontinuing the protection of the safety notice). Proceedings for contravention of the safety notice will also be compromised. The court should consider whether to treat the safety notice as still constituting a valid application for an order or it may suggest that a party make a fresh application. The court could then make an interim order under s 53(1)(a) or (b).

Last updated: 20 April 2010

2.1.6 Service

Applications

As soon as practicable after an application for an intervention order is issued, the appropriate registrar must cause the application to be served on the respondent.

(FVPA ss 48, 205]

If the affected family member is not the applicant, the appropriate registrar must also serve the application on:

- the affected family member;
- if the affected family member is a child and the application was made with his or her parent's consent, that parent;
- if the affected family member is a child and the application was made with leave of the court, a parent of the child with whom the child normally or regularly lives (other than the respondent); or
- if the affected family member has a guardian, the guardian.

(FVPA s 48]

A registrar must also serve applications for variation, revocation or extension of intervention orders on:

- each party to the proceeding (which includes the applicant, the protected person and the respondent):
- a parent or guardian of the protected person (if the protected person is a child or has a guardian).

(FVPA s 113]

Interestingly, s 113 requires service of the application on all parties to the proceeding in addition to the parent or guardian of an affected family member. Section 48 however, only requires service on the affected family member, *or* his or her parent or guardian.

Orders

When a court makes, varies, revokes or extends an interim or final family violence intervention order, or varies, extends or revokes a recognised DVO, the registrar must have the order served on the respondent, and *given* to:

- each party to the proceeding;
- if the protected person is a child and the application was made with the consent of the child's parent, that parent;
- if the protected person is a child and the order was made by a court under its own initiative, a parent of the child (other than the respondent) with whom the child normally or regularly lives
- the officer in charge of the police station nearest the residence of the protected person; and
- the Chief Commissioner of Police.

(FVPA s 201]

Interstate orders

The Act provides for the recognition of intervention orders issued from courts in other states of Australia or New Zealand. The orders must first be registered by a registrar at a Victorian court. Currently, this is always done at the Melbourne Magistrates' Court to provide anonymity for the protected person. The appropriate registrar must give a copy of the registered order to the protected person, the court that made the original order, the Chief Commissioner of Police and the Secretary to the Department of Human Services.

The registrar may list the registered order before the court to decide whether the registered order should also be served on the respondent. The court must hear from the protected person and decide whether service of the order would jeopardise the safety of the protected person (or their children) by revealing the protected person is in Victoria.

(FVPA ss 181, 185]

The Act allows Victorian courts to vary, revoke or extend a registered interstate intervention order on application of a party to the proceeding but only if notice of the application has been served on the respondent or protected person, as the case requires

(FVPA s 182]

An order by a Victorian court varying, extending or revoking an interstate order only needs to be given to the court that made the original order and the Chief Commissioner of Police and the Secretary to the Department of Human Services.

(FVPA s 183]

A Victorian court cannot vary a New Zealand order.

Manner of service

Section 202 of the FVPA outlines that where the Act requires "service", the manner of service is defined as:

- giving a true copy of the document to the person personally; or
- if a court makes an order for alternative service under s 202A(1), in accordance with that order.

However, a family violence safety notice, and any document that is required under the Act to be served on a person who is a child, must be served personally.

(FVPA s 202]

A court may make an order for alternative service of a document by any means specified in that order, if satisfied that service other than personal service:

- is likely to bring the document to the attention of the person to be served; and
- will not pose an unacceptable risk to the safety of the affected family member, protected person or any other person.

The court must also be satisfied that it is appropriate in all the circumstances to make the order for alternative service.

The court may make the order for alternative service either on its own initiative, or upon application by a party to the proceeding.

If an order for alternative service is made, the court may order that the document be taken to have been served either on the happening of any specified event, or upon the expiry of any specified time.

(FVPA s 202A]

The Act does not limit the forms of alternative service a court may permit. Forms of alternative service may include:

- service by post;
- service by email; or
- service by leaving the document at the respondent's address.

In the absence of any evidence to the contrary and subject to any conditions of the order for alternative service under s 202A(3), a document is taken to have been served under an order for alternative service if:

- the document is required to be served by prepaid post to an address, at the time at which the document would have been delivered in the ordinary course of post; or
- if the document is required to be served by registered post to an address, at the time at which the document would have bene ordinarily delivered by registered post

If the order for alternative service requires that a document be served by electronic communication, the *Electronic Transactions (Victoria) Act 2000* extends and applies to that service regardless of whether the person to be served consented to this manner of service, and applies as if the person consented to service by this means. Subject to any condition of the order for alternative service, and in the absence of any evidence to the contrary, the document served by electronic communication is taken to be served at the time of receipt.

(FVPA s 202B, *Electronic Transactions (Victoria) Act 2000* ss 13A, 13B]

It, for whatever reason, it is not possible to serve a document in the manner required by s 202, a court may make an order for substituted service so that such steps may be taken that the court specifies in order to bring the document to the notice of the person to be served. However, an order for substituted service under s 202C(1) may not be made with respect to service of a family violence safety notice.

(FVPA s 202C]

Where a particular person is required by the Act to effect service, the Act allows that person to cause service by delegating the task to another (FVPA s 205). Victoria Police usually serve documents on behalf of the court.

If it has not been possible to serve a document personally, the police officer or court registrar must file a certificate concerning why service has not been possible. The certificate must be made on oath or by affidavit or may be certified. It must specify each document that was to be served, and must provide the following information:

(i) if the person completing the certificate is a police officer, the police officer's name, rank and station;
(ii) if the person completing the certificate is an appropriate registrar, the appropriate registrar's name and the location of the Court;
(iii) the reasons it has not been possible to serve the document, including details of attempts to locate or serve the person;
(iv) the means that the person completing the certificate believes could be used to bring the document to be served to the person's attention, and the reasons for that belief.

(FVPA s 204;
Magistrates' Court (Family Violence Protection) Rules 2018 r 5.03;
Children's Court (Family Violence Protection) Rules 2018 r 5.03]

A respondent does not need to be served with a copy of the order if the court has given the respondent an oral explanation under ss 57(1), 57A(2), 96(1), 96A(2). However, if in this situation, the respondent must still be given a copy of the order.

(FVPA s 201(b), s 201(c)(iia)]

Prior to the commencement of the amendments to service in the *Family Violence Protection Amendment Act 2017*, the court could only order substituted service if personal service was not reasonably practicable. At common law, service is "practicable" if it is capable of being carried out (*Humane Society International v Kyodo Senpaku Kaisha* [2007] FCA 124). However, "reasonably practicable" may be closer to a test of whether service is "practical". That is, whether service is sensible, realistic or is likely to succeed.

A certificate of inability to serve will provide the court with information on previous attempts to serve and why personal service is not reasonable practicable.

[See *Porter v Freudenberg* [1915] 1 KB 857; *Centralian Industries v Johnston* [1997] 1 VR 118. See also *Williams, Civil Procedure Victoria*, 6.10]

Following the amendments, the test is whether alternative service is "appropriate". This amendment gives effect to Recommendation 57 of the *Royal Commission into Family Violence*. The Royal Commission had expressed concern about balancing the need for service as a pre-condition to enforceability of orders with the administrative burden service imposes on Victoria Police. However, the Royal Commission did not provide any guidance on how the test of "appropriate" should be operate as a consideration separate from the risk-assessment consideration.

[Royal Commission into Family Violence: Report and recommendations, Vol III, 104–106]

A certificate of service (or inability to serve) must be filed with the court. The certificate is admissible in evidence and, in the absence of evidence to the contrary, is proof of the matters stated in it.

(FVPA ss 203. 204. See also: *Magistrates' Court (Family Violence Protection) Rules 2018* rr 5.02, 5.03; *Children's Court (Family Violence Protection) Rules 2018* rr 5.02, 5.03]

Manner of giving

The requirements for "giving" documents to a person are covered in Rule 5.01 of both the *Magistrates Court (Family Violence Protection) Rules 2018* and *Children's Court (Family Violence Protection) Rules 2018* which state that giving a document is achieved:

- by handing the document to the person; or
- by leaving the document at the address of the person; or
- by posting the document to the person at that person's address; or
- if a person has a facility for the reception of documents by facsimile transmission, by transmitting the document to that facility; or
- if the person is a respondent who has provided an email address under section 85(1) of the Act, by sending the document to that email address; or
- if any other party has provided an email address, by sending the document to that email address.

Where a particular person is required by the Act to give a document, the Act allows that person to delegate the task to another (FVPA s 205).

Service outside Victoria

Under the *Service and Execution of Process Act 1992*, initiating process and other court process issued in one State may be served in another State (*SEPA* ss 15, 27). Service on an individual in the other State must comply with the rules of service in the issuing State. In addition, initiating process must be accompanied by Form 1 of the *Service of Execution of Process Regulations 1993 (Service and Execution of Process Regulations 1993* reg 4).

Disclosure of information by organisations to facilitate service

Under the FVPA, the police may apply to 'organisations' (as defined in the *Privacy and Data Protection Act 2014*) for information to assist the police in locating the respondent for the purposes of personally serving the respondent with the document under the Act or in order to enable to respondent to be served with the document under an order for alternative service. The FVPA and the *Information Privacy Act 2000* define to whom applications can be made, what information must be provided and how that information can be used.

Information provided by an organisation to a police officer must not be used by a police officer for any purposes other than serving the respondent with a document under the Act.

(FVPA s 207]

Under the *Privacy and Data Protection Act 2014*, an organisation is a person or body to which Part 3 of the Act applies. These are:

(a) a Minister;
(b) a Parliamentary Secretary, including the Parliamentary Secretary of the Cabinet;

(c) a public sector agency;
(d) a Council;
(e) a body established or appointed for a public purpose by or under an Act;
(f) a body established or appointed for a public purpose by the Governor in Council, or by a Minister, otherwise than under an Act;
(g) a person holding an office or position established by or under an Act (other than the office of member of the Parliament of Victoria) or to which the person was appointed by the Governor in Council, or by a Minister, otherwise than under an Act;
(h) a court or tribunal;
(i) Victoria Police;
(j) a contracted service provider, but only in relation to its provision of services under a State contract which contains a provision of a kind referred to in section 17(2);
(k) any other body that is declared, or to the extent that it is declared, by an Order under subsection (3)(a) to be an organisation for the purposes of this subsection

However, the Act does not apply to a Commonwealth-regulated organisation or an entity that is declared, or to the extent that it is declared, by an Order under section 13(3)(b) not to be an organisation for the purposes of subsections (e), (f) or (g).

Therefore, it is clear that the police may only apply to Victorian public sector organisations, including local councils, courts and tribunals and other statutory bodies, but may not apply to Commonwealth bodies, such as Centrelink.

Last updated: 29 March 2018

2.1.7 Case Management

Mention date

All applications, whether made by application and warrant, application and summons or Family Violence Safety Notice will be returned to a mention date.

In most magistrates' court venues, specific days in a dedicated court room are allocated for the mention of family violence intervention order matters.

Many courts have established procedures for court meetings prior to commencing calling matters on. A morning co-ordination meeting chaired by the registrar involves a police prosecutor, lawyers from Legal Aid and community legal centres and, where applicable applicant and respondent support workers or other support agencies who maintain a presence at the relevant court venue. These meetings enable all the relevant practitioners to gain an understanding of the cases that are contested and any issues regarding security or service that may arise.

The Mention Date checklist identifies matters that must be addressed at first mention.

The court must determine:

- whether an interim order is in place and, if not, whether an interim order is warranted;
- Either:
    - if the respondent is not present at court, whether he or she has been served with the application and summons; and
    - if the respondent is present, whether he or she will contest the final intervention order.

The court may make a final intervention order at a mention hearing where:

- all parties to the proceeding have consented to, or do not oppose, the making of the intervention order; or
- the court is satisfied that the respondent was served with the application and has not attended the hearing and is satisfied that the circumstances warrant making a final intervention order according to the test in FVPA s 74 (the respondent has committed family violence and is likely to do so again.

Alternatively, the court may conduct a contested final hearing on the mention date if:

- all parties have had the opportunity to get legal advice and representation;
- all parties consent to progressing to the final hearing; and
- the court determines that it is fair and just to all parties for the application to be heard at that time.

(FVPA s 61]

See 2.2 Making intervention orders for assistance on making interim or final intervention orders or 2.4 Hearings for guidance on conducting hearings.

Directions hearing

Directions hearings allow the court to identify and attempt to resolve some issues in dispute and manage the progress of the hearing. Alternatively, the hearing may assist the parties to narrow the issues in dispute, identify the number of witnesses required, the presence of protected witnesses and any special needs of witnesses such as alternative arrangements or interpreters. The hearing may also allow the court to give direction or make orders regarding legal representation. Directions hearings are not mandatory and in some cases may delay resolution of the case and increase the burden on the parties. A directions hearing may be held on the first mention date, or at any later date, where a contested final hearing is anticipated. Directions hearings are particularly useful where:

- the respondent or the applicant require representation; or
- alternative arrangements for giving evidence are appropriate.

Prohibition on personal cross-examination of protected witnesses

The FVPA prohibits the respondent from personally cross-examining the affected family member or any other 'protected witnesses' unless:

- the protected witness is an adult;
- the protected witness consents to being cross-examined;
- if the protected witness has a cognitive impairment, the court is satisfied the witness is competent to give evidence and understands the nature and consequences of consenting to being cross-examined; and
- the court decides that cross-examination will not harm the protected witness.

(FVPA s 70(3)]

The following people are protected witnesses for the purpose of the FVPA:

- the affected family member or the protected person;
- any child;
- any family member of a party;
- any person the court declares to be a protected person because the court is satisfied the person:
    - has a cognitive impairment; or
    - otherwise needs the protection of the court.

If the respondent does not have legal representation at the first mention hearing, the court must warn him that he may not personally cross-examine protected witnesses and ask if he has sought legal representation or had a reasonable opportunity to do so. The court should also tell the respondent that if he does not obtain legal representation after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid (VLA) to offer representation for the purpose of cross-examining protected witnesses on the respondent's behalf. Finally, the court should warn the respondent that if he refuses VLA assistance or does not cooperate with VLA:

- that he or she is prohibited from cross-examining protected witnesses about events relevant to the application; and
- that the respondent may not lead evidence from his or her own witnesses about those events.

(FVPA s 71(4)]

The court must adjourn proceedings if it satisfied that the respondent has not had a reasonable opportunity to obtain representation.

(FVPA s 70(4)]

If the respondent has not obtained legal representation, despite having a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer representation for the purpose of cross-examining protected witnesses on the respondent's behalf.

(FVPA s 71]

When making an order under s 71, the court should provide the respondent with a VLA financial statement and a reply paid envelope, which will be provided to court registries by VLA. The court should instruct the respondent to return the completed form to VLA within a week.

If the court is satisfied that a respondent has not refused an offer of assistance or has not refused to cooperate, and the court adjourns the matter to allow the respondent to again seek legal representation, the respondent may be referred back to VLA under the original order, rather than making a new order.

VLA should be advised of the court's action.

In addition, the court must order VLA to provide representation to an unrepresented *applicant* (except police officers) when the following conditions are met:

- the respondent is prohibited from personally cross-examining a protected witness; and
- the respondent is legally represented; and
- the protected witness is the applicant, is not a police officer and is not legally represented.

(FVPA s 72]

Final Hearing

The conduct of hearings in discussed in 2.4 - Hearings with particular focus on procedure and evidence.

Guidance for making final orders and the conditions attached are discussed in 2.2.2 - Final intervention orders

There is a Mandatory Considerations checklist to guide judicial officers when deciding on conditions for intervention orders.

Last updated: 8 November 2011

2.1.8 After an order is made

Variation, Revocation and Extension of intervention orders

A full discussion of applications and hearings to change intervention orders can be found in 2.3 - Changing orders.

The court may order the variation, revocation or extension of a family violence intervention order on the application of a party to the proceeding (or where appropriate their parent/guardian) and, under limited circumstances, on its own initiative.

(FVPA ss 100, 106]

In deciding whether to vary or revoke an order, the court must have regard to all the circumstances and in particular:

- the applicant's reason for seeking the alteration;
- the safety of the protected person;
- whether the protected person is represented;
- the views of the protected person (or their guardian) on the requested changes.

The FVPA also allows the court to make an interim order varying a family violence intervention order. When making an interim variation of an intervention order, Division 1 and Division 2 of Part 4 of the Act apply with any necessary changes as if the interim variation were an interim order.

(FVPA s 101]

Prior to changing an order, the court must decide whether:

(a) there has been any change in the need to protect another person protected by the order from being subjected to family violence by the respondent for the family violence intervention order; and
(b) there are any other persons who, since the order was made, have become family members of the respondent for the family violence intervention order or protected person; and
(c) there are any Family Law Act orders in existence in relation to-

    (i) where and with whom a child who is referred to in paragraph (a) or (b) lives; or
    (ii) the respondent for the order spending time with or communicating with the child.

If there are relevant Family Law orders, the court should consider exercising its power under s 68R of the *Family Law Act 1975* to revive, vary, discharge or suspend the Family Law order.

(FVPA s 102]

Appeals and re-hearings

Procedures and limitations on appeals and re-hearings are discussed in 2.8 - Rehearings and 2.9 - Appeals.

Parties to a proceeding may appeal against an order or a refusal to make an order, except against an interim order or a refusal to make an interim order.

(FVPA s 114]

Appeals are generally to the County Court. However, appeals against decisions by the President of the Children's Court are made to the Trial Division of the Supreme Court.

(FVPA s 115]

If an appellant fails to appear at a mentions date or at the time listed for the hearing of the appeal, the County Court or Supreme Court, as the case requires, may strike out the appeal or adjourn the proceedings on any terms that the court considers appropriate. Section 118A specifies the procedure and requirements that must be adhered to if the court strikes out an appeal.

The County Court or the Supreme Court may set aside an order striking out an appeal because of the appellant's failure to appear, if the appellant satisfies the court that the failure to appear was not due to fault or neglect on the part of the appellant. If the court sets aside the order striking out the appeal, the court must order the reinstatement of the appeal per s 118A(6).

(FVPA s 118A]

Appeals are by way of rehearing.

(FVPA s 119]

A person may not bring a further appeal beyond the County Court (or under s 115(b), the Trial Division of the Supreme Court).

(FVPA s 120; *Gao v Zhang* [2002] VSCA 19]

A respondent to a final order or a declared vexatious litigant may apply to the same court that heard the matter at first instance for a rehearing of the proceeding where the court is satisfied on the balance of probabilities that:

- the application for the order:
    - was not personally served on the respondent; and
    - was not brought to the respondent's attention following alternative service; or
- there are exceptional circumstances and a rehearing is fair and just in all the circumstances of the case.

(FVPA s 122(1)]

Exceptional circumstances could include where a non-English speaking person attended the court venue on the required day but was inadvertently directed to the wrong courtroom and missed the hearing.

[*Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Act* 2010, Explanatory memorandum clause 29]

A respondent or a person declared to be a vexatious litigant applies for a rehearing by filing an application at the venue of the court that made the final order. The application must be supported by an affidavit. The applicant does not need to obtain the leave of the court before making the application for rehearing. However, if the rehearing application is struck out due to failure to attend, the respondent or declared vexatious litigant must obtain leave before applying for a further rehearing.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 13.01, *Children's Court (Family Violence Protection) Rules 2018* r 12.01]

Transitional matters

Sections 118A and 118B apply to an appeal filed on or after the commencement of s 33 of the *Family Violence Protection Amendment Act 2017*.

Contravention of intervention orders

Contravention of intervention orders is a criminal offence. See 4.1 Contravention of an intervention order.

Last updated: 6 August 2010

2.1.9 Non-Application of Magistrates' Court Act and Magistrates Court Civil Procedure Rules

Section 170 of the FVPA states:

> Part 5 (other than sections 100(1)(d) and 109) of the **Magistrates' Court Act 1989** and any rules made under that Act in relation to civil proceedings (other than rules made for the purposes of section 109 of that Act) do not apply to proceedings under this Act or a proceeding for a variation, extension or revocation of a recognised DVO.

Section 100(1)(d) of the *Magistrates' Court Act 1989* confers jurisdiction on the Magistrates' Court to hear any matter where jurisdiction is conferred by another Act, while s 109 gives parties a right of appeal to the Supreme Court in civil proceedings on a question of law.

Last updated: 13 February 2018

2.2 Making intervention orders

This section looks at the court's power to make interim and final intervention orders under the FVPA. It also examines the conditions a court can include in an order and the use of undertakings as a substitute for an intervention order.

Last updated: 20 April 2010

2.2.1 Interim intervention orders

Interim intervention orders are designed to provide urgent, short-term protection for an affected family member. The orders may be made ex-parte, without notice to the respondent and without giving the respondent a full hearing. The purpose is to protect the affected family member until the court can consider whether to make a final intervention order.

[See VLRC, Final report, 7.1]

Under the Act, there are a number of common issues between interim orders and final orders. These matters are generally dealt with in greater detail in the sections on final orders.

Power to make interim intervention orders

The court may make an interim intervention order if:

- it is necessary, pending a final decision about an application, to ensure the safety of the affected family member, preserve property of the affected family member or protect a child; or
- the parties consent to, or do not oppose, the making of an interim order; or
- a family violence safety notice has been issued and there are no circumstances to justify discontinuing protection until the court makes a final decision on the application.

(FVPA s 53]

The court may make an interim order even if:

- some or all of the alleged family violence occurred outside Victoria, provided the affected family member was in Victoria at the time of the violence; and
- the affected family member was outside Victoria when the alleged family violence took place, provided the alleged family violence occurred in Victoria.

(FVPA s 53(3)]

The court may make an interim order at any time after the making of an application for a family violence intervention order and before the final decision about the application is made, and may do so whether or not the court has previously made or refused to make an interim order.

(FVPA s 53(4)]

Court must make interim intervention orders for a child if court makes an interim order for an affected family member

The court must make an interim order for a child if court makes an interim order for an affected family member if:

- the court makes an interim order under s 53(1) in relation to an affected family member; and
- the court is satisfied (on the balance of probabilities) that a child has been subjected to family violence committed by the respondent (whether or not that child is an affected family member)

Unless the interim order was made by consent, the court must:

- If the child's need for protection is substantially the same as that of the affected family member, include the child in the interim order as a protected person; or

- Otherwise, make a separate interim order for the child as a protected person.

If the court makes the interim order by consent under s 53(1)(b), and that order does not include the child, the court must make a separate interim order for the child as a protected person.

The court is not required to include the child in the interim order or to make a separate interim order to protect the child if the court is satisfied that it is not necessary to do so to protect the child or ensure the safety of the child pending a final decision about the application.

(FVPA s 53AA]

The court can make an interim order for a child on its own motion

If, on a hearing for an interim order, the court does not make an interim order in relation to an affected family member, the court may, on its own initiative, make an interim order for a child as a protected person if satisfied that:

- The child has been subjected to family violence, and
- An interim order is necessary to protect the child pending a final decision about the application.

For the purpose of the Act, an interim order for a child on the court's own motion is treated as an interim order under section 53.

For the purposes of any proceeding for any final order, the applicant for the order will be the affected family member who made the initial application, or the person who made that application on their behalf, or Chief Commissioner of Police as appointed by the court.

The respondent to the initial application and the child are parties to the proceeding.

The court may appoint the Chief Commissioner as the applicant if satisfied that the Chief Commissioner was not the initial applicant and the appointment is necessary in all the circumstances. Once the appointment is made the Chief Commissioner of Police must be given a copy of the interim order which makes that appointment and a copy of the application.

(FVPA s 53AB]

Section 52A of the FVPA, added by s 5 of the *Family Violence Protection Amendment Act 2017*, provides that before deciding whether to make an interim order under s 53, the court must consider whether there are any children who have been subjected to family violence committed by the respondent.

(FVPA s 52A]

Section 53(3) of the FVPA was added by section 200 of the *Personal Safety Intervention Orders Act 2010*. It ensures that the court may make interim orders provided that either the affected family member was in Victoria, or the alleged violence was committed in Victoria, at the time of the alleged violence.

The court can make an interim order in bail or criminal proceeding on its own motion

In certain situations, a court may make an interim order against an accused if it is satisfied on the balance of probabilities that the interim order is necessary to ensure the safety of the family member pending a decision about a final order.

The court may make this order in two situations:

1. **On an application or appeal relating to bail**. This refers to an application for bail, to vary conditions, extend or revoke bail, or appeals under s 18A or 18AG of the Bail Act 1997.
2. **In a criminal proceeding.** This includes any stage of the criminal proceeding. Once made, the order remains in force regardless of any future developments in the criminal proceeding. The prosecutor is not a party to the intervention order proceeding and has no standing or status for the purposes of the making of the interim order.

The court must not make an interim order on its own motion in a bail or criminal proceeding if there is an existing family violence intervention order or the proposed protected person has already applied for an intervention order.

An interim order under ss 60B or 60C must be made on the material before the court in the hearing of the application or appeal relating to bail, or in the criminal proceeding.

(FVPA ss 60B–60E]

This own motion power is narrower than the general interim order power in s 53, as it is only concerned with ensuring the safety of the family member, and not with protecting property.

See 1.3 People covered by the Act for further information as to who a family member includes.

If a court makes an interim order under ss 60B or 60C, and the court is satisfied on the balance of probabilities that a child has been subjected to family violence by the accused, the court must either include the child on the interim order as a protected person (if the child's need for protection is substantially the same) or make a separate interim order for the child as a protected person. However, the court is not required to make an order protecting the child if it is satisfied that it is not necessary in order to protect the child or ensure the safety of the child pending a decision about a final order

(FVPA s 60F]

FVPA s 60F is substantially equivalent to FVPA s 53AA, which also creates an obligation to make orders protecting a child where the court makes an interim order. Unlike FVPA s 53AA, s 60F does not (and does not need to) consider the implications of consent interim orders, and there is no requirement for a residual power to make orders protecting a child (see FVPA s 53AB), because the general own motion power in ss 60B and 60C is equally applicable to both children and adults.

In deciding whether to make an interim order, the court must not take into account whether the respondent is, or has been, subject to a direction or detention by police under Division 1, Part 3 of the Act. The Explanatory Memorandum states that holding powers are civil powers and therefore should not affect the court's assessment of the seriousness of the incident or the need for an interim order.

(FVPA s 53, Explanatory memorandum cl 53]

The Act defines "safety" as safety from family violence. Ensuring the safety of the affected family member therefore means protecting the affected family member from *all forms of family violence,* including:

- physical or sexual abuse; or
- emotional or psychological abuse; or
- economic abuse; or

- threats; or
- coercion; or
- conduct that controls or dominates the affected family member and causes the affected family member to feel fear for their own safety or wellbeing, or the safety and wellbeing of another person

(FVPA ss 4, 5]

The Act does not oblige the court to give reasons for its ultimate decision in relation to an application for a family violence intervention order, nor does it require the court to give reasons for any particular part of such a decision.

[*YY v ZZ & Anor* [2013] VSC 743 at [107]]

Despite this, there may still be an implied obligation to give reasons for the overall decision, as well as particular part/s of it. Failure to do so however, may not affect the validity of the decision or the part thereof.

[*YY v ZZ & Anor* [2013] VSC 743 at [108]; see also *Bloomfield v Haralabakos* [2007] VSC 279 at [13]; *Kerr v Colley* [2002] VSC 209 at [16]; *Kocak v Wingfoot* [2012] VSCA 259]

Comparing tests for interim and final intervention orders

The tests for interim and final orders examine different factual matters. Leaving aside consent orders and safety notices, the court may make an interim order if it is satisfied, on the balance of probabilities, that the order is necessary pending a final decision:

(iii) to ensure the safety of the affected family member; or
(iv) to preserve the property of the affected family member; or
(v) to protect an affected family member who is a child who has been subjected to family violence by the respondent.

(FVPA s 53(1)(a)]

On an application for an interim order, the court does not need to find that family violence has occurred.

In contrast, the test for a final order is whether the court is satisfied that the respondent has committed family violence against the affected family member and is likely to do so again.

In many situations, these two tests will produce the same result, as an order will not be necessary unless the respondent is likely to commit further family violence. However, judicial officers hearing applications for interim orders will focus on the test in s 53 and will often need to make a decision quickly based on limited evidence.

See the Family Violence resource page for guidance on MARAM and assessing risk on an application for an interim order.

One unresolved issue is whether the court needs to decide that the affected family member and respondent are "family members" before it can make an interim order. The need to determine this matter will depend on which ground of s 53(1) the court proposes to rely upon when making an interim order.

It is clear that the court does not need to make a final decision on this matter before making an order under s 53(1)(c) if a family violence safety notice has been issued (see *Zion-Shalom v Magistrates' Court of Victoria & Ors* [2009] VSC 477). Also, it is clear that under s 53(1)(a)(i), the court must be satisfied that the affected family member and the respondent are family members, because "safety" means safety from family violence, and family violence can only occur between family members (see FVPA ss 4, 5).

However, it is unclear whether the court must be satisfied that the affected family member and the respondent are family members before acting under s 53(1)(a)(ii) to preserve the property of the affected family member or s 53(1)(b) where the parties consent to or do not oppose the making of the order. The definition of "affected family member" does not incorporate any requirement that the person be a family member of the respondent. The definition only looks at whether the person would be the beneficiary of a family violence intervention order. Therefore, s 53(1)(a)(ii) and s 53(1)(b) do not expressly require the court to be satisfied that the affected family member and respondent are family members before the court can make an interim order. In some cases, this will not be resolved until the court considers whether to make a final order.

Interim orders for more than one affected family member

The court may include more than one person on an interim intervention order where:

- the test for making an intervention order under s 53(1)(a) is satisfied for each affected family member; or
- the court makes an interim order other than by consent and a child's need for protection is substantially the same as the affected family member
- all the parties, including each affected family member, have consented to or do not oppose the application in accordance with s 53(1)(b); or
- a family violence safety notice was issued for each affected family member and the court is satisfied that there are no circumstances that justify discontinuing the protection for each of the affected family members in accordance with s 53(1)(c).

(FVPA ss 53AA, 56]

Evidentiary requirements for making interim intervention orders

The court can make an interim intervention order if:

- the parties consent or do not oppose the making of the order; or
- the application is supported by oral evidence or an affidavit;
- the application is made by the issue of a certified family violence safety notice.

(FVPA s 55]

While certified family violence safety notices will generally be sufficient evidence for the making of an interim order, if the court is considering whether to refuse to admit or limit the use to be made of the family violence safety notice under s 65(3), it must first consider whether it is reasonably practicable to obtain oral or affidavit evidence.

(FVPA s 55(3)]

The Act explicitly states that the affected family member is not obliged to give evidence before the court makes an interim order.

(FVPA s 55(2)]

The applicant may call other relevant witnesses, such as:

- a police officer who attended in response to a family violence incident;
- a family member or friend who witnessed family violence; or
- a medical practitioner who treated the affected family member for injuries inflicted during a family violence incident.

[See FVPA Explanatory memorandum Clause 55]

If the application does not contain sufficient evidence, the affected family member does not wish to give evidence and there are no other witnesses available, then the court may not make an interim order at that time and will adjourn the proceeding. Any relevant family violence safety notices will lapse, as the court has not made an order on the first mention date (see FVPA s 30).

Evidence from the respondent and cross-examination of the applicant

The court does not need to allow the respondent to present evidence or test the applicant's evidence before making an interim order.

On a contested hearing for an interim order, a judicial officer may:

- consider affidavit and oral evidence without permitting cross-examination; and
- refuse to allow the respondent to give evidence; and
- allow the applicant and respondent to make submissions regarding whether the court should make the order and the appropriate conditions.

This significant departure from the ordinary rules of procedural fairness is justified on several bases.

First, the purposes of the Act are to:

(a) maximise safety for children and adults who have experienced family violence; and
(b) prevent and reduce family violence to the greatest extent possible; and
(c) promote the accountability of perpetrators of family violence for their actions.

(FVPA s 1]

Secondly, s 54 of the Act allows the court to make interim orders regardless of whether the respondent has been notified of the application or is present in court for the hearing. This supports the conclusion that, even if the respondent is present, the court does not need to allow him to give evidence.

Thirdly, according to the second reading speech, the purpose of interim orders is to provide short term protection until the court can hear all the evidence. Allowing the respondent to call evidence may frustrate this process.

[see Victorian Parliamentary Debates, Legislative Assembly, 26 June 2008, 2646]

Finally, the Statement of Compatibility for the FVPA states that the power to make interim orders may involve compromising the respondent's right to procedural fairness. Nevertheless, given that the orders are transient and they are not final determinations of rights and responsibilities, the right of the affected family member to be protected from violence justify the curtailment.

[see Victorian Parliamentary Debates, Legislative Assembly, 26 June 2008, 2644]

In *Zion-Shalom v Magistrates' Court of Victoria & Ors* [2009] VSC 477, Harper J considered the requirements of procedural fairness when making interim intervention orders. The respondent was present in court for the hearing after being served with a family violence safety notice. The magistrate allowed a few minutes for the respondent to brief counsel and allowed counsel to make submissions to the court. These submissions outlined the evidence the respondent was prepared to give. The magistrate then refused to allow the respondent to give the proposed evidence. Harper J held that this process provided the magistrate with sufficient information to determine that there were no circumstances which justified discontinuing the protection provided by the family violence safety notice. His Honour said at [13]:

> Since it is clear that the legislation contemplates a magistrate reaching the required state of satisfaction on an ex-parte application for an interim order, and without even hearing any evidence from the alleged victim, there is an obvious difficulty in arguing that the magistrate failed to accord the plaintiff procedural fairness when she indicated that she did not have time to allow him to give evidence or, through his counsel, to cross-examine the alleged victim.

While the interim order process curtails the respondent's right to procedural fairness, it is important to balance the purposes of the Act, the right of the affected family member to be free from violence and the right of the respondent to a fair hearing. As Ashley J warned in *Hickman v Smith & Ors* [2003] VSC 126 at [8]:

> Something should be said, I think, about the jurisdiction to grant an interim intervention order. Whether such an order is made in the presence or absence of the defendant, it is an order which has far-reaching consequences. Of course the safety of the complainant is a crucial consideration. But it must be remembered that if such an order is made the consequences for a defendant are serious indeed. His or her conduct is inhibited; and any failure to abide the order constitutes an offence which may lead to the imposition of substantial penalties. Moreover, the order is made having heard one side of things only.

Hickman v Smith was decided under the CFVA and these comments were clearly obiter. The preamble and purposes sections of the FVPA reveal a strong focus on protecting people from family violence. As Harper J recognised in *Zion-Shalom v Magistrates' Court of Victoria*, this may compromise some aspects of procedural fairness. Despite these countervailing factors, Ashley J's remarks reveal an important consideration that forms part of the balance of where the interests of justice lie when deciding whether to grant an interim order.

Evidentiary issues and procedural fairness are discussed further in 2.4 - Hearings.

Consented or unopposed interim intervention orders

The court may make an interim intervention order when all the parties consent to or do not oppose the making of an interim order.

(FVPA s 53(1)(b)]

When the parties consent to or do not oppose the making of an order, the court does not need to consider whether the order is necessary for one of the purposes specified in s 53(1)(a) or (1)(c). The court also does not require evidence in support of the application. The Act allows the court to make the order solely on the basis that all the parties consent to or do not oppose the order.

(FVPA s 55(1)]

Under s 4 of the Act, a "party" to a proceeding includes the affected family member (whether or not he or she is the applicant), the applicant (if the affected family member is not the applicant) and the respondent. As a result, if the application was brought by a person other than the affected family member, the court must ensure that the affected family member, the applicant and the respondent all consent to, or do not oppose, the order.

(FVPA s 4]

See also 2.2.2.1 Power to make final intervention orders for a discussion on making consent orders.

Consent orders and children or the cognitively impaired

The Act allows the court to make an interim consent order even if the affected family member or respondent is a child, cognitively impaired or is subject to a guardianship order under the *Guardianship and Administration Act 1986*. However, as a party to the proceeding, the affected family member, the respondent and the applicant must all consent to or not oppose the order.

In contrast, the Act requires the court to be satisfied of the basis for the order if the respondent is a child before making a final order by consent.

Consent orders without admissions

Section 53(1C) allows a respondent to consent to an interim order without admitting the substance of the allegations.

Consent without admission to an interim order will not provide the basis for a final order.

Consent orders made without admissions may have implications for any subsequent proceedings for contravention of the order and the use that can be made of material from the intervention order hearing in proceedings relating to a contravention. See 4.1.3 Discussion for further discussion.

Interim intervention order following a family violence safety notice

When the application for an interim order is commenced by the police issuing a family violence safety notice, the court may make an interim order at the first mention hearing if the court is satisfied, on the balance of probabilities, that there are no circumstances that would justify discontinuing the protection of the affected family member until a final decision.

(FVPA s 53(1)(c)]

This is an additional ground that only applies if the police issued a family violence safety notice. The court can still grant interim orders by consent under s 53(1)(b) and, if appropriate, make an interim order under s 53(1)(a).

Use of a certified family violence safety notice in substitution for oral or affidavit evidence was introduced by the *Justice Legislation Amendment (Victims of Crime Assistance and Other M atters) Act 2010.* The explanatory memorandum states that this provision was added to address 'difficulties and inefficiencies' that arose, particularly when neither the police applicant or the affected family member are present or available at the first mention hearing. While certified family violence safety notices will generally be sufficient evidence for the making of an interim order, if the court is considering whether to refuse to admit or limit the use to be made of the notice under s 65(3), it must first consider whether it is reasonably practicable to obtain oral or affidavit evidence.

(FVPA s 55(3)]

The reference in s 55(3) to excluding or limiting the evidentiary value of a certified family violence safety notice arguably implies that the court has the power to adjourn the mention hearing, and extend the family violence safety notice, if it considers it necessary and reasonably practicable to obtain oral or affidavit evidence. Otherwise, the protection offered by the safety notice would lapse due to an evidentiary ruling the applicant could not necessarily have anticipated, given the evidentiary status the Act gives to safety notices. However, it remains unclear whether this is permissible, as s 30(1)(b) of the Act states that a family violence safety notice expires if the court refuses to make an interim intervention order on the first mention date.

The court may only make an interim order following a family violence safety notice if the application is supported by oral or affidavit evidence, with several exceptions (see 2.1.4.3.2 Application and summons for further information, including exceptions to this rule). The printed form of Family Violence Safety Notice only provides for certification by the police. If the police applicant or the protected person is not able to attend court on the first mention date, the prosecutor may file an affidavit stating the basis for the safety notice which will usually attach the safety notice as an exhibit.

[see FVPA s 55]

The court has no power to extend or vary family violence safety notices. The protection provided by the family violence safety notice ceases on the first mention date unless the court makes an interim intervention order. If the court makes an interim order, it must determine the appropriate conditions and is not limited to repeating the conditions on the safety notice.

[see FVPA s 30(1)(b)]

Intervention orders already in place

A person should not apply to the court for a further order in relation to the respondent if there is already an intervention order in place. Instead, the applicant should apply to vary the existing order. A court may also make interim variations.

[see FVPA ss 100, 101]

See 2.3 Changing orders for a full discussion on varying, extending and revoking intervention orders.

However, where a person is protected by a recognised DVO made in another jurisdiction, *National Domestic Violence Order Scheme Act 2016* s 25(2)(e) specifies that the practicality of the applicant applying for a local order with similar prohibitions or restrictions is a matter a court may consider in deciding whether to hear an application to vary or revoke a non-local DVO.

Interim orders and associates

Section 76 of the FVPA, entitled "Associated final orders" gives the court power to make orders to protect an associate of the protected person or an associate of the respondent. Subsection (3)(b) states:

> this Act applies to an associated final order and an application for the order as if they were the original final order and the application for the original final order respectively.

Despite the general language of this provision, the court cannot make interim orders for associates.

Interim orders for associates are inconsistent with the policy of the Act. The provisions regarding orders for associates were added in response to the VLRC report and designed to be limited to when the court makes a final order. Applications for interim orders must be determined quickly, based on limited evidence. It is not appropriate to investigate complex questions about the relationship between the affected family member, the respondent and a potential associate at a hearing for an interim order.

While the interaction of the various statutory provisions is complex, it appears that the Act generally gives effect to this policy. First, s 76(3)(b) states that the Act applies to an application for an associated final order as if it were an application for the original final order. Second, s 4 defines an "affected family member" to include an associate who seeks protection under an associated order and defines "safety" as safety from family violence. Thirdly, s 5 defines "family violence" as certain kinds of behaviour towards a family member. Fourthly, under s 53, the court may make an interim order if a person has applied for a family violence intervention order and the court is satisfied that an interim order is necessary to ensure the safety of the affected family member, to preserve the property of the affected family member or to protect a child who has been subject to family violence committed by the respondent.

The result of these four discrete points it that while associates are an "affected family member" and have applied for a family violence intervention order, conduct by the respondent to the associate will not threaten the "safety" of the associate, because unless the associate is a family member, he or she cannot suffer "family violence". The only bases for granting an order in relation to an associate are if the order is necessary to preserve the property of the associate, or if the parties consent. Even then, it requires a strict interpretation and application of several related provisions in a way that is inconsistent with the common understanding of the Act. If the associate requires urgent protection, he or she should make a separate application under either the FVPA or the *Personal Safety Intervention Orders Act 2010*, depending on the nature of the alleged conduct and the relationship between the associate and the respondent.

See 2.2.2.1 Power to make final intervention orders for information on the court's power to make orders over associated respondents or to protect associates of the affected family member.

Conditions of interim intervention orders

The court may include any conditions on an interim intervention order that appear to be necessary or desirable in the circumstances. The court's power to impose conditions on an interim order closely follows the available conditions on a final order. The key difference is that a court may only suspend a firearms authority, weapons approval or weapons exemption on an interim order, while the court may cancel these authorisations when it makes a final order.

A judicial officer should consider the MARAM when determining the appropriate conditions for an interim order. See the Family Violence resource page for guidance.

In contrast to final orders, there is no restriction on the available conditions for an interim order when the affected family member did not consent to the application (compare FVPA s 75). A court could, in principle, impose exclusion or non-approach conditions on an interim order contrary to the wishes of the affected family member, if the court considered that this was appropriate in the circumstances of the case.

This may be appropriate when police officers apply for an order without the consent of the affected family member. The court may find that it is necessary to exclude the respondent from a shared residence on an interim basis, despite paragraph (d) of the preamble which requires the court to treat the views of victims with respect. Separating the parties in this way may be necessary to prevent ongoing violence. It may also allow the affected family member to obtain legal advice or allow child protection workers to assess the safety of any children of the relationship. While the Act prevents the court imposing an ongoing exclusion condition, the relevant policy factors do not apply with the same force on an interim basis.

Duration of interim intervention orders

An interim order ends when:

- the final order is served on the respondent, if the court orders that the interim order continues until service when making the final order; or
- the court makes a final order, if the court does not order that the interim order continues until the final order is served; or
- the court refuses to make a final a order; or
- the court revokes the interim order; or
- the application for an intervention order is withdrawn.

(FVPA s 60]

As interim orders are designed to provide temporary protection until the court determines whether to make a final order, the court does not need to specify the duration of an interim order.

Interim orders can be source of frustration to respondents. While interim orders are necessary to ensure the safety of the protected person, the orders are usually made on limited evidence and impose significant restrictions on the respondent's liberty until the application is finally determined. Courts should endeavour to dispose of intervention order proceedings in a timely manner, as these proceedings are frequently emotionally charged. FVPA s 59 requires a court that makes an interim order to list the matter for decision about a final order as soon as practicable.

Although interim orders continue until the court makes a final order, the court must fix a return date. This return date must give sufficient time for the order to be served and to allow the respondent to obtain legal advice. The following periods may provide some general guidance on a suitable return date:

- if the court imposes an exclusion condition, or other significant limit on the respondent's liberty, one week from the date of making the interim order;
- if the parties are separated and there are no time pressures on hearing from the respondent, two weeks from the date of making the interim order;
- if the respondent must be served in another State or Territory, three weeks from the date of making the interim order.

Inconsistency with other orders

Under the *Family Law Act 1975* (Cth), state courts of summary jurisdiction may revive, vary, suspend or dischargeFamily Law Act orders, including injunctions and undertakings, when making family violence intervention orders. When varying a Family Law Act order in conjunction with an *interim* intervention order:

- the court may not *discharge* a Family Law Act order (but can do so when making a final intervention order); and
- any reinstatement, variation or suspension of a Family Law Act order is interim - the variation ceases after 21 days or when the interim intervention order ends, whichever occurs first.

[*Family Law Act 1975* ss 68R, 68T]

In most cases it will not be possible to hear and determine a contested final order within 21 days. The court should advise the applicant to seek legal advice about applying to the Federal Magistrates' Court or the Family Court to vary Family Law Act orders as soon as possible, as it will often be difficult to obtain orders from the Family Court in the time available. Victorian courts cannot make multiple interim variations of a Family Law Act order. As intervention orders are invalid to the extent of any inconsistency with Family Law Act orders, the protected person must act promptly, as the Family Law Act orders will be restored after 21 days and may override parts of the interim intervention order.

Interim intervention orders prevail over any inconsistent child protection orders. However, when the Children's Court makes a child protection order, it may vary any existing intervention orders, including existing interim orders.

See 2.6 Interaction with family law and 2.7 Interface with Children, Youth and Families Act 2005 for further information on the interaction between intervention orders, Family Law Act orders and child protection orders.

Explanation of interim intervention orders

If the court makes an interim intervention order, and the respondent or protected person (or both) are before the court, the court must explain to the respondent and protected person (or whichever of them is before the court) the following matters:

(a) the purpose, terms and effect of the interim order;
(b) the consequences and penalties that may follow if the respondent fails to comply with the terms of the interim order;
(c) when the interim order expires and the means by which the interim order may be varied;
(d) for the respondent, that the interim order is a civil order of the court and the protected person cannot give permission to contravene the interim order;
(e) the process for deciding the final order;
(f) how the order interacts with a Family Law Act order or an order under the *Children, Youth and Families Act 2005*;
(g) if the court has varied, suspended, revoked or revived a Family Law Act order because it is inconsistent with the interim order, the purpose, terms and effect of the variation or suspension;
(h) any relevant family violence services offering legal, emotional or practical support that may be available to the protected person or respondent.

(FVPA ss 57(1), 57A(2)]

This also applies to interim orders made in criminal proceedings or during a bail application or appeal.

(FVPA s 60G(1)]

This explanation must be a clear oral explanation.

(FVPA ss 57(2), 57A(3), 60G(12)]

A written notice including the matters referred to above, in the form prescribed by the rules, must:

- be given to the protect person with a copy of the interim order; or
- in the case of an adult respondent, be given to the respondent with a copy of the interim order if the respondent is before the court;
- in the case of a child respondent, or an adult respondent who is not before the court, be served on the respondent with a copy of the interim order

(FVPA ss 57(2A), 57A(4)]

This written notice may include any additional information that the court considers necessary to explain the interim order.

The prescribed explanation is provided in Form 1A of the Magistrates' Court (Family Violence Protection) Rules 2018 (Vic) and Form 1AA of the Children's Court (Family Violence Protection) Rules 2018 (Vic).

(FVPA s 57]

Failure to explain orders does not affect the validity of the interim order. However, in the case of an adult respondent, providing the explanation allows the order to be enforced without the need to serve a copy of the order on the respondent. 4.1 - Contravention of an intervention order.

Form 1A of the Magistrates' Court (Family Violence Protection) Rules 2018 (Vic) informs the parties of the following matters:

- what an interim order is; and
- identifying the parties to an interim order; and
- the effect of contravening an interim order; and
- that the protected person cannot consent to a contravention; and
- the duration of an interim order; and
- when the court will decide whether to make a final order; and
- variation of an interim order; and
- interaction between interim orders and orders under the *Family Law Act 1975* and the *Children, Youth and Families Act 2005*.

An interim order is valid despite a failure to comply with the requirement to explain the order (FVPA ss 57, 57A(6) , 60G(2)). However, in the case of an adult respondent, receiving the explanation allows the order to be enforced even if the order has not been served. See 4.1 Contravention of an intervention order.

(FVPA s 123]

If the court makes an interim intervention order on the application of a police officer by facsimile (after-hours or from a remote location), the court will fax the order and completed application back to the police officer. This will provide:

- the terms of the order; and
- the period of operation of the order; and
- the venue, date and time of the first mention date for the application.

(FVPA s 58]

Last updated: 10 December 2019

2.2.2 Final intervention orders

2.2.2.1 Power to make final intervention orders

A court may make a final intervention order if:

- the court is satisfied on the balance of probabilities that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again (FVPA s 74(1)); or
- all the parties to the application consent to the court making a final intervention order, or do not oppose the order, unless the respondent is a child (FVPA s 78).

Prior to deciding whether to make a final order under s 74, the court *must* consider whether there are any children who have been subjected to family violence committed by the respondent.

Prior to deciding whether to make a final order under s 76, the court *must* consider whether there are any children who have been subjected to behaviour which would be considered family violence if the child and perpetrator were family members.

(FVPA s 73I]

Section 74(1) was amended by s 203 of the *Personal Safety Intervention Orders Act 2010* to include reference to 'is *likely to continue to do so* or do so again' (emphasis added) to ensure that the court may make a final family violence order where there is a continuing course of family violence or there are discrete acts that are likely to be repeated.

[*Personal Safety Intervention Orders Bill 2010*, Explanatory memorandum cl 203]

Final intervention orders may be made for more than one affected family member against the same respondent where the test for a contested order is satisfied for each affected family member, or all the parties consent to, or do not oppose, the order.

If the court makes a final order in relation to an affected family member, the court must make a final order to protect a child who has been subjected to family violence, unless the court is satisfied that it is not necessary to make an order to protect the child from family violence by the respondent.

(FVPA s 77]

If the court does not make an order in relation to an affected family member, it may, of its own initiative, make a final order to protect a child who is not an affected family member.

(FVPA s 77B]

The Act does not oblige the court to give reasons for its ultimate decision in relation to an application for a family violence intervention order, nor does it require the court to give reasons for any particular part of such a decision.

[*YY v ZZ & Anor* [2013] VSC 743 at [107]]

Despite this, there may still be an implied obligation to give reasons for the overall decision, as well as particular part/s of it. Failure to do so however, may not affect the validity of the decision or the part thereof.

[*YY v ZZ & Anor* [2013] VSC 743 at [108]; see also *Bloomfield v Haralabakos* [2007] VSC 279 at [13]; *Kerr v Colley* [2002] VSC 209 at [16]; *Kocak v Wingfoot* [2012] VSCA 259]

Test for a contested final intervention order

There are two elements to the test for a contested final order. The court must be satisfied, on the balance of probabilities, that:

- the respondent has committed family violence against the affected family member; and
- the respondent is likely to continue to commit family violence against the affected family member or is likely to commit family violence against the affected family member again.

First element – Respondent has committed "family violence"

The court must first make a finding of fact that the respondent has committed family violence against the affected family member. This will often involve two discrete questions:

- is the affected family member a family member of the respondent?
- did the respondent commit *family violence*, as defined in the Act?

The court's determination must be based on the evidence led by the parties at the hearing.

The court may find that the respondent committed family violence even if:

- some or all of the alleged family violence occurred outside Victoria, provided the affected family member was in Victoria at the time of the violence; and
- the affected family member was outside Victoria when the alleged family violence took place, provided the alleged family violence occurred in Victoria.

(FVPA s 74(3)]

Section 74(3) of the FVPA was added by section 203 of the *Personal Safety Intervention Orders Act 2010*. It ensures that the court may make final orders provided that either the affected family member was in Victoria, or the alleged violence was committed in Victoria, at the time of the alleged violence.

The following terms are relevant to determining whether the respondent committed family violence and are defined in Part 2 of the Act and discussed in 1.1 - Family violence:

- domestic partner;
- economic abuse;
- emotional or psychological abuse;
- family member;
- family violence;
- relative.

Second element – Respondent likely to continue to do so or do so again

Once the court is satisfied that the respondent has committed family violence against the affected family member, the court must then consider whether he is likely to continue to do so or do so again.

The term 'likely' has received substantial judicial consideration, but there are no binding decisions on its meaning for the purpose of the FVPA. In its ordinary meaning, it means "probable", though it can also mean a "substantial chance" or a "real and not remote chance". The precise meaning of the word depends on the statutory context.

[see *RJE v Secretary to the Department of Justice* [2008] VSCA 265;
Boughey v R (1986) 161 CLR 10;
Kirby v Phelan [2003] VSC 43;
Attorney-General for the State of New South Wales v Winters [2007] NSWSC 1071]

Predicting future conduct is notoriously difficult. The court should consider the following matters:

- whether the respondent has demonstrated his unwillingness to comply with previous court orders (such as any contraventions of an interim order or any previous family violence intervention orders); and
- the history of the relationship and the respondent's conduct; and
- any prior violent incidents between the respondent and the affected family member; and

- the frequency and seriousness of previous violence.

[See VLRC, Final Report, p30]

When interpreting the statutory context of "likely" for the purpose of the FVPA, the court is faced with two competing principles.

First, the court must adopt an interpretation that promotes the purposes of the Act. As legislation designed to maximise the safety of affected family members and promote human rights such as the right to life, freedom from cruel, inhuman or degrading treatment and protection of families, liberty and property rights, the Act should be interpreted favourably towards affected family members.

The second principle is that intervention orders constitute a substantial interference with the rights of the respondent. The order limits the rights of the respondent, such as his liberty, freedom of movement and property rights. Contravention of the order exposes the respondent to criminal sanctions.

The former factors support a lower standard of "likelihood" that includes a "real and not remote chance", while the latter factors point towards the higher standard of "more likely than not", which is closer to the ordinary meaning of the word "likely". In most circumstances, it is not necessary for a judicial officer to determine the precise meaning of "likely". A court may reach the same conclusion regardless of whether "likely" means "probable", "more than merely possible" or "more likely than not". It will only be in borderline cases that a judicial officer must determine whether a real risk that is lower than "more likely than not" is sufficient under the Act.

Assessing likelihood – Multi-Agency Risk Assessment and Management Framework (MARAM)

The MARAM contains tools to help assess the risk of family violence and suggests a standardised approach to determining risk. Court registrars have received specific resources and training to help determine the risk of family violence when completing applications for intervention orders and considering whether the affected family member requires special arrangements to be safe while at court.

These resources can also assist judicial officers to assess whether respondents are likely to commit further acts of family violence. See the Family Violence resource page for guidance.

Consented or unopposed final intervention orders

The court may make a final intervention order if all the parties consent to the order or do not oppose the order (a "consent order"). When making a consent order, the court does not need to be satisfied of the facts necessary to support a final order under s 74 or s 76.

(FVPA s 78]

This provision addresses the issues raised by *Stephens v Melis and the Magistrates' Court at Moe* (2002) 131 A Crim R 377, which held that under the CFVA, the court still needed to be satisfied of the relevant jurisdictional facts before making an order by consent.

All parties must consent to or not oppose the order

The Act defines "a party" to include the affected family member, the applicant and the respondent. Even if the affected family member did not initiate the application, she is still a party to the application, as well as the applicant.

(FVPA s 4]

A parent of an affected family member or the guardian of an affected family member under the *Guardianship and Administration Act 1986* may apply for the intervention order on behalf of a child or represented person. The parent or guardian is then a party to the proceeding, including for the purposes of consent orders. If a third party brought the application with the consent of the affected family member's parent (see s 45(d)(ii)) or guardian, the parent or guardian must also consent to or not oppose the order.

(FVPA ss 74(2)(b)(ii), 78(3)]

The court may conduct a hearing in relation to the particulars of the application before making a consent order, if it is in the interests of justice to do so, however it is not bound to conduct a hearing.

(FVPA s 78(4)]

The power to make consent orders is discretionary. Even when all the parties consent to the order, the court may refuse to make the order if it believes that the order may pose a risk to the safety of a party or a child of the affected family member or respondent.

(FVPA s 78(5), see the discussion in *Murphy v Magistrates' Court at Heidelberg* [2011] VSC 61]

Consent, children and guardianship orders

The affected family member is always a party to the proceeding, even if a third party applied for the order. While the legislation is unclear, this suggests that the court cannot make a consent order without the consent or lack of opposition of the affected family member, even if he or she is a child or is under a guardianship order. The Act contains several provisions that implicitly support this interpretation:

- sections 64 and 112 of the FVPA state that if an application was brought by the guardian and the affected family member objects, the affected family member's view must be heard separately from the guardian. A note to the section refers to provisions under the *Guardianship and Administration Act 1986* regarding resolving disputes between guardians and affected family members. This indicates that the court must consider the affected family member's views; and
- section 116 of the FVPA sets out extra procedures the court must follow on an appeal if the order was made without the consent of a protected person who is a child. This recognises that children can consent to or oppose orders under the Act.

Despite this, there are other provisions of the Act and several general principles that suggest that a child or the subject of a guardianship order may not need to independently consent to an order:

- the Act limits the right of children to initiate proceedings by requiring a person to bring proceedings on the child's behalf, or for the child to obtain the leave of the court (FVPA s 45);
- the Act restricts the right of an affected family member who is a child to have legal representation or to give evidence, unless the court grants leave. The court must have regard to the desirability of protecting children from unnecessary exposure to the court system and the

harm that could occur to the child and any family relationships if the child is directly represented or gives evidence in the proceeding (FVPA ss 62, 67);

- at common law and under s 63E of the *Family Law Act 1975*, a parent has most of the rights and duties of a guardian of the child. This may include the power to exercise consent on behalf of the child. However, this power is not absolute and diminishes at the child matures. Whether the parent can consent to the order on behalf of the child depends on the age and maturity of the child (see *Secretary of Department of Health & Community Services v JWB (Marion's Case)* (1992) 175 CLR 218); and
- under s 4(d) of the *Guardianship and Administration Act 1986*, any decision by a plenary guardian is taken to be a decision by the represented person and made as if the represented person was competent to make the decision.

In cases where it is relevant, judicial officers must determine whether a child or represented affected family member must consent to or not oppose the order.

Requirements of consent or non-opposition

The FVPA allows the court to make orders where the parties to the proceeding consent to, or do not oppose, the making of the order. However, the Act does not explain the difference between consent and the absence of opposition.

Prior to the commencement of the FVPA, s 14 of the CFVA provided that the court may make an order "if the parties to the proceeding consent to the making of the order". Under the FVPA, the equivalent expression is "consent has been given, or the making of the order has not been opposed" (see FVPA s 74).

It is not clear what Parliament intended when adding a party's failure to oppose the order as a basis for making a consent order. Section 78 is entitled "consent orders", though it also deals with orders that are not opposed. The section makes it clear, at least for final orders, that consent does not necessarily involve admission of the particulars of the application. Similar provisions also apply in relation to interim orders (see FVPA s 53(1C)). This suggests that "does not oppose" was not necessary to cover the practice of consent without admissions.

Similarly, s 61(1) limits the court's power to make final orders on a mention date. Subsection (2) removes that limitation if:

(a) all the parties to the proceeding have consented to, or are not opposed to the making of, the order in accordance with s 78; or
(b) the court is satisfied the respondent has been served with a copy of the application for a family violence intervention order and has not attended court on the mention date.

Section 61(2)(b) implies that non-attendance is not enough, by itself, to demonstrate lack of opposition to an order. Instead, failure to attend creates a separate basis for the court to make final orders on a mention date.

Due to the uncertainty surrounding when a person "does not oppose" the making of an order, a court should clearly identify whether the respondent consents to the order or does not oppose the making of the order before making an order under s 78. Respondents might choose to not oppose an order rather than consenting due to a belief that even consent without admissions involves some acknowledgment of the grounds for the order.

If the affected family member or the respondent has not received legal advice, the court should ensure that the parties understand the consequences of any order before consenting and are making a free and informed decision whether to contest an application.

Consent without admissions

Respondents often state that consent is "without admissions". That is, without admitting that the allegations in the application are true.

(FVPA s 78(1)(b)]

Section 78(1)(b) ensures that the court may make consent orders without making a finding of fact that the respondent has committed family violence against the affected family member and is likely to do so again. Previously, the Supreme Court of Victoria in *Stephens v Melis and the Magistrates' Court at Moe* (2002) 131 A Crim R 377 held that the mere power to make consent orders under the CFVA did not remove the court's obligation to find the necessary jurisdictional facts, including the family relationship between the affected family member and the respondent. The effect of this decision was overturned by s 18 of the *Magistrates' Court (Family Violence) Act 2004*, which amended the relevant provisions of the CFVA. Under the FVPA, s 78 makes it clear that consent of all the parties is a sufficient jurisdictional basis for a final family violence intervention order.

Consent orders made without admissions may have implications for any subsequent proceedings concerning the order, including contravention proceedings, applications to vary or revoke the order and firearms applications.

Consent orders and child respondents

If the respondent is a child, the court may only make a final order if it is satisfied the test for making the order is met. The fact that the respondent and the other parties consent to the order or do not oppose the order does not remove the obligation of the court to make the necessary findings of fact.

(FVPA s 78(2)]

The explanatory memorandum explains the purpose of this provision:

> This clause has been included to provide additional protection to child respondents. Child respondents may consent or not oppose the making of an order without fully appreciating the consequences. Therefore, in these cases, the court must be satisfied that the respondent child has committed family violence before making a final order against the child. The length of any order made against a child respondent is limited, by clause 98, to 12 months unless there are exceptional circumstances.

[Explanatory memorandum, clause 78]

This requirement only applies to final orders and there is no corresponding requirement for interim orders against child respondents.

Associated final intervention orders

The court may make an "associated final order" to protect an affected family member from an associate of the respondent or to protect an associate of the affected family member from the respondent.

The Act defines an associate as:

(a) in relation to a respondent, a person who is so closely connected with the respondent that the respondent can influence the actions of the person, whether directly or indirectly; and
(b) in relation to an affected family member or a protected person, a person who provides the affected family member or protected person with assistance or support.

(FVPA s 4]

An associate does not need to be a family member of the respondent or the affected family member.

At the earliest reasonable opportunity, the court should identify whether orders will be sought for an associate of the affected family member or against an associate of the respondent. The court may do this at the hearing for an interim order, or on the first mention date. Early identification of associates ensures that the applicant or affected family member can serve and file any additional applications that are necessary.

When a person applies for an associated order, the court registrar issues a separate application on Courtlink, including a related case option to link the associated application to the original application. The associated application must be sworn or on affidavit and then served on all relevant parties as for original applications. Alternatively, a police officer may certify an application under FVPA s 153.

The court may hear applications for associated final orders at the same time as hearing applications for the final order for the original affected family member.

(FVPA s 76(3)(a)]

The court must independently apply the test for a final order and an associated order. The associate application must be supported by evidence, or made with consent of all the parties. The associated final order can impose different conditions or have a different duration to the original final order. Once made, an associated order exists independently of the original order. Variation, extension, revocation or termination of the original final order does not affect the associated order.

(FVPA s 76(3)(c)]

It is unclear whether an associated order is affected following a successful appeal against the original final order. Most likely, the associated order is not affected, as "the associated final order is not affected if the original final order … otherwise ends" (FVPA s 76(3)(c)). Appellants may need to separately challenge the original final order and any associated order in consolidated proceedings. See 2.9 Appeals.

Applications for associated orders

The following people may apply for an associated final order:

- an associate of the protected person for the original final order; or
- any person who could apply for the order under s 45 if the associate were an affected family member, including a police officer, the associate and other people with the written consent or the associate or the leave of the court.

(FVPA s 76(4)]

See 2.1.4.1 Who is eligible to make an application? for details on who can apply for a family violence intervention order.

Additional or associated respondents

The court may make an order against an additional respondent if:

- the court has made a final intervention order against a respondent;
- the court is satisfied, on the balance of probabilities, that the additional respondent is an associate of the respondent (as defined in s 4); and
- the court is satisfied on the balance of probabilities that the additional respondent has subjected the protected person to behaviour that would be family violence if the protected person and the additional respondent were family members and the additional respondent likely to do so again.

(FVPA s 76(1)]

Additional or associated applicants

The court may make orders to protect an additional person if:

- the court has made a final intervention order to protect a protected person;
- the court is satisfied, on the balance of probabilities, that the additional person is an associate of the protected person (as defined in s 4); and
- the court is satisfied on the balance of probabilities that the respondent has subjected the additional person to behaviour that would be family violence if the respondent and the additional person were family members, and the respondent is likely to do so again.

(FVPA s 76(2)]

Despite the use of the term "additional applicant" in s 76(2), it is clear that the associated order must protect the subject of the application, regardless of whether he or she made the application (compare FVPA s 76(4)).

Operation of general provisions to associated orders

Many general provisions of the FVPA apply to associates:

- associates are included under the definition of an affected family member and a respondent (FVPA s 4);
- the Act applies to applications for an associated order as if it were an application for an original order. Similarly, the Act applies to associated final orders as if they were original final orders (FVPA s 76(3)(b));

- provisions for making final orders by consent apply to final associated orders by consent (FVPA s 78);
- the court must consider whether there are any children who are family members of the affected family member or respondent who may be subject to family violence committed by the respondent (FVPA s 77). Because associates are included under the definition of affected family member and associate, this provision also applies to children of an associate and family violence committed by an associated respondent.

Court must consider safety of children when making final orders

Prior to making a final intervention order under s 74 or s 76 of the FVPA, the court must consider whether any children who are family members of the affected family member or respondent have been subjected to family violence committed by the respondent.The court must also consider whether there are any children who have been subjected to behaviour which wold be considered to constitute family violence if the child and the respondent or additional respondent were family members.

(FVPA s 73I]

In some cases, the parties will consent to an order between the adults and argue that no order is necessary in relation to any children. Section 73I imposes an independent obligation on the court to consider the safety of any children of the protected person or the respondent. Judicial officers should encourage the parties to call evidence to allow the court to make this assessment, but are ultimately limited by the material that is available.

See 5 Social context for a discussion of the court craft skills that can be used to encourage parties to call evidence, and a discussion of the effects of family violence on children.

See 2.2.3.4 Safety of children for further discussion on mandatory enquires for the protection of child required before making intervention orders.

Note that children are subjected to family violence if they hear, witness or are otherwise exposed to family violence. See discussion in 1.1 Family violence.

Final orders to protect children

If the court makes a final order under s 74 in relation to an affected family member, and the court is satisfied on the balance of probabilities that a child has been subjected to family violence committed by the respondent (whether or not that child is also an affected family member):

- unless the court makes the final order under s 74 by consent, the court must include the child in the final order as a protected person so long as the child's needs for protection are substantially the same as those of the affected family member;
- if the child's needs for protection are not substantially the same as those of the affected family member, the court must make a separate final order for the child as a protected person.

If the final order is made by consent, and that final order does not include the child, the court must make a separate final order for the child as a protected person.

The court is not required to make an order in relation to a child of the affected family member who has been subjected to family violence if it is satisfied that it is not necessary to do so to protect the child from family violence committed by the respondent.

(FVPA s 77]

If the court does not make a final order under s 74 in relation to an affected family member, the court may, on its own initiative, make a final order for a child of an affected family member or respondent as a protected person if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the child and is likely to continue to do so or do so again.

(FVPA s 77B(1)]

Children and associated final orders

If the court makes an associated final order in relation to an affected family member or an additional applicant, and the court is satisfied on the balance of probabilities that a child (whether or not the child is also an affected family member or an additional applicant) has been subjected to behaviour which would be considered family violence if the child and the respondent or additional applicant were family members:

- unless the court makes the final order under s 76 by consent, the court must include the child in the final order as a protected person so long as the child's needs for protection are substantially the same as those of the affected family member
- if the child's needs for protection are not substantially the same as those of the affected family member, the court must make a separate final order for the child as a protected person

If the final order is made by consent, and that final order does not include the child, the court must make a separate final order for the child as a protected person.

As with final orders, the court is not required to make an order in relation to a child who has been subject to conduct that would be family violence if the respondent or additional respondent were family members if it is satisfied that it is not necessary to do so to protect the child.

(FVPA s 77A]

If the court does not make an associated final order in relation to an affected family member or an additional applicant, the court may, on its own initiative:

- make a final order for the child of an affected family member as a protected person if satisfied that that additional respondent has subjected the child to behaviour which would be considered family violence if the child and additional respondent were family members, and the additional respondent is likely to continue to do so or do so again; or
- make a final order for a child of an additional applicant as protected person if satisfied, on the balance of probabilities, that the respondent has subjected the child to behaviour that would be family violence if the child and the respondent were family members, and is likely to continue to do so or do so again.

(FVPA s 77B(2)]

Multiple protected persons on one intervention order

There are advantages and disadvantages to including more than one protected person on an intervention order. Judicial officers should consider these matters when deciding whether to make one intervention order covering all parties or whether to make separate orders to protect each affected family member:

- the conditions included in the intervention order will apply to all protected persons on the order. This will not be appropriate in all circumstances. Where the needs of all the parties to be included on the order are substantially the same (for example, orders protecting the affected family member's children) making a single order will protect all parties equally;
- one order per protected person simplifies proceedings to vary, revoke or extend the order, or appeal an order. If there are multiple protected persons on an order, the court must notify all those on the order when there is an application to vary an order and the court will need to consider the protective needs of multiple parties. Separate orders may also be easier to locate on Courtlink;
- one order for multiple protected persons simplifies the scope of the orders and promotes clarity for the protected persons and the respondent. Separate orders may make it harder for the respondent to understand the boundaries of each of the orders and their interaction;
- if multiple orders are imposed on one respondent, that respondent may contravene multiple intervention orders in one act. A court will need to sentence the respondent for the breach of each order without violating the prohibition on double punishment.

Registrars must issue separate Courtlink applications for each adult applicant, even where there are multiple adult applicants seeking protection from the same respondent.

Last updated: 29 March 2018

2.2.2.2 Conditions of final intervention orders

The conditions the court may include on an intervention order are discussed in the following sections. The general rule is that the court may include any conditions that are necessary or desirable in the circumstances.

See 2.2.3 Conditions of orders for a discussion of conditions.

Conditions limited if the affected family member did not consent to the application

If a police officer applied for a family violence intervention order without the consent of the affected family member, the court may only include the following conditions:

- prohibit the respondent from committing family violence against the protected person;
- prohibit the respondent from causing another to engage in conduct prohibited by the order;
- revoke or suspend a weapons approval or weapons exemption held by the respondent;
- cancel or revoke the respondent's firearms authority.

(FVPA ss 75(2), 81(2)(a), (f), (g) and (h)]

This restriction does not apply if the affected family member is a child, is cognitively impaired, or has a guardian who consented to the application. In these cases, the court may include any conditions in the order that appear necessary or desirable.

(FVPA s 75(3)]

Last updated: 20 April 2010

2.2.2.3 Commencement and duration of final intervention orders

The court may specify when a final intervention order expires. If the court does not specify the duration of the order, it lasts until it is revoked or set aside on an appeal.

(FVPA ss 97, 99]

The court must take the following matters into account when deciding the duration of a final intervention order:

(a) that the safety of the protected person is paramount; and
(b) any assessment by the applicant of the level and duration of the risk from the respondent; and
(c) if the applicant is not the protected person, the protected person's views, including the protected person's assessment of the level and duration of the risk from the respondent.

(FVPA s 97(2)]

The court may also take into account any matters the respondent raises that are relevant to the duration of the order.

(FVPA s 97(3)]

When applying for an intervention order, the applicant must indicate whether she wants the order to last for less than 12 months, 12 months or more than 12 months and to explain her reason for specifying this period.

The conditions and the duration of an order should be designed to meet the risk the court has found that the respondent is likely to commit family violence again.

As discussed in relation to the second limb of the test for a final order, making accurate predictions about a person's future conduct is inherently difficult.

The following matters may also be relevant when determining the duration of a final order:

- the history of the relationship, including the duration of the relationship and incidents of violence both during the relationship and after it ended;
- whether the court has made previous family violence intervention orders between the protected person and the respondent;
- evidence of expert witnesses;
- the MARAM risk assessment framework;
- the likelihood that the respondent will undertake counselling or respond to behaviour change programs to reduce the risk of committing family violence;
- whether the risk of family violence is heightened by temporary risk factors that may subside, such as pregnancy, separation or drug use.

See 5 Social context or a discussion of risk assessment, including a list of risk indicators.

Expiry of interim orders

When the court makes a final order, any existing interim orders will expire, unless the court orders that the interim order shall continue until the final order is served on the respondent.

(FVPA s 60]

Given that the respondent cannot be charged with breach of an intervention order until he is served with a copy of the order or receives the prescribed explanation (FVPA s 123), the court should ensure that the affected family member's protection does not lapse when the court makes the final order. In the ordinary case, if the respondent is not present when the court makes the final order, the court should direct that the interim order will continue until the respondent is served with the final order.

Child respondents

If the respondent is a child, the court must not make a final order of more than 12 months duration unless there are exceptional circumstances.

The following matters may help judicial officers to determine whether the circumstances are exceptional:

- the mandatory considerations in s 97(2), that is:
    - that the safety of the protected person is paramount;
    - the applicant's assessment of the level and duration of risk from the respondent; and
    - the protected persons' views, including the protected person's assessment of the level and duration of the risk from the respondent;
- the age of the child, as it is more likely to make longer orders against older children;
- the MARAM risk assessment framework;
- the needs of the child;
- the impact of the order on the child;
- the difficulty of predicting future conduct;
- any other relevant matters.

As courts have frequently warned, it is dangerous to attempt to define when a case will be "exceptional". Instead, the court must judge each case on its own merits and should consider whether there are factors that are out of the ordinary, unusual or special (*Oxford English Dictionary*. See also *Owens v Stevens*, Unreported, VSC, 3 May 1991).

Duration of orders: statistics

Between 2004–05 and 2011–12, most family violence intervention orders lasted for between 12 and 24 months. Within this category, in 2011–12, the vast majority (98%) of orders lasted for exactly 12 months.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p16]

Last updated: 23 October 2013

2.2.2.4 Explanation of final intervention orders

If the court makes a final intervention order, the court must orally explain to the protected person and the respondent (if present in court) the effect of the order. The explanation must include:

(a) the purpose, terms and effect of the final order, including the effect of the order on any firearms authority or weapons approval held by the respondent or weapons exemption which applies to the respondent; and
(b) if the family violence intervention order prohibits the respondent living with, spending time with or communicating with the child, that prohibition; and
(c) if the family violence intervention order includes a condition requiring arrangements between the protected person and respondent relating to a child living with, spending time with or communicating with the respondent to be in writing, that condition; and
(d) the consequences and penalties that may follow if the respondent fails to comply with the terms of the final order; and
(e) for the respondent, that the final order is a civil order of the court and the protected person cannot give permission to contravene the final order; and
(f) how the final order interacts with a Family Law Act order or an order under the *Children, Youth and Families Act 2005*; and
(g) if the court has varied, suspended, revoked or revived a Family Law Act order because it is inconsistent with the final order, the purpose, terms and effect of the variation or suspension.

(FVPA ss 96(1), 96A(2)]

A written notice including the matters referred to above, in the form prescribed by the rules, must:

- be given to the protect person with a copy of the final order; or
- in the case of an adult respondent, be given to the respondent with a copy of the final order if the respondent is before the court;
- in the case of a child respondent, or an adult respondent who is not before the court, be served on the respondent with a copy of the final order

(FVPA ss 96(3), 96A(4)]

This written notice may also include any additional information the court considers necessary to explain the final order.

(FVPA ss 96(3A), 96A(5)]

The prescribed explanation is provided in Form 1B of the Magistrates' Court (Family Violence Protection) Rules 2018 (Vic) and Form 1AB of the Children's Court (Family Violence Protection) Rules 2018 (Vic).

Failure by the court to explain a final order does nodes affect the validity of the order.

(FVPA ss 96(4), 96A(6)]

In the case of an adult respondent, an order cannot be enforced unless the respondent has received the oral explanation in court or has been served with a copy of the order. In the case of a child respondent, the order cannot be enforced until it is served on the respondent. See 4.1 Contravention of an intervention order

If the court makes a final intervention order, the registrar must:

- arrange to serve a copy of the order on the respondent personally, unless the respondent has been given an explanation of the order under section 57(1) or 96(1); and
- give a copy of the order to:

- the Chief Commissioner of Police;
- each party to the proceeding;
- the respondent, if the respondent did not need to be served with a copy of the order;
- the parent of a child protected person, if the application was made with the consent of that parent;
- the parent of a child protected person with whom the child normally resides (other than the respondent), if the order was made on the court's own initiative under 53AA, s 77(2), s 77A;
- the guardian of a protected person, if the protected person has a guardian; and
- the police officer in charge of the police station closest to the residence of the protected person.

(FVPA ss 201, 202]

Last updated: 28 March 2018

2.2.3 Conditions of orders

When the court makes a family violence intervention order, it may include any conditions that appear necessary or desirable in the circumstances.

(FVPA s 81(1)]

The Act confers a broad discretion on the court to formulate the appropriate conditions and guides that discretion by requiring the court to consider matters such as exclusion conditions, the safety of children and the respondent's access to weapons.

Last updated: 20 April 2010

2.2.3.1 Sample conditions

The Act contains a list of illustrative conditions, including:

(a) prohibiting the respondent from committing family violence against the protected person; and

(b) excluding the respondent from the protected person's residence in accordance with section 82 or 83; and

(c) relating to the use of personal property in accordance with section 86; and

(d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person; and

(e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives; and

(f) prohibiting the respondent from causing another person to engage in conduct prohibited by the order; and

(g) revoking or suspending a weapons approval held by the respondent or a weapons exemption applying to the respondent as provided by section 95; and

(h) cancelling or suspending the respondent's firearms authority as provided by section 95.

(FVPA s 81(2)]

These conditions are only examples and are not intended to restrict the court's discretion to include *any* conditions that are *necessary or desirable* in the circumstances. The court exercises its own judgment to determine the appropriate conditions and must give paramount consideration to the safety of:

- the affected family member; and
- any children subjected to the family violence to which the application relates.

(FVPA s 80]

The standard Courtlink conditions also include:

- a specific prohibition on damaging property;
- prohibition on following or keeping the protected person under surveillance; and
- making electronic publications about the protected person.

Except where specified, the guidance in the following sections applies to both interim and final intervention orders.

The court should consider all of the applicable circumstances when imposing an order and decide which conditions are necessary or desirable to properly protect the protected person and any children who have been subjected to family violence.

Prohibition on further family violence

A condition prohibiting the respondent from committing family violence against the protected person is the core of most intervention orders.

The standard Courtlink conditions prohibit family violence and include a definition that accords with the Act. The condition is not limited to the type of behaviour that led to the intervention order. A court should explain the breadth of this condition to the respondent so that he is aware that *any* type of family violence is a breach of the order.

The rationale for this is that family violence is not usually limited to one or more behaviours of a specific character but is most often a course of conduct characterised by control and domination of a family member. Family violence tends to be dynamic and when one form of it ends, another may begin. The condition must prohibit all forms of family violence in order to effectively protect the affected family member, rather than merely requiring the respondent to adopt a different type of violence.

See 1.1 Family violence for a discussion of the breadth of the term 'family violence'.

Excluding respondent from a residence

The Act allows the court to exclude the respondent from the protected person's residence, even if it is also the residence of the respondent. The court *must* consider imposing an exclusion condition.

(FVPA ss 82–85]

See 2.2.3.2 Exclusion of the respondent from a residence for further information.

Personal property conditions

The court may include conditions relating to the personal property of the protected person and the respondent. The Act draws a distinction between personal property that belongs to the protected person and jointly owned property. The court may direct that:

- the respondent is to return all personal property that belongs to the protected person (or a family member of the protected person); or
- the respondent is to return personal property that was jointly owned by the respondent and protected person to enable the protected person's everyday life to continue with as little disruption as practicable.

(FVPA s 86(1)]

Section 86(2) provides conditions directed at personal property where the court is also including a condition excluding the respondent from a residence.

See 2.2.3.2 Exclusion of the respondent from a residence for further information.

The power to impose conditions regarding personal property is subject to any contrary order made by the Family Court or another court or Tribunal with jurisdiction to adjudicate in property disputes. An order by the Family Court or other relevant court or Tribunal prevails over an inconsistent order under the FVPA.

(FVPA s 87]

Property conditions do not affect the ownership rights of the respondent or protected person over the property in question.

(FVPA s 88]

Prohibition on approaching, telephoning or otherwise contacting

The court may prohibit the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person.

This order should specify the minimum distance the respondent must maintain from the protected person at all times. If there is no associated exclusion order, judicial officers usually specify a distance of 5 or 10 metres, as this ensures the order remains workable if the protected person and the respondent meet accidentally in the street or at an entertainment venue.

Section 81(1)(d) provides a couple of examples of telephoning or otherwise contacting:

1. emailing the protected person.
2. sending text messages to the protected person.

This condition prohibits *all* contact, including seemingly innocuous conduct, unless the respondent is in the company of a police officer or a specified person.

In many cases, the court should include an exception that permits contact via a lawyer.

Prohibition on being within a specified distance of a person or place

The court may prohibit the respondent from being within a specified distance of the protected person or their home or workplace.

The distance specified should be reasonable and take into account the location of the homes and workplaces of both the protected person and respondent. It should also take into account the routines of the protected person and any child contact arrangements that may be agreed.

Courtlink sets a default distance of 200 metres, but judicial officers should assess the appropriate distance in the circumstances of the case.

Prohibition on causing another to commit family violence

The court should include this condition if there is a risk that the respondent may continue committing family violence against the protected person through a proxy. This condition should clearly indicate that the respondent must not disturb the protected person himself or by his agents.

This condition can operate in conjunction with the court's power to make orders against associated respondents under s 76. Both provisions demonstrate the policy of the FVPA to stop respondents from committing family violence against a protected person by using a friend or a new partner. While associated orders rely on proof that the associated respondent has committed family violence and is likely to do so again, this condition is designed to stop the respondent from enlisting the help of associates to commit family violence.

Weapons and firearms conditions

The court must enquire about the respondent's access to weapons and firearms and may restrict the respondent's access to weapons and firearms.

See 2.2.3.3 Firearms and weapons enquiries.

Prohibition on damaging property

The standard Courtlink conditions includes a code for prohibiting the respondent from damaging the property of the protected person. As property damage is a form of family violence (FVPA s 5(2)), this condition is arguably redundant if the court includes the general prohibition on family violence. Regardless, this condition ensures that the respondent is aware that property damage is prohibited and it prevents future disputes about whether property damage fell within the terms of the order or whether the respondent intended to breach the order.

Following or keeping the protected person under surveillance

An order prohibiting the respondent from following the protected person or keeping her under surveillance serves several objectives:

- it reinforces a non-approach order, by making it clear that the respondent cannot harass the protected person while remaining at the specified distance required by the order;
- in many cases, it prevents stalking, within the meaning of *Crimes Act 1958* s 21A and the *Personal Safety Intervention Orders Act 2010*;
- it prevents conduct that may constitute family violence, as the prohibited conduct will often be threatening or would otherwise cause the protected person to fear for her safety or wellbeing;
- it prevents an escalation of violence that could occur if the respondent did follow the protected person.

Electronic publication

This condition prohibits the respondent from publishing on the internet, by email or other electronic communication, any material about the protected person. Such conduct is potentially also stalking, for the purpose of *Crimes Act 1958* s 21A and the *Personal Safety Intervention Orders Act 2010*. This condition is designed to prevent indirect harassment after a couple separates and could include blogs, Twitter, Facebook and emails.

Last updated: 26 October 2011

2.2.3.2 Exclusion of the respondent from a residence

If the court decides to make an intervention order, the court must consider whether to include a condition excluding the respondent from the protected person's residence (an exclusion condition).

The VLRC Final Report expressed three reasons why courts should make exclusion orders:

- it is fair that the perpetrator is excluded from the family home, rather than the victim. This reinforces the message that family violence is wrong and that perpetrators will be held accountable;
- it is safer for the children of the relationship if they can remain in a familiar area and do not need to change schools;
- family violence creates a high risk of women and children becoming homeless and suffering other economic and social disadvantages. Use of exclusion orders may reduce that risk and moves the burden of finding alternative accommodation onto the respondent

[VLRC, Final report, 318–319]

The increased prominence of exclusion orders in the FVPA compared to the CFVA is designed to highlight the availability of this order and to promote its use as part of the protection available for an affected family member. The VLRC was concerned by anecdotal reports that judicial officers in Victoria and other States were reluctant to make exclusion orders because they believed that exclusion was unfair to the respondent and should only be used in extreme cases.

When deciding whether to impose an exclusion condition, the court must have regard to all the circumstances of the case, including:

(a) the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;

(b) the desirability of continuity and stability in the care of any child living with the protected person; and

(c) the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance.

(FVPA s 82(2)]

The protected person's residence is defined as a place of residence that is, has been, or is proposed to be, shared by the protected person and the respondent (FVPA s 79). Exclusion orders are therefore unnecessary when the protected person and respondent live in separate premises and non-approach orders under s 81(2)(e) are sufficient. Such non-approach orders will often specify a larger distance that the respondent must remain from the premises in order to prevent stalking behaviour where the respondent remains visible from the premises or remains at the minimum allowed distance.

The court must consider imposing an exclusion condition regardless of any legal or equitable rights the parties have in the residence (FVPA s 82(3)). Therefore, the court may make exclusion orders over a residence solely owned by the respondent, or where the respondent and the protected person are joint tenants. To support the operation of exclusion orders, Division 1 of Part 6 of the *Residential Tenancies Act 1997* allows a protected person to apply to VCAT to terminate an existing tenancy agreement and to enter a new tenancy agreement with the landlord when the court makes an exclusion condition on a final intervention order. This allows a protected person to remove the respondent as tenant and prevent him from terminating the tenancy agreement.

If the court decides that an exclusion condition is appropriate, and the protected person does not oppose an exclusion condition, the court *must* include the condition in the intervention order. The explanatory memorandum states that in some cases, the protected person may wish to move to another location, rather than stay in premises known to the respondent.

(FVPA s 82(4), Explanatory Memorandum clause 82]

If the order includes an exclusion condition, the court may also include:

- a condition requiring that furniture or appliances remain in the residence to enable the normal running of the home;
- a condition permitting the respondent to return to the residence in the presence of a police officer or another specified person to retrieve any personal belongings that do not need to remain at the residence or to return property in accordance with the court's direction.

The specified person might include a person who is a trusted friend of both the protected person and the respondent.

(FVPA s 86(b)]

Judicial officers should consider the practical operation of orders under s 86. Removing a large amount of property after the court makes an exclusion condition is a lengthy process and can take most of day. The court should not assume that police officers are available to supervise this process for the whole time. Extended exercises of this nature are best supervised by a third party who is known and trusted by the protected person and the respondent.

Personal property conditions under s 86 do not affect the rights of the protected person or respondent.

(FVPA s 88]

Respondent's address

If the court makes an exclusion condition, the court must ask the respondent to provide an address for the service of documents. A respondent may provide an email address and may refuse a request to provide any address for service.

The court must also advise the respondent that if a police officer is unable to locate the respondent for the service of documents, a police officer may seek information from public sector organisations, other than Commonwealth agencies, to assist in locating the respondent. See 2.1.6 Service for further information on obtaining information from public sector organisations.

If the respondent provides an address that is not his own home or work address, and another person living at the specified address advises the court that they do not consent to the use of their address for service of documents under the FVPA, that address is not a valid address for service.

(FVPA s 85]

The *Electronic Transactions Act 2000* provides that information may be given to a person by email with that person's consent. However, email delivery is not permitted for documents that must be personally served. However, under Per ss 85 and 202A, documents may be served by email if the court makes an order for alternative service.

When the court excludes the respondent from a rented property by an exclusion condition under the FVPA, documents under the *Residential Tenancies Act 1997* can be given and served via email.

[*Residential Tenancies Act 1997* s 506(4)]

Exclusion conditions and child respondents

If the respondent is a child, the court must consider whether to impose an exclusion condition in accordance with s 82 and must also must consider:

- the desirability of the child being supported to gain access to appropriate educational services and health services; and
- the desirability of allowing the education, training or employment of the child to continue without interruption.

(FVPA s 83]

The court may not include a condition in the order excluding a child from the residence unless it is satisfied that the child will have appropriate alternative accommodation and appropriate care and supervision.

Additionally, if the child respondent is an Aboriginal or Torres Strait Islander, the court must consider the following matters when determining whether the child has appropriate alternative accommodation and appropriate care and supervision:

- as a priority, an Aboriginal or Torres Strait Islander child should live within the child's Aboriginal or Torres Strait Islander extended family or relatives or, if that is not possible, other extended family or relatives; and

- the need to maintain the child's culture and identity through contact with the child's community.

The court may seek a report from the Secretary to the Department of Human Services on whether appropriate accommodation, care and supervision is available if the court imposes an exclusion condition.

(FVPA s 84]

The Secretary must provide the report within the period ordered by the court. Without a specific order, the Secretary must deliver the report within 7 days.

[*Family Violence Protection Regulations 2008* r 10]

If the request relates to a child under the age of 17, the Secretary may:

- provide advice and assistance to the child and the family;
- refer the matter to community-based child and family service or service agency to provide advice, services and support to the child or the family of the child;
- treat the request for a report as a protective intervention report under Part 4.4 of the *Children, Youth and Families Act 2005.*

[*Children, Youth and Families Act 2005* s 30, FVPA s 84(2)(b)]

If the Court imposes an exclusion condition in an order in relation to a child respondent, it must notify the Secretary to the Department of Human Services.

(FVPA s 83(5)]

Respondents with cognitive impairments

Although s 83 applies only to child respondents, many of these considerations will also be relevant if the respondent is cognitively impaired.

Last updated: 29 March 2018

2.2.3.3 Firearms and weapons enquiries

If the court intends to make an intervention order, the court must enquire whether the respondent:

- holds a firearms authority; or
- is a person to whom weapons exemption applies; or
- holds a weapons approval.

(FVPA s 94]

If the court makes an *interim* intervention the court may include a condition to:

- suspend the respondent's firearms authority or weapons approval; or
- suspend the weapons exemption which applies to the respondent.

If the court makes a *final* intervention order the court may include a condition to:

- cancel the respondent's firearms authority; or
- revoke the respondent's weapons approval; or
- revoke the weapons exemption that applies to the respondent.

(FVPA ss 81, 95]

Regardless of whether the court includes a condition relating to a firearms authority, weapons approval or weapons exemption, the respondent under a final order is a prohibited person for the purposes of the *Firearms Act 1996* for the duration of the final order and for 5 years after the final order expires. However, unless the court includes the above conditions, the respondent may apply for a declaration that he is not deemed to be a prohibited person, or is only deemed to be a prohibited person for limited purposes (*Firearms Act 1996* s 189).

See 3.8 Firearms Orders for further details on applications that a person is not deemed to be a prohibited person.

Last updated: 20 April 2010

2.2.3.4 Safety of children

If the court decides to make a family violence intervention order and the protected person or the respondent is a parent of a child, the court must:

- enquire whether any of the following orders are in force in relation to the child:
    - a Family Law Act order; or
    - a child protection order; and

decide whether allowing the child to have contact with the respondent will or may jeopardise the safety of the child or the protected person. For the purposes of making this decision, the fact that there has been no previous violence by the respondent towards the child is not sufficient, on its own, to establish that it is safe for the respondent to have contact with the child.

(FVPA ss 89, 91]

For this purpose, "contact" includes the respondent:

- living with; or
- spending time with; or
- communicating with the child.

Parent

The Act defines "parent" to include:

- a person who has responsibility for the long-term welfare of the child and has, in relation to the child, all the parental powers, rights and duties that are vested by law or custom in the guardian of a child; and
- a person with whom the child normally or regularly resides.

(FVPA s 4]

After the court determines whether contact between the child and the respondent will or may jeopardise the safety of the child (pursuant to s 91 FVPA) and determined whether or not there are other orders in place (pursuant to s 89) the court *must* take one of the following actions:

1. If contact will not jeopardise the safety of the child and there are no existing Family Law Act orders:

The court *must* include the following conditions in the intervention order:

- a condition that child contact arrangements and handover arrangements agreed between the protected person and the respondent must be in writing and must comply with any other prescribed requirements; and
- a condition regarding how contact and handover arrangements are to be negotiated to maximise the safety of the protected person;

The court may allow non-written contact arrangements in exceptional circumstances, such as if one of the parties cannot read or write. Handover arrangements must be designed to minimise the risk of violence to the protected person. The Act suggests that conducting handover negotiations in writing or through a third party are ways to maximise the safety of the protected person.

The court does not have to include the conditions applicable to child contact arrangements in the intervention order if the respondent, protected person and child live together.

If the parties cannot reach agreement on contact or handover arrangements, they can seek an order under the Family Law Act.

(FVPA s 92]

A generic order allowing the respondent to contact the protected person for the purpose of child contact will not meet these requirements. Such conditions weaken the protection offered by the intervention order and make it more difficult to prove a breach of the order. In many cases, the prosecution would need to prove that the conduct was not for the purpose of child contact.

[VLRC, Final report, 340–341]

Conditions allowing negotiation for child contact must be designed to maximise the safety of the protected person, including safety from threatening, coercive or controlling conduct by the respondent. The current standard exceptions to an intervention order will often meet this requirement:

> If the respondent does not commit family violence while doing so, he/she will not contravene this order by:
> (a) doing anything that is permitted by a Family Law Act order, a child protection order or a written agreement about child arrangements; or
> (b) negotiating changes to child arrangements by letter, email or text message.

2. If contact will not jeopardise the safety of the child, and there is an existing Family Law Act order:

If the proposed intervention order will be inconsistent with the Family Law Act order, the court must alter the Family Law Act order to remove the inconsistency (if it is within the jurisdiction of the court to do so). See 2.6 Interaction with family law (FVPA s 90, *Family Law Act 1975* s 68R).

If the proposed intervention order will be consistent with an existing Family Law Act order, the court may make the intervention order without amending the Family Law Act order.

3. If contact may jeopardise the safety of the child and there are no existing Family Law Act orders:

The court must include a condition in the intervention order that prohibits the respondent from contract that jeopardises the safety of the child (FVPA s 93). The scope of this requirement is discussed in more detail under **Ambiguity and difficulties regarding children** (below).

The court must also make an intervention order regarding the respondent and the child if the respondent has committed family violence against the child and is likely to do so again (FVPA ss 74, 77, 77A, 77B). See 2.2.2.1 Power to make final intervention orders.

4. If contact may jeopardise the safety of the child, and there is an existing Family Law Act order:

The court must include a condition in the intervention order that prohibits the respondent from living with, spending time with or communicating with the child (FVPA s 93). The scope of this requirement is discussed in more detail under **Ambiguity and difficulties regarding children** (below).

Also, if the proposed intervention order will be inconsistent with the Family Law Act order, the court must alter the Family Law Act order to remove the inconsistency (if it is within the jurisdiction of the court to do so). See 2.6 Interaction with family law (FVPA s 90, *Family Law Act* s 68R).

Ambiguity and difficulties regarding children

The interaction between several sections of the Act designed to protect children is unclear and may give rise to difficulty.

The relevant provisions are (emphasis added):

Section 4:

> **parent**, of a child, includes-
>
> > (a) a person who has responsibility for the long-term welfare of the child and has, in relation to the child, all the parental powers, rights and duties that are vested by law or custom in the guardian of a child; and
> >
> > (b) a person with whom the child normally or regularly resides;
>
> **safety** means safety from family violence;

Section 77:

(1) This section applies if-

(a) the court makes a final order under s 74 in relation to an affected family member; and

(b) the court is satisfied, on the balance of probabilities, that a child has been subjected to family violence committed by the respondent (whether or not that child is also an affected family member).

(2) Unless the court makes the final order under s 74 by consent, subject to subsection (4), the court must –

(a) if the child's need for protection is substantially the same as that of the affected family member, include the child in the final order as a protected person; or

(b) otherwise, make a separate final order for the child as a protected person.

(3) If the court makes the final order by consent under s 74, and that order does not include the child, subject to subsection (4), the court must make a separate final order for the child as a protected person.

(4) The court is not required under this section to include the child in the final order or to make a separate final order to protect the child if the court is satisfied that it is not necessary to do so to protect the child from family violence committed by the respondent.

Section 77A:

(1) This section applies if-

(a) the court makes a final order under s 76 in relation to an affected family member or an additional applicant, and

(b) the court is satisfied, on the balance of probabilities, that a child (whether or not that child is also an affected family member or an additional applicant) has been subjected to behaviour that would be family violence if the child and the respondent or additional respondent were family members

(2) Unless the court makes the final order by consent under s 76(4), the court must:

(a) if the child's need for protection is substantially the same as that of the affected family member or additional applicant, include the child in the final order as a protected person, or

(b) otherwise, make a separate final order for the child as a protected person

(3) if the court makes the final order by consent under s 76, and the order does not include the child, subject to subsection (4), the court must make a separate final order for the child as a protected person the court must make a separate final order for the child as a protected person

(4) The court is not required under this section to include the child in the final order or to make a separate order if satisfied that it is not necessary to do so to protect the child from behaviour that would be family violence committed by the respondent or additional respondent, as the case requires

Section 77B:

(1) If the court does not make a final order under s 74 in relation to an affected family member, the court may, on its own initiative, make a final order for a child of an affected family member or respondent as a protected person if satisfied, on the balance of probabilities, that the respondent has committed family violence against the child and is likely to continue to do so or do so again.

(2) If the court does not make a final order under s 76 in relation to an affected family member or an additional applicant, the court may, on its own initiative-

(a) make a final order *for a child of an affected family member* as a protected person if satisfied, on the balance of probabilities, that the *additional respondent* has subjected the child to behaviour that would be family violence if the child and the additional respondent were family members, and is likely to continue to do so or do so again, or

(b) make final order for a *child of an additional applicant* as a protected person if satisfied, on the balance of probabilities, that the *respondent* has subjected that child to behaviour that would be family violence if the child and the respondent were family members, and is likely to continue to do so or do so again

(3) A final order under subsection (1) or (2) is an order in the proceeding under section 74 or 76, as the case requires, and for that purpose-

(a) in the case of a final order referred to in subsection (1) or (2)(a), the applicant for the final order is—

(i) the affected family member who made the initial application referred to in section 53(1), 74 or 76, as the case requires; or

(ii) if the affected family member did not make the initial application referred to in section 53(1), 74 or 76, the person who made that application on behalf of the affected family member; or

(iii) if an appointment has been made under section 53AB(3), the Chief Commissioner of Police; and

(b) in the case of a final order referred to in subsection (2)(b), the applicant for the final order is the additional applicant under section 76(2); and

(c) the child is a party to the proceeding; and

(d) the respondent to the initial application referred to in section 53(1), 74 or 76, as the case requires, is a party to the proceeding.".

Section 91(1):

(1) If the court decides to make a family violence intervention order and the *protected person or the respondent is the parent of a child*, the court *must* decide whether or not it will or may jeopardise the safety of the protected person or the child for the child to *live with, spend time with or communicate with* the respondent.

(2) For the purpose of making a decision under subsection (1), *a previous lack of violence by the respondent towards the child is not on its own sufficient* reason to decide that the child's safety will not be jeopardised by living with, spending time with or communicating with the respondent.

Section 93:

> If the court decides under section 91 that it may jeopardise the protected person's or child's safety for the child to live with, spend time with or communicate with the respondent, the court *must include a condition* in the family violence intervention order prohibiting the respondent from *living with, spending time with or communicating with* the child.

These six provisions raise three discrete issues.

The first issue concerns the difference between the definition of a parent and the definition of a family member. While the definition of *family member* in s 8 includes a child who normally or regularly resides with the relevant person, it does not in terms include a person who has responsibility for the long-term welfare of the child. This means that a person who is a parent due to clause (a) of the definition might not be a family member of the child. If this occurs, the court could not make an order under s 77. In addition, while s 91 and s 93 appear to apply, s 4 states that safety means safety from family violence, which in turn requires that relevant parties are family members. As a result, the court must be satisfied that any child in question is a family member of the respondent.

The second issue relates to the composite phrase "live with, spend time with or communicate with the child". Under s 91(1), the court must decide whether any of these events will or may jeopardise the safety of the protected person or the child and s 93 specifies the consequences if the court finds that a person's safety is jeopardised. That is, "the court must include a condition in the family violence intervention order prohibiting the respondent from living with, spending time with or communicating with the child". The difficulty is whether the court must prohibit all three of these events, or whether it is only required to prohibit the events which will jeopardise the safety of the child.

While it is arguable that a plain reading of the Act would require the court to prohibit all three events, it is more likely that the court must only respond to the risks it identifies.

First, it is consistent with the natural meaning of "or" to adopt a disjunctive interpretation.

Secondly, doing so gives the phrase "live with, spend time with or communicate with" (and its conjugation "living with, spending time with or communicating with") a consistent meaning wherever it appears and avoids the absurdity of first reading the phase disjunctively and then reading it conjunctively in the same section. Given that "live with, spend time with or communicate with" generally describes a descending scale of contact between the child and the respondent, a court could not interpret the phase conjunctively where it first appears. The choice is then between adopting a consistent interpretation or an inconsistent interpretation. In this context, a consistent interpretation could be achieved by reading in the words "as the case may be" at the end of s 93.

Thirdly, s 93 is a mandatory provision interfering with the respondent's liberty and so the court should adopt a restrictive interpretation, where it is possible to do so consistent with the purpose of the legislation. There is nothing on the face of the legislation to suggest that it was the purpose of s 93 to require a court to do more than it thought necessary.

The third issue concerns the operation of ss 73I, 77A, 77B and 91. These provisions impose an independent obligation on the court to examine the safety needs of any children subjected to family violence by the respondent. These provisions are not limited to cases where the child in question is a family member of the affected family member. In cases involving a child who is not a family member of the affected family member, it is not clear how orders limiting contact between the child and the respondent would be practical. Such cases would need to be handled sensitively and may require coordination between the court and child protection workers.

Family Law Act orders

Family violence intervention orders that are inconsistent with certain orders under the *Family Law Act 1975* (Cth) are invalid to the extent of the inconsistency. Concerned parties can apply to the Family Court, Federal Magistrates' Court or a state court of summary jurisdiction for a declaration that the orders are inconsistent.

[*Family Law Act 1975* (Cth) s 68Q, FVPA s 176]

Section 68R of the *Family Law Act (Cth) 1975* gives state and territory courts of summary jurisdiction power to revive, vary, discharge or suspend an existing order, injunction or arrangement made under the *Family Law Act 1975* (Cth) when making or varying a family violence order.

When making an interim intervention order, the *Family Law Act 1975* (Cth) limits the court's jurisdiction to vary Family Law Act orders. The court may revive, vary or suspend an order but must not discharge a Family Law Act order, injunction or arrangement.

For practical reasons, the Magistrates' Court and the Children's Court makes the relevant orders under the *Family Law Act 1975* (Cth) by imposing the appropriate conditions on the intervention order through Courtlink, even though it is not part of the intervention order. This provides a convenient way to make the order and ensure it is served on the respondent.

For full details on the interface between family violence and family law, including the power to vary family law orders to avoid inconsistency, see 2.6 Interaction with family law.

Child protection orders

A family violence intervention order, a recognised DVO made by a court and a variation or extension of a recognised DVO by a court prevail over any inconsistent child protection orders.

(FVPA s 173]

If the court makes an intervention order or varies a recognised DVO which is or may be inconsistent with an existing child protection order, the registrar must provide written notice of the order and its terms to the Secretary for the Department of Human Services.

(FVPA s 174]

However, if the Children's Court is hearing an application for a child protection order and the child is a protected person or respondent under a family violence intervention order or a recognised DVO, the Children's Court may, on its own motion, revoke or vary the existing intervention order or recognised DVO to avoid the inconsistency. When exercising this power:

- the registrar must notify all the parties to the proceeding in which intervention order or recognised DVO was made that the court is proposing to vary or revoke the order; and
- the court must not vary or revoke the order until all parties to the proceeding for that order have had an opportunity to be heard; and
- the court may make an interim variation to the intervention order or recognised DVO until the requirements above have been met; and
- the order may only be revoked or varied to the extent of the inconsistency.

(FVPA s 173]

In *DOHS v Mr D & Ms W* (Unreported, Children's Court of Victoria, 7 January 2009) Magistrate Power considered the operation of s 173(2) and held that:

> The operation of s 173(2) is not entirely clear. However, it seems to me that it does not operate as a quasi-appeal against an intervention order nor does it give the court an

> unfettered discretion to vary an intervention order. On the evidence I have heard in this case, I would not have made an intervention order against Mr D in relation to any of the three children. But that does not mean that I can vary the intervention order to exclude conditions even though I believe there is no proper evidentiary basis for them. I can only vary the intervention order to remove any inconsistencies between it and the supervision orders.

The court doubted that s 173(2) could be used to revoke or vary a counselling order. In any event, it would be rare that a counselling order would be inconsistent with a child protection order.

[From *Children's Court Research Materials* 6.6.2]

See 2.7 Interface with Children, Youth and Families Act 2005 for further information.

Last updated: 08 April 2019

2.2.3.5 Mandatory and voluntary counselling

If a relevant court makes a final intervention order against an adult respondent who resides within one of the eligible postcodes, the court must order:

- that a counselling assessor give a report to the relevant court, by a date specified in the order, on whether the respondent is eligible to attend approved counselling to address the violence that is the subject of the order; and
- that the respondent attend an interview with the counselling assessor for the purposes of preparing the report

The court is not required to make such an order if there is already an order in force under ss 129 and 130 in respect to the respondent, or if:

- there is no approved counselling that is reasonably practicable for the respondent to attend; or
- in all the circumstances of the case, it is not appropriate to make the order

A ‘counselling assessor’ is a person employed by Court Services Victoria to prepare reports for the purposes of s 129.

(FVPA s 129]

In other courts, the judicial officers may encourage the respondent to contact the Men’s Referral Service to obtain advice or information about available services. This is commonly entered as a Referral condition on the order if the respondent agrees to that condition. While it is not strictly a "condition" of the order, and the respondent cannot be charged with breaching the condition, this is the only way on Courtlink to record that the judicial officer encouraged the respondent to contact the Men’s Referral Service.

The presence of express provisions governing counselling orders, and the limited jurisdictional basis for those orders, suggests that other courts cannot make counselling a condition of an order under the general power to include conditions in section 81. While any court can encourage the respondent to undertake counselling, only certain, specified, courts can order the respondent to do so.

See 3.6 Counselling orders for more information on ordering eligibility reports and counselling for respondents

Last updated: 10 December 2019

2.2.4 Undertakings

The FVPA does not contain any provisions regarding the use of undertakings in response to family violence.

The VLRC review on family violence laws reported that undertakings were often used inappropriately by the courts or resulted in less than ideal outcomes. However, the Commission did not recommend prohibiting the use of undertakings, because in some circumstances an undertaking might be the most appropriate outcome. Instead, the report recommended that court protocols regulate the use of undertakings.

The court does not have protocols about the use of undertakings. However, judicial officers should consider the advantages and limitations of undertakings when deciding whether to accept an undertaking instead of making an interim or a final order, with safety being a paramount consideration.

Limitations of undertakings

- breach of an undertaking is not an offence and the police cannot take any action on the basis of the breach. Often an affected family member will not understand this limitation and has a false expectation of the protection offered by an undertaking. This contributes to a low level of reporting of breach of undertakings;
- an affected family member may be intimidated into accepting an undertaking even when it is against her interests. The undertaking can form another part of the control that a perpetrator of family violence seeks over the affected family member, and may make the legal system complicit in that violence;
- undertakings are no more than a promise by the perpetrator to refrain from further family violence. Frequently, the perpetrator has previously made and broken promises to the affected family member not to be violent again;
- there are some forms of undertaking in use that have a similar appearance to a court order which may blur the distinction between an order and an undertaking in the mind of an affected family member.

Advantages of undertakings

- for some women, accepting an undertaking is the first step they are prepared to take. It may encourage a woman to seek an intervention order if the violence continues.
- if there is not enough evidence to support an intervention order, an undertaking may be the next best alternative. A breach of an undertaking would be evidentiary support for a subsequent intervention order;
- undertakings may be more appropriate for child respondents as it reduce the risk of juveniles being drawn into the criminal justice system.

The VLRC recommended substantial revisions to the court protocols to promote a wider understanding of the limitations of undertakings and to guide the court on when to accept undertakings. This will ensure that an undertaking is only used when all the circumstances suggest it is the most appropriate outcome.

[VLRC, Final report, 301]

VLRC recommendations on use of undertakings

The VLRC recommended that the court should only accept an undertaking when:

1. the court is satisfied that the affected family member fully understands the consequences of accepting an undertaking (e.g., if the applicant has received legal advice or is legally represented).
2. an undertaking is a more appropriate outcome than an intervention order in all the circumstances, including;
    - the age of the respondent - an undertaking is more appropriate where the respondent is under 18 years of age;
    - the nature of the violence - an undertaking should never follow serious acts of violence;
    - whether, in the circumstances, a more appropriate outcome would be an intervention order with limited conditions such as a prohibition on further acts of family violence.

The VLRC also recommended that:

1. an undertaking should operate as a suspension of an intervention order application with a right of reinstatement of the original order.
2. the court should develop a standard form of undertaking to reduce the confusion with orders and fully explain the effect of an undertaking.
3. the court should provide the parties to the undertaking with a written explanation of the nature of an undertaking.

Finally, the Commission recommended that judicial officers do not inform parties that breach of an undertaking may result in a charge of contempt of court. The Commission argued:

> This sets up a parallel system to the intervention order system and is difficult to enforce because the police will not act on breach of an undertaking. The appropriate response to a breach of an undertaking should be the reinstatement of the original application for an intervention order or a new application for an interim intervention order.

[VLRC, Final report, 8.143 (302)]

This argument recognises that in Victoria, proceedings have never been commenced to enforce an undertaking given in family violence proceedings. Therefore, courts should not give the applicant false expectations about the protection that an undertaking provides.

Last updated: 13 February 2018

2.3 Changing orders

The Magistrates' Court and the Children's Court have jurisdiction to revoke, vary or extend a family violence intervention order.

(FVPA Part 4, Division 8]

Except in relation to orders to protect children, the Court can only exercise this power on application. That is, the Court does not have an 'own motion' power to vary an intervention order made in relation to an adult.

[*L v L* [2016] VSC 182]

In appropriate cases, the Court could consider briefly standing down a hearing to allow a participant to file an application to vary. The Court could then resume the hearing and consider whether an interim variation is necessary pending service of the application to vary.

These courts also have jurisdiction to revoke, vary or extend intervention orders confirmed or varied by the County Court or Supreme Court on an appeal, but only if the court is satisfied that there are new facts or circumstances relevant to the order.

(FVPA s 149]

The jurisdiction of the Children's Court to act on related applications is discussed in 2.1.2 - Jurisdiction.

Applications to vary, extend or revoke intervention orders

The following people may apply to the court for the variation, revocation or extension of a family violence intervention order:

(a) a party to the proceeding in which the order was made; or

(b) if the protected person is a child-

(i) a parent of the child, other than the respondent for the order; or

(ii) any other person with the written consent of a parent of the child, other than the respondent for the order; or

(c) if the protected person is a child who is 14 years of age or more, the protected person with the leave of the court; or

(d) if a police officer was not a party to the proceeding in which the family violence intervention order was made, a police officer; or

(e) if the protected person has a guardian and the guardian was not a party to the proceeding in which the family violence intervention order was made, the guardian

If a police officer or an officer of another organisation was a party to the original proceeding, any other police officer or officer of the organisation may apply to vary, revoke or extend the order and the other officer is taken to be a party to the original proceeding.

(FVPA s 108]

The applicant for the variation, revocation or extension order must obtain written consent unless he or she is:

- the protected person;
- the protected person's guardian;
- the respondent to the intervention order;
- a police officer.
- That consent must be obtained from:
- the protected person; or
- if the protected person is a child, a parent of the child other than the respondent; or
- if the protected person has a guardian under the *Guardianship and Administration Act 1986*, the guardian.

(FVPA s 111]

In practice, the obligation to obtain consent is only likely to be relevant if the protected person, or a parent of the protected person, gave written consent to another person applying for the original order, or the court gave leave for someone other than the protected person's guardian to bring the original application. That person will be a party to the proceeding and will have standing to apply to vary, extend or revoke an order, but must first obtain the consent of the protected person, a parent or the protected person's guardian.

The court may also vary or revoke an intervention order on its own motion if the court made the order on its own initiative to protect a child under s 53AB, s 77B or s 103 of the Act. Similarly, the court may order the extension of a final order own its own initiative if the court made the original order on its own initiative.

(FVPA ss 100(1)(b), 105, 106]

The court must, if satisfied on the balance of probabilities that a child has become a family member since an initial order was made has been subjected to family violence by the respondent and is likely to be subjected to family violence, vary or make an intervention order.

(FVPA s 104]

Respondent must obtain leave

The respondent to an intervention order must obtain leave of the court before applying to vary or revoke a family violence intervention order.

The court may only grant leave if it is satisfied:

- that there has been a change in circumstances since the original order was made; and
- this change of circumstances may justify a variation or revocation of the order.

For interim orders, the court must also be satisfied it is in the interests of justice that the application be determined immediately, rather than waiting for the hearing of the application for the final order.

In the case of an interim order made where the respondent was not present, the court may grant leave if it is satisfied that it is in the interests of justice to do so, having regard to the reasons the respondent was not present when the order was made. If the court grants leave, it may, instead of varying or revoking the order, set aside the order if the court is satisfied that there are exceptional circumstances that justify setting aside the order. The effect of setting aside an order is that it is treated as though it had never been made, whereas revocation keeps the order on the record for the time it operated.

Leave must be sought within 21 days after the day on which a copy of the order was served on the respondent, but may be extended where there are exceptional circumstances.

(FVPA ss 108–109]

This leave requirement reduces the risk of respondents harassing a protected person through the court system by making frivolous applications to vary or revoke an order. The protected person is not exposed to the disruption, trauma and expense of further court hearings unless the court grants leave.

Judicial officers will generally hear and determine applications for leave ex-parte. The purpose of the leave requirement is to reduce the respondent's ability to harass the protected person by bringing frivolous applications to vary or revoke an intervention order and holding a contested hearing would defeat this purpose.

The leave tests are designed to reduce the prospect of a person seeking to vary or revoke an interim order as a means of challenging the correctness of the original order.

[Explanatory Memorandum, Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018, clause 109]

The requirement that the respondent obtain leave to apply to vary or revoke an order under FVPA s 109 does not apply to applications in relation to recognised DVOs under the *National Domestic Violence Order Scheme Act 2016*. Instead, s 25 of the *National Domestic Violence Order Scheme Act 2016* provides that a court has a discretion whether to hear applications to vary or revoke an order, and lists matters the court may consider in deciding whether to hear the application. See 3.3 Interstate and New Zealand orders for more information.

Form of application

The applicant must provide the following information when applying to vary, revoke or extend a family violence intervention order:

(a) the names of the parties to the proceeding in which the order was made;

(b) the name of the applicant for the variation, revocation or extension;

(c) the capacity in which the applicant applies;

(d) if the protected person is not the applicant or a police officer —

(i) whether the protected person consents to the making of the application; or

(ii) if the protected person is a child, whether a parent of the child consents to the making of the application; or

(iii) if the protected person has a guardian, whether the guardian consents to the making of the application;

(e) whether the applicant requires leave of the Court to make the application;

(f) the date of making the family violence intervention order;

(g) whether any other persons have become family members of the respondent since the family violence intervention order was made;

(h) the reasons for seeking a variation, revocation or extension;

(i) details of any relevant Family Law Act order or child protection order, or any current application for a relevant Family Law Act order or child protection order;

(j) if the application is for a variation, the conditions of the variation sought;

(k) if the application is for an extension, the duration of the extension sought.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 4.05; *Children's Court (Family Violence Protection) Rules 2018* r 4.04]

When the respondent to the intervention order applies to vary or revoke the order, he must also include details of any change of circumstances to show why the court should grant leave.

If a person must provide a written consent to an application to vary, revoke or extend an intervention order, then the consent must be filed with the court and must include:

(a) the name, address, date of birth, occupation and gender of the person who will make the application;

(b) the name, address, date of birth, occupation and gender of the person providing the consent;

(c) if the person providing the consent is not the affected family member or protected person, that person's relationship to the affected family member or protected person;

(d) a description of the application.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 4.06; *Children's Court (Family Violence Protection) Rules 2018* r 4.05]

Process of making the applications

An application to vary, revoke or extend an order may be made by filing the application with the proper venue of the court.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 12.01; *Children's Court (Family Violence Protection) Rules 2018* r 11.01]

Service of applications

The appropriate registrar must arrange for a true copy of the application to vary, extend or revoke an order to be personally served on:

- each party to the proceeding for the original order, other than the person applying for the variation, extension or revocation order; and

- if the protected person is a child, and the order was made with consent of the child's parent, that parent; and
- if the protected person is a child and the order was made by the court under s 53AA, s 77 or s 77A or on the court's own initiative, a parent of the child (other than the respondent) with whom the child normally or regularly lives' and
- if the protected person has a guardian under the *Guardianship and Administration Act 1986*, the guardian.

(FVPA ss 113, 201, 202, 205]

Variation, revocation and extension

The following sections describe the court's power to vary, extend or revoke a family violence intervention order.

The principles and procedures in the Act governing the conduct of hearings also apply to applications to vary, revoke or extend an order. See 2.4 Hearings for further details.

Interim variations

When a person applies for a variation of a family violence intervention order, the court may make an interim order varying the family violence intervention order (an "interim variation order").

Division 1 and Division 2 of Part 4 of the Act apply with any necessary modifications to the making of an interim variation order as if it were an interim family violence intervention order. These Divisions include:

- rules about how an application for a family violence intervention order may be made; and
- the power to make interim orders in the absence of the respondent; and
- the requirement, with limited exceptions, to support an application with oral or affidavit evidence; and
- the obligation to explain an interim order; and
- the obligation to list the matter for decision regarding a final order as soon as practicable; and
- the duration of interim orders.

(FVPA s 101; FVPA Part 4 Division 1 and 2]

The conditions on making interim orders are discussed in 2.2.1 - Interim intervention orders. These principles apply wit

A police officer may file an application to vary, revoke or extend an order with the Magistrates' Court after-hours service and the duty magistrate may hear and determine the matter outside court hours. The magistrate may also use the power in FVPA s 55 to waive the requirement for oral or affidavit evidence.

(FVPA, Explanatory Memorandum, clause 101]

Ex-parte interim extension

The court may make an interim order extending a final intervention order in the absence of the respondent if:

- the application for the extension was filed before the expiry of the final order; and
- the respondent has not been served with the application for the extension; and
- the court considers it necessary to make an interim extension order.

An interim extension order expires 28 days after it is made unless the respondent is earlier served with the notice of the application for the extension order. The court may make more than one interim extension order if it has not been possible to serve the respondent with notice of the application for the extension order.

A copy of any interim extension order must be served on the respondent along with the application to extend the original order.

If the respondent is served with notice of the application for the extension order within 28 days of the court making the interim extension order, the order remains in force until either:

- the final order is served on the respondent, if the court orders that the interim extension order continues until service when making the final order; or
- the court makes a final order, if the court does not order that the interim extension order continues until the final order is served; or
- the court refuses to extend the final order; or
- the court revokes the interim extension order; or
- the application for the extension of the final order is withdrawn.

This provision is similar to that contained in s 60 of the Act in relation to the expiry of interim orders.

(FVPA s 107]

Final variation, revocation or extension

A court may vary or revoke an interim or a final family violence intervention order and it may extend a final intervention order.

(FVPA ss 100, 106]

Test for variation or revocation

In deciding whether to grant an application to vary or revoke an intervention order, the court must consider all the circumstances, in particular:

(a) the applicant's reasons for seeking the variation or revocation;

(b) the safety of the protected person;

(c) the protected person's views about the variation or revocation;

(d) whether or not the protected person is legally represented;

(e) if the protected person has a guardian, the guardian's views.

(FVPA s 100(2)]

The court must consider these five matters, but has a wide discretion to make such orders as the justice of the case requires.

[*Miles v Barca* [2003] VSC 376 at [24]]

The court may consider the seriousness of the protected person's original allegations even if the intervention order was made by consent without admissions. Even if the court does not have sufficient material to establish whether or not the original allegations are true, the seriousness of the alleged conduct affects the court's assessment of whether varying or revoking the intervention order may pose a risk to the protected person.

If the court decides not to grant an application to revoke an intervention order, it may vary the intervention order in the way it considers appropriate.

(FVPA s 100(3)]

The court must also consider any changes in the protective needs of others on the intervention order, whether there are any new family members and the status of any Family Law Act orders. See **Mandatory considerations and enquiries** (below).

The preamble to the Act states that the justice system should treat the views of victims of family violence with respect. However, the dynamics of family violence means that in some cases, a protected person may be coerced into making a variation or revocation application. It can be difficult for a court to determine whether an application to vary or revoke an order reflects a free decision by the protected person to resume contact with the respondent or is an application made under duress. A judicial officer should be aware of these issues and, under s 100(2), must consider the reasons for the application and the protected person's safety.

[See VLRC, Final report, 350–357]

The Magistrates' Court has developed a practice that where an applicant support worker is available, the court will require the protected person to speak to the support worker before it finalises a protected person's application to vary or revoke an order. Registrars are also instructed to speak to the protected person in the absence of the respondent. If the original applicant for the order was a police officer, that officer will normally conduct a risk assessment before the court finalises the application.

Test for extension

The court may order the extension of a final order if it is satisfied on the balance of probabilities that, if the order is not extended, the respondent is likely to commit family violence against the protected person.

The court may extend an order whether or not the respondent committed family violence while the order was in effect.

(FVPA s 106]

Courts should consider the history of the relationship, any interactions between the parties and the basis for the application when determining whether to extend an order.

The court may also consider the allegations contained in the original application, even if the order was made by consent without admissions. Deciding whether to grant an extension order is an exercise in risk management. Even when the court cannot be positively satisfied that the allegations are true, the allegations may help the court to assess the level of risk posed to the protected person.

The test in s 106 is similar to the second limb of the test for a final order: that the respondent is likely to commit family violence again. In its final report, the VLRC recommended that, the protected person should not have to prove a further act of family violence (in contravention of the order) before she may seek to extend the order.

[VLRC, Final report, 4.25]

See 2.2.2.1 Power to make final intervention orders for a discussion of the difficulties of predicting future violence.

There is no power for the court to extend an interim order. Instead, the duration of an interim order is governed by s 60. See 2.2.1 Interim intervention orders.

Consent to variation, revocation or extension

The consent order provisions in s 78 of the Act are applicable to final orders, or the variation, extension or revocation of final orders, subject to special provisions in relation to children. If the parties to a proceeding for the variation, extension or revocation of a final order consent or do not oppose the order being made, the court can make the order without being satisfied as to:

- any of the matters referred to in s 100 or s 106; and
- whether or not the respondent admits to any or all of the particulars of the application.

The court may refuse to order the variation, extension or revocation of a final order by consent if the court believes it may pose a risk to the safety of one of the parties or a child of the protected person or respondent (see FVPA s 78(5)). If the respondent is a child, the court must be satisfied as to the grounds for making the order before making a final order, or the variation, extension or revocation of a final order.

Mandatory considerations and enquiries

Before making a variation or revocation order, the court must consider whether:

(a) there has been any change in the need to protect another person protected by the order from being subjected to family violence by the respondent for the family violence intervention order; and

(b) there are any other persons who, since the order was made, have become family members of the respondent for the family violence intervention order or protected person; and

(c) there are any Family Law Act orders in existence in relation to-

(i) where and with whom a child who is a person referred to in paragraph (a) or (b) lives; or

(ii) the respondent for the order spending time with or communicating with the child.

(FVPA s 102(1)]

The court may refuse to vary or revoke the order, or may vary the order in a different way to that requested, if the court is satisfied on the balance of probabilities that this is necessary to ensure the safety of another person protected by the order.

(FVPA s 102(2)]

If there has been a change in the protective needs of a child, the child has a continuing need for protection and the child's need for protection is *not* substantially same as that of the other person protected by the order, the court may make a new final order in relation to the child and vary the existing order as it considers necessary.

(FVPA ss 102, 103]

If the court is satisfied on the balance of probabilities that a new family member of the respondent or the protected person is a child who has been subjected to family violence by the respondent and is likely to be subjected to family violence again:

- if the child's need for protection is substantially the same as the other protected person, the court must vary the existing order to include the child as a protected person and make any other variations the court considers appropriate; or
- if the child's need for protection is not substantially the same, the court must make a separate final order for the child as a protected person.

(FVPA ss 102, 104]

Under *Family Law Act 1978* s 68R, a court that makes or varies a family violence intervention order can revive, vary, discharge or suspend any Family Law Act orders. It is unclear whether a court can exercise this power when it revokes or extends a family violence intervention order. See 2.6 Interaction with family law for further details on the power to modify Family Law Act orders.

Applications by police officers without consent of protected person

A police officer may apply to vary or extend an intervention order with or without the consent of the protected person.

However, if the protected person did not consent to the application:

- if the intervention order is to be varied, the court may only vary the order to include the conditions in ss 81(2) (a), (f), (g) and (h);

- if the intervention order is to be extended, the court may only extend the order if it is subject to the conditions in ss 81(2) (a), (f), (g) and (h); and
- the court may not remove any conditions.

(FVPA s 110]

Similar limitations also apply when a police officer applies for a family violence intervention order without the consent of the AFM. See 2.2.2.2 Conditions of final intervention orders.

The effect of this section is that if the protected person did not consent to the application for the original order, the court may vary or extend the order within the same limitations that applied to the original order and may not remove any conditions from the order.

However, if the police apply to extend an order without the consent of the protected person, the court will not be able to do so unless the order only contains the conditions in s 81(2)(a), (f), (g) and (h). This is because the court cannot remove conditions and it cannot extend the order unless it only contains those conditions. This means that if the original order was more comprehensive, the court cannot extend the order without the consent of the protected person. A police officer applicant may instead apply for a new order if the protected person will not consent to the application to extend or vary the order. The court would then be limited to making an order with the conditions described in s 81(2)(a), (f), (g) and (h).

The court is not subject to any of these limitations when ordering variations or extensions to intervention orders where the protected person:

- is a child; or
- has a guardian who consented to the application; or
- is cognitively impaired.

(FVPA s 110(3)]

Unlike s 75, which imposes similar restrictions when a police officer applies for a final order, s 110 is not limited to final variation or extension orders. It therefore also applies to interim variations and interim extensions under s 101 and s 107, respectively.

These limitations apply to both interim and final variations or extensions.

Conflict between protected person and guardian

If a protected person's guardian applies to vary, revoke or extend a final order and the protected person objects, then the court must hear the protected person's views separately from the guardian's views.

To achieve this, the court might allow an independent legal representative to act on behalf of the protected person.

(FVPA s 112]

Last updated: 31 July 2019

2.4 Hearings

This section examines the rules of evidence and procedure that apply to hearings under the FVPA.

Before examining these rules, it should be noted that the FVPA "aims to achieve its purpose by providing an effective and accessible system of family violence intervention orders and family violence safety notices". That system has inquisitorial as well as adversarial aspects.

[*YY v ZZ & Anor* [2013] VSC 743 at [78]–[79]]

Against that background, in proceedings under the FVPA, the general rule is that the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary. This is subject to exceptions.

(FVPA s 65]

Under s 65(2) of the FVPA, the following rules of evidence apply to proceedings for an intervention order:

- s 13 of the *Evidence Act 2008*, which governs when a witness is competent to give sworn or unsworn evidence;
- s 30 of the *Evidence Act 2008*, which provides for a witness to give evidence through an interpreter;
- s 31 of the *Evidence Act 2008*, which provides for the giving of evidence by a witness who is deaf or mute;
- s 41 of the *Evidence Act 2008*, which permits a court to disallow improper questions and requires the court to disallow improper questioning of vulnerable witnesses;
- Part 3.10 of the *Evidence Act 2008*, which governs privileges, including client legal privilege, religious confessions, self-incrimination and matters of state;
- Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958*, which regulates the admissibility of *confidential communications.*

In proceedings under the FVPA, the court has a broad power to exclude or to limit the use of evidence if satisfied:

> (a) it is just and equitable to do so; or
>
> (b) the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.

(FVPA s 65(3)]

The second limb of s 65(3) (above) incorporates two of the three basis for discretionary rejection of evidence under s 135 of the *Evidence Act 2008*. It does not expressly incorporate the rejection of evidence that may cause or result in undue waste of time. In many cases, the court could refuse to admit evidence of unnecessary collateral matters under s 65(3)(a), as it will be just and equitable to do so.

In family violence cases, there is a risk that the respondent will seek to adduce evidence to embarrass or humiliate the protected person. The judicial officer should exclude such evidence where its probative value is substantially outweighed by the danger that it will unfairly prejudice the protected person.

Last updated: 16 June 2014

2.4.1 Obligation to provide procedural fairness

A provision that a court or tribunal may inform itself as it sees fit, regardless of the rules of evidence, such as that contained in FVPA s 65, does not abrogate the need for the court to provide natural justice and procedural fairness.

[*YY v ZZ & Anor* [2013] VSC 743 at [79]]

The court must still base its decision on evidence that is logically probative of the facts in issue and must give each party an opportunity to be heard (except in cases where the hearing rule does not apply, see, e.g., FVPA s 54).

Relevant considerations when determining whether a party has been accorded natural justice or procedural fairness include the following:

- disclosure of an adverse conclusion will be necessary where the conclusion is not obvious or anticipated or is not 'reasonably to be expected';
- procedural fairness may require an adverse conclusion which is not immediately obvious to the parties to be put to them before that conclusion can fairly be made, in order that the parties can have the opportunity to respond;

- in such cases, procedural fairness requires some disclosure to be made in order to afford the party the opportunity to adduce material or make submissions to try and answer the foreshadowed conclusion;
- on the other hand, decision makers are not generally required to disclose their mental processes or provisional views before making the impugned decision; and
- procedural fairness requires, at least in relation to important decisions and those which are critical to the determination of a case, that considerations which are important to a judicial officer's conclusions should be drawn to the attention of the parties affected or their representatives so that they have a fair opportunity to present contrary argument to persuade the judicial officer to a different opinion.

[*YY v ZZ & Anor* [2013] VSC 743 at [79], citing *Harding v County Court of Victoria* [2013] VSC 711 at [40]–[42]]

In some circumstances, procedural fairness and natural justice principles will require a judicial officer to write down his or her adverse conclusion, not merely to state it orally.

[*YY v ZZ & Anor* [2013] VSC 743 at [97]]

It is suggested that, while it is open to the court to determine a family violence matter on grounds which are not advanced in the application, before doing so, the court should ensure that the parties are forewarned of this prospect, and given an opportunity to respond. Many of the rules of evidence were developed to minimise the risk of error, accord the parties procedural fairness and increase the chance of discovering the truth. Regardless of provisions such as FVPA s 65, a court cannot not completely ignore the rules of evidence and base its decisions on suspicion or speculation. Instead, a court in proceedings for an intervention order is not bound by the exclusionary rules of evidence and may base its decision on any material that is logically probative of the facts in issue.

[See *Heyward v Minister for Immigration and Citizenship* [2009] FCA 1313 at [63]–[65]; *Weinstein v Medical Practitioners Board of Victoria* (2008) 21 VR 29 at [27]–[30]; *MIEA v Pochi* (1980) 4 ALD 139 per Deane J]

Principles such as the rule in *Browne v Dunn* and the line of reasoning approved in *Jones v Dunkel* also apply to proceedings for an intervention order.

[See, e.g., *Dolan v Australian and Overseas Telecommunications Corp* (1993) 114 ALR 231; *Kumar v Minister for Immigration and Citizenship* [2009] AATA 124]

Judicial officers will often rely on evidence of previous conduct to determine whether the respondent committed family violence and is likely to do so again. Such tendency evidence is relevant, probative and admissible in proceedings under the FVPA, even though it is strictly limited in proceedings governed by the *Evidence Act 2008*.

[See, in a similar context, *Doomadgee v Clements* [2006] 2 Qd R 352]

Similarly, when a party wishes to rely on opinion evidence, the court will usually require proof that the witness is properly qualified and proof of the basis for the opinion. Otherwise, the court will not be able to determine the weight of the evidence and will not be able to provide a fair hearing by allowing the other party to test the witness' opinion evidence through argument or cross-examination.

[*South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16]

Last updated: 16 June 2014

2.4.2 Written evidence

A person may give evidence in a proceeding under the FVPA by affidavit or sworn statement, and, with leave of the court, the other party may require the person to attend the hearing to be called as a witness and cross-examined.

(FVPA s 66]

Affidavit evidence is often suitable on the following topics if they are not in dispute:

- medical evidence;
- financial evidence;
- police evidence.

The power of the court to act on evidence given by affidavit or sworn statement applies despite any laws to the contrary, other than the *Charter of Human Rights and Responsibilities*.

(FVPA s 66(2)]

Last updated: 20 December 2010

2.4.3 Expert Evidence

Expert evidence about family violence

A court may receive evidence from a witness with relevant qualifications, training or expertise in family violence about the dynamics and characteristics of family violence. This includes evidence about:

- the nature and dynamics of relationships affected by family violence, including the possible consequences of separation of the parties; and
- the psychological effect of violence on people in a relationship or part of a family affected by family violence; and
- social, cultural or economic factors that impact on people in a relationship affected by family violence.

(FVPA s 73]

In recent years, parliaments have enacted similar provisions to ensure that particular kinds of expert evidence is admissible – see, e.g. *Crimes Act 1958* s 9AH (family violence evidence in homicide cases), *Criminal Procedure Act 2009* s 388 (nature and consequences of sexual offences) and *Evidence Act 2008* s 79(2) (evidence of child development).

The VLRC received submissions on increasing the use of expert evidence as a way to address mistaken views about the nature or consequences of family violence. Ultimately, the commission thought that this problem was best met through increased training and the expanded definition of "family violence". It did not recommend increased use of expert evidence, but noted that parties could call experts if the presiding judicial officer decided that such evidence was relevant.

[VLRC, Final report, 400–401]

Assessment reports in Children's Court proceedings

The Children's Court has power under s 73A of the Act to order the Secretary of the Department of Human Services to submit an assessment report in intervention order proceedings in respect of a respondent, affected family member or protected person.

The court may only order an assessment report if the subject of the report consents. If the subject of the report is a child, he or she must also be legally represented before the court may order an assessment report.

(FVPA s 73A]

The registrar must orally notify the Secretary of an order made under s 73A and provide the Secretary with a copy of the order within one working day after it was made (see FVPA s 73B). The Secretary must submit the assessment report to the court within 21 days of the date of notification and not less than 3 working days before the hearing (see FVPA s 73F(1)).

An assessment report must include:

- the matters that the court considers relevant to the proceeding, including any psychological or psychiatric assessment of the subject of the report; and
- any other matter that the court directs to be included.

If the Secretary is of the opinion that information in the assessment report will or may be prejudicial to the physical or mental health of the subject of the report, he or she may forward a statement to that effect to the court with the report.

(FVPA ss 73E, 73F]

The author of an assessment report may be required by notice to attend and give evidence at the hearing of the proceeding by:

- the person who is the subject of the report; or
- with the leave of the court, a party to the proceeding; or
- the Children's Court.

The notice must be in writing and filed in the proper venue of the court as soon as possible and, if practicable, not later than two working days before the hearing. Once the notice is filed, the registrar must immediately arrange for the author of the report to be notified that he or she must attend the hearing.

(FVPA s 73G]

If the assessment report contains matters that the subject of the report disputes, the court may only take those matters into account if it is satisfied on the balance of probabilities that those matters are true. If the author of the assessment report was required to attend the hearing but does not, the court must not take any disputed matters into account unless the subject of the report consents.

(FVPA s 73D]

Subject to any contrary direction of the court a person must not disclose any part of the report without the consent of the subject of the report. The court may impose conditions on access to an assessment report, including conditions about who can access the report or part of the report.

(FVPA s 73H]

Children's Court Clinic

In addition to the court's power under s 73A of the Act to request assessment reports from the Secretary, the court may request the Children's Court Clinic to make a clinical assessment of a child respondent, affected family member or protected person and submit a report to the court.

[*Children, Youth and Families Act 2005* s 546]

Case law regarding admission of expert evidence in family violence cases

The judgments of King CJ, sitting in the Supreme Court of South Australia, have informed much of the jurisprudence relating to the admission of expert evidence regarding the psychological impact of family violence.

His Honour said in *R v Massey* that evidence which goes to the state of mind of a person (who does not have a psychological impairment) may be admissible in some circumstances, but that evidence of a psychologist concerning a matter of ordinary human experience will not be admissible.

[*R v Massey* (1994) 62 SASR 481, 487]

King CJ said in *R v Bonython* that the subject matter of the expert opinion must not be such that a person, without any experience or special instruction on the topic, could form a sound judgment on the subject matter.

[*R v Bonython* (1984) 38 SASR 45, 46–47]

This test was adopted by Gaudron and Gummow JJ in the High Court decision in *Osland*. Their Honours held that the expert evidence of a psychologist would be directly relevant to the jury's consideration of self-defence, principally in determining whether the 'battered woman' believed that she was at risk of serious bodily harm, and that her behaviour was therefore necessary to avoid risk of harm. Their Honours considered that a juror may not be aware of the heightened state of arousal or awareness of danger that a 'battered woman' may experience.

[*Osland v The Queen* (1998) 197 CLR 316 at 54–57]

King CJ also said in *Runjanjic v The Queen* that it is the role of the jury to judge the behaviour of normal people and the actions of such people in situations which are within the realm of comprehension by an ordinary person. In the instance of family violence, the fact that a juror may not have had the same experience as a victim of family violence is not itself sufficient justification to allow for admission of evidence. His Honour said that jurors are routinely called to assess a person's behaviour within situations that they themselves are unfamiliar with, such as criminal activity. It is within the ability of jurors to understand a person's behaviour and reactions in these kinds of situations.

[*Runjanjic v The Queen* (1991) 56 SASR 114, 120–121.]

In *Liyanage v State of Western Australia*, the Western Australian Court of Appeal reaffirmed that the proper position to be drawn from *Runjanjic* was 'not only that domestic violence stood outside the direct experience of jurors', but that the counterintuitive nature of the psychological impact of prolonged exposure to family violence required admission of evidence of the kind admitted in *Runjanjic*.

[*Liyanage v The State of Western Australia* [2017] WASCA 112, [92]]

In *Liyanage v State of Western Australia*, the Court expressed a four part test to guide when expert evidence about family violence would be admissible:

1. Is the opinion relevant? Would the proposed evidence rationally effect an assessment as to the existence of a fact in issue in the case?
2. Would a person who has ordinary experience be unable to form a sound judgment on the subject matter of the proposed expert evidence without assistance of the expert witness?
3. Does the subject matter of the expert opinion constitute part of a body of knowledge sufficiently recognised as reliable?
4. Does the witness have sufficient expertise on the subject, acquired through study or experience, such that their opinion is rendered invaluable to the resolution of the issues before the court?

[*Liyanage v The State of Western Australia* [2017] WASCA 112, [122]]

In a Victorian context, part three of the test must be doubted, whether because of *Tuite v R* (2015) 49 VR 196, [76]–[82], which held that the reliability of evidence forms no part of the test for admitting evidence under *Evidence Act 2008* s 79(1), or because of *IMM v R* (2016) 257 CLR 300, which held that reliability forms no part of the test for exclusion of evidence under *Evidence Act 2008* s 137. See also *R v Dagger* [2017] NTSC 19, [36], [39]; *DPP v Tuite (No 3)* [2017] VSC 442.

Expert evidence generally

A party that wishes to adduce evidence from an expert witness must file either a statement or a report by that witness at least 5 days before the hearing.

An expert witness statement must:

(a) give the name and professional address of the witness, unless the witness believes that disclosing his or her address would jeopardise his or her safety; and

(b) describe the qualifications to give evidence as an expert; and

(c) give the substance of the evidence it is proposed to adduce from the witness as an expert.

Alternatively, an expert's report must:

(a) give the name of the witness; and

(b) describe the qualifications to give evidence as an expert.

A party that does not file the statement or report must not adduce evidence from the witness as an expert unless:

(a) the Court grants leave; or

(b) the other parties consent; or

(c) the evidence is adduced in cross-examination.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 9.01;
Children's Court (Family Violence Protection) Rules 2018 r 8.01]

Once filed, the other party may adduce the statement in evidence.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 9.04;
Children's Court (Family Violence Protection) Rules 2018 r 8.04]

An expert witness statement or report must be served on:

(a) the applicant or respondent (as the case requires);

(b) an adult affected family member or protected person;

(c) if the application to which the proceeding relates was made with the consent of a parent or guardian, that parent or guardian.

The statement or report may not be served on a child other than a child applicant or child respondent, unless the court grants leave.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 9.02;
Children's Court (Family Violence Protection) Rules 2018 r 8.02]

Unlike most documents under the FVPA, an expert witness statement or report does not need to be served personally. It may be served:

(a) by handing the document to the person; or

(b) by leaving the document at the address of the person; or

(c) by posting the document to the person at that person's address; or

(d) if a person has a facility for the reception of documents by facsimile transmission, by transmitting the document to that facility; or

(e) if the person is a respondent who has provided an email address under section 85(1) of the Act, by sending the document to that email address; or

(f) if any other party has provided an email address, by sending the document to that email address.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 5.01;
Children's Court (Family Violence Protection) Rules 2018 r 5.01]

The registrar must arrange service of the statement or report on a party that does not have legal representation.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 9.03;
Children's Court (Family Violence Protection) Rules 2018 r 8.03]

Last updated: 31 July 2019

2.4.4 Witnesses

Competence and compellability

In proceedings for an intervention order, *Evidence Act 2008* s 13 is the only provision of that Act dealing with competence or compellability of witnesses that applies (see FVPA s 65(2)). This provision deals with when a witness is not competent to give evidence and when a witness may give unsworn evidence.

Under s 13, a witness is not competent to give evidence about a fact if the witness is not capable of understanding a question about the fact or the person is not capable of giving an answer that can be understoodto a question about the fact, and the incapacity cannot be overcome. A person may be incompetent to give evidence about one fact, but may be competent to give evidence about another fact. If a witness is competent to give evidence about a fact, the court must then consider whether the witness is competent to give sworn evidence or unsworn evidence.

A witness is competent to give sworn evidence if he or she understands the obligation to give truthful evidence. A witness who does not understand this obligation is competent to give unsworn evidence if the court tells the person:

- that it is important to tell the truth; and
- that the witness may be asked questions that he or she does not know, or cannot remember, the answer to and the witness should tell the court if this occurs; and

- that the witness may be asked questions to suggest statements are true or untrue and that the witness should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

In proceedings under the FVPA, children other than an applicant or a respondent cannot give evidence unless the court grants leave. While *Evidence Act 2008* s 13 abolishes any legal principle that the competence of children must be assessed differently to other witnesses, the section will most often arise in relation to child.

(FVPA s 67]

See 2.5.3 Protecting children in court for a discussion of when the court may grant leave.

Section 65(2) of the FVPA does not expressly incorporate *Evidence Act 2008* s 12, which establishes a general rule that, subject to exceptions, all people are competent and compellable witnesses. However, it is likely that all witnesses in proceedings for an intervention order should be treated as competent and compellable, unless the court considers it appropriate to exclude the proposed witness' evidence in accordance with FVPA s 65(3).

Securing attendance of witnesses

Order 7 of the *Magistrates' Court (Family Violence Protection) Rules 2008* and s 532 of the *Children, Youth and Families Act 2005* govern the issue of subpoenas and witness summons. The court may issue a subpoena or witness summons requiring a person to attend to give evidence, attend to produce a document or thing or attend to both give evidence and produce documents or things.

A party may apply to the court or a registrar for the issue of a subpoena or witness summons. The subpoena or summons must be personally served on the relevant person, together with conduct money. A person served with a subpoena or witness summons to produce documents or things may produce the requested items to a registrar of the court at least 2 days before the date of hearing, along with the subpoena or summons, instead of attending at the hearing.

Section 67A of the *Family Violence Protection Act 2008* provides that section 194 of the *Evidence Act 2008* applies to proceedings for a family violence intervention order. This ensures that, if a witness fails to appear when required to do so, the court may issue a warrant to apprehend the witness, fine the witness or take any other action permitted by law. The *Evidence Act 2008* also allows the court to issue a warrant to apprehend a person who is avoiding service of a subpoena or witness summons or who is unlikely to comply with a subpoena or witness summons.

Last updated: 31 July 2019

2.4.5 Confidential communications

Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* limits the admissibility of "confidential communications". These provisions apply to proceedings for an intervention order.

(FVPA s 65(2)]

A "confidential communication" is:

> A communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred.

[*Evidence (Miscellaneous Provisions) Act 1958* s 32B]

A party requires leave before:

- seeking to compel another party to produce a document containing a confidential communication; or
- producing a document that would contain a confidential communication; or
- adducing evidence that would disclose a confidential communication or the contents of a document recording a confidential communication.

A party must serve notice of application for leave on each other party to the proceeding and the medical practitioner or counsellor at least 14 days before the hearing. The court may fix a shorter period for serving notice or may waive the obligation to give notice.

[*Evidence (Miscellaneous Provisions) Act 1958* s 32C]

The court may not grant leave to compel, produce or adduce evidence of a confidential communication unless satisfied on the balance of probabilities that:

(a) the evidence will, either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave, have substantial probative value to a fact in issue; and

(b) other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and

(c) the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.

[*Evidence (Miscellaneous Provisions) Act 1958* s 32D(1)]

When deciding whether the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting the evidence, the court must consider:

- the probability or extent of harm that would follow if the communication is produced or adduced; and
- the need to encourage victims of sexual offences to seek counselling and whether adducing the evidence would discourage victims from doing so; and
- whether the party is seeking to produce or adduce the evidence on a discriminatory basis; and
- the views of the protected confider; and
- the nature and extent of the protected confider's expectation of confidentiality and the potential prejudice to her privacy.

[See *Evidence (Miscellaneous Provisions) Act 1958* s 32D]

Sexual abuse, sexual assault and sexually coercive behaviour are all recognised forms of family violence. In some cases, the affected family member's allegations of family violence will also include allegations of sexual offences. The court must then apply Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* if the respondent seeks access to any medical or counselling records regarding these alleged acts, or if he seeks to adduce these records.

Last updated: 20 April 2010

2.4.6 Procedure

The following sections examine various rules that affect the conduct of hearings under the FVPA.

Mention dates and contested applications

The court must not hear a contested application for a final order on a mention date unless satisfied that:

- all the parties have had an opportunity to seek legal advice and representation; and
- all the parties consent to hearing the contested application on the mention date; and
- it is fair and just to all the parties to do so.

This limitation only applies to contested hearings. The court may make consent orders on a mention date in accordance with s 78, or may hear and determine the application if satisfied the respondent was served with a copy of the application and did not appear on the mention date.

(FVPA s 61]

Conduct of hearings and addresses

The court may give directions regarding the conduct of hearings and the order of evidence. Parties must obtain the permission of the court before making opening or closing addresses.

[*Magistrates' Court (Family Violence Protection) Rules 2018* rr 10.01, 10.02;
Children's Court (Family Violence Protection) Rules 2018 rr 9.01, 9.02]

Hearing multiple applications

The court may hear separate applications for family violence intervention orders together if the applicant or the respondent requests, or if the court thinks it is in the interests of justice to do so.

(FVPA s 63]

Personal safety intervention orders

The court may hear applications for family violence intervention orders together with applications under the *Personal Safety Intervention Orders Act 2010* for personal safety intervention orders if:

- the applicant or respondent requests; or
- if the court considers that it is in the interests of justice to do so.

Before hearing the applications together, the court must be satisfied that the applications are sufficiently related and it is appropriate for them to be heard together.

(FVPA s 176B]

Cross-examination and unrepresented respondents

In order to protect certain vulnerable witnesses, FVPA s 70 prohibits the respondent from personally cross-examining a *protected witness*, except in limited circumstances.

This process, including the court's role in ordering representation for the respondent and the protected person, is discussed in 2.1.7 - Case Management.

Open and closed court

The general rule is that proceedings under the FVPA are conducted in open court. A judicial officer may close the court for the whole or part of the proceeding, or may limit the people who may be present in court for the whole or part of a proceeding, if it is necessary to do so to prevent undue distress or embarrassment to an AFM, protected person or a witness.

(FVPA s 68]

The power to close the court in the FVPA is broader than the equivalent power under the *Open Courts Act 2012*, where the power to close the court to prevent undue distress or embarrassment only applies in sexual offence or family violence offence proceedings. In contrast, the power to close the court in the *Children, Youth and Families Act 2005* s 523 is already very broad and it is unlikely that FVPA s 68 adds anything when proceedings are heard in the Children's Court.

If the court makes an order closing the court or limiting the people who may be present, the registrar must post a copy of the order on a door of the court or in another conspicuous place.

Children

The Act limits the right of child to be legally represented, give evidence or be present in court unless the court grants leave.

(FVPA ss 62, 67, 150]

These limitations are examined in 2.5.3 - Protecting children in court.

Right of people under Guardianship orders to be heard

Sections 64 provide additional protections for a person under a guardianship order if the guardian applies for a final order and the affected family member objects to the application. The court must then hear the views of the affected family member separately from the guardian.

Similarly, s 112 of the FVPA requires the court to separately hear the views of the affected family member if an application for a variation, revocation or extension of a final order is made by a protected person's guardian or with the guardian's consent and the protected person objects to the application.

The difficulty of balancing respect for the autonomy of a victim of family violence with the need to minimise the risk of family violence is greater when there is a dispute between an affected family member or protected person and her guardian. The Act requires the court to hear both the affected family member or protected person and the guardian in order to determine the appropriate orders.

Improper questions

The court's power or obligation to prevent improper questioning of witnesses from *Evidence Act 2008* s 41 applies to proceedings for an intervention order.

(FVPA s 65(2)]

The court:

- may disallow improper questions asked in cross-examination of *any witness*; and
- must disallow improper questions asked in cross-examination of a *vulnerable witness*, unless satisfied in all the circumstances that the question is necessary.

The *Evidence Act 2008* defines improper questions or improper questioning as questions that:

- are misleading or confusing; or
- are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- have no basis other than a stereotype.

A witness is vulnerable, and therefore the court *must* prohibit improper questioning, if:

- the witness is under the age of 18; or
- the witness has a cognitive impairment or an intellectual disability; or
- the court considers the witness vulnerable, having regard to any relevant characteristics of the witness, any mental or physical disabilities and the context of the questioning, including the nature of the proceeding and the relationship between the witness and any other parties to the proceeding.

This provision is discussed in more detail in the Uniform Evidence Manual

In some cases, the affected family member will be a vulnerable witness under s 41(4)(c), due to the nature of the proceedings and the relationship between the affected family member and the respondent. Assessing the vulnerability of the affected family member may depend on understanding the consequences of family violence and the relationship between the affected family member and the respondent. While the prohibition on personal cross-examination (see FVPA s 70) addresses part of the risk that respondents will attempt to use the court process to further traumatise the affected family member, a residual risk may exist when legal practitioners cross-examine the affected family member on the respondent's instructions in an unduly intimidating, offensive or humiliating manner.

Alternative arrangements

A party may apply to the court in writing for an order that the court use alternative arrangements when a witness is giving evidence. This application must set out:

- why the witness requires alternative arrangements for giving evidence; and
- the alternative arrangements sought.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 10.04;
Children's Court (Family Violence Protection) Rules 2018 r 9.04]

If a party has not previously applied for alternative arrangements, the court may still direct that alternative arrangements be made available if those arrangements are available on the day of the hearing.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 10.04;
Children's Court (Family Violence Protection) Rules 2018 r 9.04]

In practice, written applications are rarely necessary. Alternative arrangements are often organised by the judicial officer and the parties at an interim hearing, mention hearing or directions hearing, without a formal application.

The court may order that any of the following alternative arrangements apply when a witness is giving evidence:

- that a witness give evidence by way of closed-circuit television;
- that screens be used to remove the respondent from a party's or a witness' line of sight;
- that a person may be beside a party or a witness while the party or witness is giving evidence for the purpose of providing emotional support;
- that legal practitioners must be seated during the proceeding;
- any other alternative arrangements the court considers appropriate.

In addition, in proceedings in the Specialist Family Violence Court Division, the court is expressly authorised to order that only persons specified by the court may be present while the witness is giving evidence.

[*Magistrates' Court Act 1989* s 4K]

The court may make these orders if the witness is an adult and *must* make at least one of these orders if the witness is a child, unless it is not appropriate to do so, having regard to:

- the wishes of the witness; and
- the age and maturity of the witness; and
- the facilities available for the conduct of the proceeding; and
- any other matters the court considers relevant.

The court may make or revoke orders for alternative arrangements on its own initiative or on the application of a party.

(FVPA s 69, *Magistrates' Court Act 1989* s 4K]

The VLRC noted that victims of family violence find giving evidence a traumatic experience and that being in the same room as the respondent heightens their fear and anxiety. The commission stated that "providing alternative ways to giving evidence is essential to an accessible intervention order system".

[see VLRC, Final report, 386–390]

At an early mention or directions hearing, the court should consider whether a party requires alternative arrangements for giving evidence. When the affected family member is not represented, the judicial officer may need to inform her that she can apply to use alternative arrangements.

The Act does not state when alternative arrangements will be suitable for adult witnesses or which alternative arrangements should be used. Instead, judicial officers should consider the purposes of the Act when deciding whether to grant a request for alternative arrangements, which are to:

(a) maximise safety for children and adults who have experienced family violence; and

(b) prevent and reduce family violence to the greatest extent possible; and

(c) promote the accountability of perpetrators of family violence for their actions.

(FVPA s 1]

For child witnesses, the court should usually direct that the witness give evidence through CCTV or with a screen between the witness and respondent. In most cases, the court should also direct that a person may sit beside the child to provide emotional support if these arrangements are available.

Last updated: 13 February 2018

2.5 Children

2.5.1 Protection from family violence

The preamble of the FVPA states that one of the features of family violence is:

> (b) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing.

Recognition of the risks associated with exposing children to family violence is strengthened by s 5(1)(b), which states that causing a child to hear, witness or be otherwise exposed to the effects of family violence is itself a form of family violence.

Section 5 contains five examples of conduct that may cause a child to hear, witness or otherwise be exposed to the effects of family violence:

- overhearing threats of physical abuse by one family member towards another family member; and
- seeing or hearing an assault of a family member by another family member; and
- comforting or providing assistance to a family member who has been physically abused by another family member; and
- cleaning up a site after a family member has intentionally damaged another family member's property; and

- being present when police officers attend an incident involving physical abuse of a family member by another family member.

These examples make it clear that a child may be the victim of family violence even if he or she does not directly witness the violence.

It is, however, doubtful that a child can be the victim of family violence where family violence is inflicted on the mother while the child is in utero.

[*OP v XY* [2020] VSC 754, [449]–[451]]

The following sections also address specific procedural protections relevant to children.

Applications concerning children

A child may not apply for a family violence intervention order unless:

- he or she is at least 14 years of age; and
- the court grants leave.

(FVPA s 45(d)(iii)]

The court may not grant leave to a child applicant unless satisfied that the child understands the nature and consequences of a family violence intervention order.

(FVPA s 46(2)]

Police officers and parents may apply on behalf of a child affected family member, and any other person may apply with the written consent of a parent of the child or with the leave of the court. The court must grant leave to a third party if satisfied that it is in the best interests of the child to do so.

(FVPA ss 45, 46(1)]

An application to protect the parent of a child may also include an application to protect the child if the applications arise out of the same or similar circumstances. The court may hear these applications separately if the court thinks it appropriate to do so, after considering the advantages of hearing the matters together.

(FVPA s 47]

Once an order is made, a child protected person aged 14 or more must obtain leave of the court before applying to vary, revoke or extend the order. A parent of the child other than the respondent or any other person with the written consent of a parent, other than the respondent, may also apply to vary, revoke or extend the order.

(FVPA s 108]

Interim orders to protect children

When the court is considering whether to make an interim order, it must consider whether there is a child who requires protection from family violence committed by the respondent.

(FVPA s 52A]

Court must make interim intervention orders for a child if court makes an interim order for an affected family member

The court must make an interim order for a child if the court makes an interim order for an affected family member if:

- the court makes an interim order under s 53(1) in relation to an affected family member; and

- the court is satisfied (on the balance of probabilities) that a child has been subjected to family violence committed by the respondent (whether or not that child is an affected family member)

if the interim order is made other than by consent, the court must:

- if the child's need for protection is substantially the same as that of an affected family member, include the child in the interim order as a protected person; or
- otherwise, make a separate interim order for the child as a protected person

if the court makes the interim order by consent, and that order does not include the child, the court must make a separate interim order for the child as a protected person.

However, the court is not required to include the child in the interim order or to make a separate interim order to protect the child if the court is satisfied that it is not necessary to do so to protect the child or ensure the safety of the child pending a final decision about the application.

(FVPA s 53AA]

Consent orders

Section 78 of the Act allows the court to make a final order if all the parties to the proceeding consent to the order or do not oppose the making of the order. Similarly, s 74 of the Act allows a final order to be made for more than one family member if consent has been given, or the making of the order has not been opposed, in accordance with s 78 by all parties to the proceedings and, if the application was brought with the consent of an affected family member's parent or guardian, that parent or guardian.

These provisions mean that, with the consent of the adult parties, a child can be joined as a protected person on a family violence intervention order, without the court being satisfied that the child has been subject to family violence. In exercising this power, it is not necessary to amend the application to include the child as an affected family member, or inquire into whether the child consents to the order.

[see *OP v XY* [2020] VSC 754, [462]–[468]]

Conditions on orders made following an application without the consent of the protected person

If the affected family member is a child, the limitations in s 75 on conditions for a final order when a police officer applies for the order without the consent of the affected family member do not apply.

(FVPA s 75(3)]

Similarly, when a police officer applies to vary or extend an order without the consent of the protected person, the restrictions in s 110 do not apply if the protected person is a child.

(FVPA s 110(3)]

Protection of children on court's own initiative

If the court does not make a final order under s 74 in relation to an affected family member, the court *may, on its own initiative*, make a final order for a child of an affected family member or respondent as a protected person if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the child and is likely to continue to do so again.

(FVPA s 77B(1)]

If the court does not make a final order under s 76 in relation to an affected family member or an additional applicant, *the court may, on its own initiative*:

- make a final order for the child of an affected family member as a protected person if satisfied that the additional respondent has subjected the child to behaviour which would be family violence if the child and additional respondent were family members, and the additional respondent is likely to continue to do so or do so again; or
- make a final order for a child of an additional applicant as protected person if satisfied, on the balance of probabilities, that the respondent has subjected the child to behaviour that would be family violence if the child and the respondent were family members, and is likely to continue to do so or do so again.

(FVPA s 77B(2)]

If the court does not make an interim order under s 53(1) in relation to an affected family member, the court may, on its own initiative, make an interim order for a child as a protected person if satisfied that:

- the child has been subjected to family violence; and
- an interim order is necessary to protect the child pending a final decision about the application

(FVPA s 53AB]

Where the court makes an interim order under s 53AB, both the child and the respondent will be parties to the proceeding for the final order. The applicant is either the affected family member, the person making the application (if not the affected family member), or the Chief Commissioner of Police where appointed by the court.

For final orders, the Chief Commissioner may be appointed where:

- the Chief Commissioner of Police is not a person referred to in subsection (2)(a)(ii); and
- the appointment is necessary in all the circumstances, having regard to the child's safety.

The Commissioner will then receive a copy of the interim order which makes that appointment and a copy of the s 53(1) application.

The application for the final order in respect of the child is not affected by the initial application referred to in section 53(1) being struck out or withdrawn. It may be dealt in the same way as any other application.

Court to inquire about other relevant orders for children

If the protected person or the respondent is the parent of a child and the court decides to make an interim or a final order, the court must enquire whether there are any Family Law Act orders or child protection orders in force in relation to the child.

(FVPA s 89]

If the court discovers that there is a Family Law Act order that will be inconsistent with the proposed intervention order, the court must exercise its powers under the *Family Law Act 1975* (Cth) to revive, vary, discharge or suspend the Family Law Act order to the extent of the inconsistency. See Chapter 3.6 for further details on this process.

(FVPA s 90]

The court must also decide whether or not it will or may jeopardise the safety of the protected person or the child for the child to live with, spend time with or communicate with the respondent. The Act states that a previous lack of violence is not sufficient reason on its own to conclude that the child's safety will not be jeopardised.

(FVPA s 91]

If living with, spending time with or communicating with the respondent may jeopardise the child's safety, the court must include a condition in the order prohibiting the respondent from the kinds of contact that would jeopardise the child's safety. Otherwise, the court must include conditions that contact arrangements must be in writing and must minimise the risk of violence against the protected person.

(FVPA ss 92, 93]

The operation of these obligations is arguably unclear. See 2.2.3.4 Safety of children for an analysis of these provisions.

Continuing protection of child protected persons

Section 73I requires a court to consider any children before making a final intervention order under ss 74 or 76. This includes children who have been subjected to behaviour which would be considered family violence if the child and the respondent or additional applicant were family members.

(FVPA s 73I]

When the court is asked to vary or revoke an order, the court must decide:

- whether there has been any change in the need to protect another person protected by the order from the respondent; and
- whether there are any other people who have become family members of the respondent or protected person since the order was made; and
- whether there are any Family Law Act orders in relation to where children in the above two categories live, or in relation to the respondent spending time with or communicating with the child.

Section 102(2) of the Act states:

> The court may refuse to vary or revoke the family violence intervention order, or may vary the order in a way that differs from the variation sought in the application if the court is satisfied, on the balance of probabilities, that it is necessary to do so to ensure the safety of another person protected by the order.

In addition, if a child protected by the order has a continuing need for protection from the respondent which is not substantially the same as the needs of the other person protected by the order, the court may make a new intervention order to protect the child and vary the relevant order as the court considers necessary.

(FVPA s 103]

If the court discovers that a child has become a family member and is satisfied, on the balance of probabilities, that the respondent has subjected the child to family violence and is likely to do so again, the court may, on its own motion:

- vary the order under review to include the child as a protected person and make any other variations the court considers appropriate, if the child's need for protection is substantially the same as that of the person protected by the order; or
- make a new family violence intervention order for the child as a protected person, if the child's needs are not substantially the same as those of the protected person.

(FVPA s 104]

Orders under s 103 and s 104 are taken, for the purpose of s 100, to be orders under s 53AB or 77B. This means that the court has jurisdiction to vary or revoke these orders on its own motion.

(FVPA s 105]

See 2.3 Changing orders for further information on the mandatory enquiries to protect children when the court varies or revokes an intervention order.

Children protected by orders: statistics

The number of children protected under intervention orders has increased exponentially over recent years. In 2011–12, 15,414 children were protected by intervention orders. And between 2004–05 and 2011–12, there was a 295.4% increase in the number of children protected under an order.

Several factors have been identified as explaining this increase. Firstly, the *Family Violence Protection Act 2008* explicitly states that family violence includes the direct perpetration of violence against children, as well as the exposure of children to family violence. Secondly, there may have been administrative changes in how protected persons are recorded on family violence intervention orders. Under the *Crimes (Family Violence) Act 1987*, it would often be the case that there would only be one protected person for the purposes of the order, although in practical terms several children may have been protected by the conditions of the order. Under the *Family Violence Protection Act 2008*, all people requiring protection are likely to be individually listed as protected persons on a family violence intervention order.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), pp 19–20]

For further information regarding the rate at which children experience family violence, see 5.3.1 Prevalence of children experiencing family violence.

Last updated: 30 November 2020

2.5.2 Respondent children

The following five sections discuss particular provisions that may be relevant when the respondent is a child.

Intergenerational abuse, sibling abuse and family violence between adolescents are all emerging areas of law and social science and there is currently little research on the prevalence of this behaviour and the particular challenges it poses.

Police powers and family violence safety notices

The police holding powers and the family violence safety notice provisions both rely on the police officer suspecting on reasonable grounds that the respondent is an adult. These provisions are therefore effectively not available against child respondents, unless the police officer forms a mistaken belief that the respondent is an adult.

(FVPA ss 13(b), 24(a)]

Consent orders and unopposed orders

Section 78 allows the court to make a final order if the parties consent to the order or do not oppose the court making the order. However, this general provision is qualified if the respondent is a child. Section 78(2) states that if the respondent is a child, the court cannot make a final order unless it is satisfied that the grounds for the order are established.

See 2.2.2.1 Power to make final intervention orders for details on the relevant test.

This limitation does not apply to interim orders. The court may make an interim order that is consented to or not opposed against a child respondent without being satisfied of the grounds of the order and whether or not the respondent admits to any or all of the particulars of the application.

(FVPA s 53(1C)]

Exclusion conditions and children

When the court makes an intervention order, it must consider including a condition excluding the respondent from the protected person's residence. In deciding whether to impose an exclusion condition, the court must consider:

(a) the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;

(b) the desirability of continuity and stability in the care of any child living with the protected person;

(c) the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance.

(FVPA s 82(2)]

If the respondent is a child, the court must also consider the following matters:

(a) the desirability of the child being supported to gain access to appropriate educational services and health services;

(b) the desirability of allowing the education, training or employment of the child to continue without interruption.

(FVPA s 83(2)]

Section 83 of the FVPA also qualifies the general rule that the safety of the affected family member and any children who have been subjected to family violence must be the paramount consideration when determining the conditions to impose on an intervention order. When the respondent is a child, the court may only impose an exclusion condition if satisfied that the child will have appropriate alternative accommodation and appropriate care and supervision.

In addition, if the child is an Aboriginal or Torres Strait Islander child, the court must have regard to the following matters when determining whether the child will have appropriate alternative accommodation, care and support:

(a) as a priority, an Aboriginal or Torres Strait Islander child should live within the child's Aboriginal or Torres Strait Islander extended family or relatives or, if that is not possible, other extended family or relatives;

(b) the need for the child to keep the child's culture and identity through contact with the child's community.

(FVPA s 83(4)]

For the purpose of considering the additional matters relevant to a child respondent, the court may ask the Secretary to the Department of Human Services to provide a report about available alternative accommodation, care and supervision. The Secretary must provide this report within the time specified by the court, or within 7 days if the court does not specify a time.

(FVPA s 84; *Family Violence Protection Regulations 2008* r 10]

If the court imposes an exclusion condition in an order against a child respondent, the court must notify the Secretary to the Department of Human Services.

(FVPA s 83(5)]

Duration of order

The court may specify an operative duration of a final order. An order has indefinite duration if the court does not specify when it expires.

(FVPA s 97]

If the respondent to the order is a child, the court may not specify a duration of more than 12 months unless there are exceptional circumstances.

(FVPA s 98]

Counselling orders

Under Part 5 of the FVPA, the Specialist Family Violence Court Division cannot make a counselling order if the respondent is a child.

(FVPA s 128]

Last updated: 10 December 2019

2.5.3 Protecting children in court

The following sections describe provisions of the Act that aim to minimise the trauma that children can suffer when participating in court proceedings.

For further information, see *Chapter 14: Child Victims* in Victims of Crime in the Courtroom: A Guide for Judicial Officers.

Limiting involvement of children

The FVPA aims to minimise a child's exposure to the court system by requiring the court to grant leave before a child may participate in the following ways.

First, an affected family member who is a child, but is not the applicant, may not be legally represented unless the court, *on its own initiative*:

> (a) considers it appropriate in all the circumstances of the case; and
>
> (b) gives leave for the child to be represented.

(FVPA s 62]

Secondly, children other than applicants and respondents must not give evidence in a proceeding under the FVPA unless the court grants leave.

(FVPA s 67]

Thirdly, unless the court makes an order allowing the child to be present, or the child is the respondent or the accused, the following types of children must not be present during proceedings under the FVPA:

> (a) the affected family member or protected person for the proceeding; or
>
> (b) a family member of the respondent or the affected family member or protected person in the proceeding; or
>
> (c) in relation to a proceeding for an offence against this Act, the victim in relation to the alleged offence or the child of the alleged victim.

(FVPA s 150(1)]

When determining whether to grant leave or to make an order permitting the event that is otherwise prohibited, the court must consider:

- the desirability of protecting children from unnecessary exposure to the court system; and
- the harm that could occur to the child and to family relationships if the child participates in the manner contemplated.

(FVPA ss 62(2), 67(2), 150(3)]

See Child Witnesses: Testing Competence and Questioning for further information on children as witnesses.

Alternative Arrangements

Section 69 of the Act gives the court power to direct that any of the following arrangements be made if the proceedings is in respect of a family violence intervention order:

- permitting the use of closed circuit television;
- using screens to remove the respondent from the child's direct line of vision;
- permitting someone to be beside the child for the purpose of providing emotional support;
- requiring legal practitioners to remain seated;
- any other alternative arrangements the court considers appropriate.

(FVPA s 69(1)]

In addition, in proceedings in the Specialist Family Violence Court Division, the court is expressly authorised to order that only persons specified by the court may be present while the witness is giving evidence.

[*Magistrates' Court Act 1989* s 4K]

The court must make a direction for the use of alternative arrangements in relation to a child witness unless the court considers it is not appropriate to do so. The court must consider:

- the wishes of the child; and
- the age and maturity of the child; and
- the facilities available to conduct the proceeding; and
- any other matters the court considers relevant.

(FVPA s 69(3)]

See 2.4.6 Procedure for further details on making alternative arrangements for witnesses.

Children as protected witnesses

Children are automatically protected witnesses for the purpose of the Act. The respondent may not personally cross-examine a protected witness. A child cannot waive this protection.

(FVPA s 70]

Jurisdiction of courts in relation to children

The Family Division of the Children's Court and the Magistrates' Court both have jurisdiction if the affected family member, protected person or respondent was a child at the time the application was made. However, FVPA s 146(2) specifies that "if the respondent is a child, the application should, if practicable, be dealt with by the Children's Court".

The Children's Court has jurisdiction to deal with related applications and related orders concerning an adult affected family member, protected person or respondent. Related applications and related orders are applications or orders based on the same or similar circumstances to another application or order.

(FVPA s 147]

The Children's Court also has jurisdiction to deal with applications which are related to child protection proceedings. Applications are related to child protection proceedings if the child who is the subject of the child protection proceeding is the child of, or under the care and supervision of, the affected family member or protected person, or the respondent for the application. In addition the application under the FVPA must raise issues relating to the safety of the child which are the same as, or similar to, the issues which form the basis for the child protection proceeding.

(FVPA s 147A]

Last updated: 10 December 2019

2.6 Interaction with family law

Division 11 of Part VII of the *Family Law Act 1975* (Cth) (FLA) governs the interaction between family violence orders and parenting orders, recovery orders and other orders or injunctions under the FLA. The general rule is that orders under the FLA prevail over inconsistent orders under family violence legislation. However, State courts have jurisdiction to revive, vary, suspend or discharge family law orders when making family violence orders. This assists courts to establish consistency between family violence orders and orders under the FLA and to take account of violence that occurs after a court makes a family law order.

(FVPA s 176, FLA ss 68P, 68R]

The FLA defines "family violence orders" as orders under a prescribed law of a State or Territory to protect a person from family violence.

[FLA s 4]

The FVPA is a "prescribed law" under the FLA.

[*Family Law Regulations* 1984 r 12BB, Schedule 8]

The Family Court, the Federal Magistrates' Court and state courts of summary jurisdiction have jurisdiction to make orders under Part VII of the FLA.

[FLA ss 69H, 69J]

Last updated: 20 April 2010

2.6.1 Types of Family Law Act Orders

The FVPA defines "Family Law Act order" as

> an order, injunction, undertaking, plan or recognisance referred to in section 68R of the Family Law Act.

Section 68R refers to the following kinds of "orders", provided the order allows a child to spend time with a person or requires or authorises a person to spend time with a child:

- parenting orders; and
- recovery orders; and
- injunctions; and
- undertakings; and
- registered parenting plans; and
- recognisances.

Some sections of the FLA draw a distinction between the first three orders, which may be termed "court orders" and the latter three types of "orders". There are often extra restrictions on modifying court orders compared to the latter type of orders.

Parenting orders

A parenting order is an order dealing with one or more of the following matters:

(a) the person or persons with whom a child is to live;

(b) the time a child is to spend with another person or other persons;

(c) the allocation of parental responsibility for a child;

(d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child;

(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:

(i) a child to whom the order relates; or

(ii) the parties to the proceedings in which the order is made;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

An order discharging, varying, suspending or reviving an order dealing with one of the above matters is also a parenting order.

[FLA s 64B]

The FLA encourages parents to make agreements called "parenting plans" and to use the legal system as a last resort. These agreements must be in writing, signed and dated and must be made free of any threat, duress or coercion.

[FLA ss 63B, 63C]

Unless the court makes an order to the contrary, all parenting orders contain an implied condition that the order is subject to any later parenting plan agreed upon by the parties. Parties cannot set aside or vary a parenting plan unless all consent. If parties cannot agree, then one party may need to seek a fresh court order to displace the parenting plan. The court must have regard to the most recent parenting plan when making a parenting order.

[FLA ss 64D, 65DAB]

Recovery orders

A recovery order directs that a child be returned to a person. The order may also authorise or direct specified people to help in locating and recovering the child, such as the Australian Federal Police, the police forces of all States and Territories, and the Marshall of the Family Court.

A recovery order remains in force for the period specified in the order, to a maximum duration of 12 months (FLA s 67W).

Injunctions

A court exercising jurisdiction under Part VII of the FLA may make an injunction for the welfare of a child. This includes injunctions for the personal protection of a child or another person, or injunctions restraining the respondent from approaching the place of residence, employment or education of the child or another person.

[FLA s 68B]

Similarly, a court may make injunctions concerning parties to a marriage, including restraining a party from entering the premises or the workplace of another party, or restraining a party from harming another party to the marriage, or harming the property of a party. The court may also make injunctions regarding de facto partners.

[FLA s 114]

While injunctions may normally either prohibit certain conduct (prohibitory injunctions) or compel a person to do something (mandatory injunctions), the drafting of the FLA makes this more complex than usual. The FLA confers power to *make an order* or *grant an injunction* in relation to certain specified matters (see s 68B(1) and s 114(1) and (2)). Apart from these specific matters, the FLA only confers a general power to *grant an injunction* and does not give a general power to *make an order*. Courts must recognise the distinction Parliament has drawn between orders and injunctions. In some cases, a direction to perform certain acts (such as disclosing the address of another person to aid a recovery order) must be classed as an order, rather than a mandatory injunction. This distinction can be important, as s 68R does not confer a general power to suspend or revoke an order, rather than an injunction, made under s 68B or s 114.

[See *R v Bell; ex parte Lees* (1980) 146 CLR 141]

The provisions of the FLA regarding injunctions do not "cover the field" of injunctions between family members, as the Act expressly recognises the continued operation of State-based family violence orders. Section 109 of the *Australian Constitution* therefore does not override family violence laws.

[*De Angelis v De Angelis* (2000) 158 FLR 331]

Injunctions under the FLA do not provide the same degree of protection as State-based intervention orders, because Victorian police cannot enforce family law injunctions. Instead, the onus is on the applicant to bring proceedings to enforce the injunction.

A person may not institute proceedings seeking an injunction under s 68B or s 114 of the FLA if he or she has instituted proceedings or taken any other action under a "prescribed law" (which, under *Family Law Regulations* 1984 reg 19, includes the FVPA) regarding a matter the person could otherwise have commenced under the FLA. This prohibition does not apply when the other proceedings have lapsed, or the orders have been set aside.

(FVPA s 114AB]

While s 114AB is designed to prevent duplication of proceedings, it does not apply when proceedings under the prescribed law were commenced by a person other than the applicant in the Family Law proceedings applies for an intervention order under the FVPA and the affected family member applies for an injunction under the FLA. There is also no equivalent provision in the FVPA to stop a person bringing proceedings for an intervention order after instituting proceedings in the Family Court or the Federal Magistrates' Court for an injunction or other order.

[see *L & L* [2003] FMCAfam 549; *Cauchi v Cauchi* [1993] FamCA 140; *Domestic violence laws in Australia*, The National Council to Reduce Violence against Women and their Children, 2009]

Undertakings

Undertakings are not expressly governed by the FLA. In accordance with common practice, parties may give undertakings to facilitate the management of a case, or in exchange for another party compromising an aspect of the proceeding.

A court may suspend, vary, discharge or revive an undertaking under s 68R.

Registered parenting plan

Prior to the *Family Law Amendment Act 2003* (Cth), parenting orders were only subject to latter *registered* parenting plans. Section 68R allows a court to revive, vary, discharge or suspend a registered parenting plan that expressly or impliedly authorises a person to spend time with a child.

Recognisances

Recognisances are no longer expressly dealt with by the FLA, but might be required by the court as part of making an order. Recognisances as part of the penalty for breach of an order are now dealt with by bonds under s 112AF.

Last updated: 20 April 2010

2.6.2 Power to modify Family Law Act orders

In proceedings to make or vary a family violence order, a court has power to revive, vary, discharge or suspend any Family Law Act orders. A court may exercise this power on its own initiative or on the application of any person.

[FLA s 68R]

The three conditions on exercising this power are:

- the court must make or vary a family violence order in the proceeding; and
- if the court proposes to revive, vary, discharge or suspend a *court order,* the court must have material that was not before the court that made the order or injunction; and
- if the court proposes to vary, discharge or suspend a *court order,* the court must be satisfied that it is appropriate to do so because the earlier order exposes or is likely to expose a person (including a child or an adult) to family violence.

[FLA ss 68R(3), (5)(b)]

Section 68R only applies when the court "makes" or "varies" a family violence order. It does not apply when the court "extends" or "revokes" an order under s 106 of the FVPA.

The second requirement is designed to prevent parties from circumventing Family Law Act orders by applying under family violence laws where there is no new evidence of violence. It promotes consistency between court orders.

[See *Family Law Amendment (Shared Parenting Responsibility) Bill 2006*, Explanatory Memorandum, section 68R]

Orders under s 68R are currently made by including a s 68R condition with the conditions of an invention order on Courtlink. While a s 68R order is legally a distinct order, the design of Courtlink requires the court to record the order in this way and it ensures that all relevant orders are recorded in one place.

Identifying inconsistent orders

When the court makes a family violence intervention order and the protected person or respondent is the parent of a child, the court must enquire whether there are any Family Law Act orders in force in relation to the child.

(FVPA s 89]

If there are Family Law Act orders in force in relation to the child and if the intervention order and Family Law Act order would be inconsistent, then the court *must*, to the extent of its powers under s 68R, revive, vary, discharge or suspend the Family Law Act order to the extent that it is inconsistent with the intervention order.

(FVPA s 90]

Note, however, that when the court makes an interim order, it cannot discharge a family law order and may only revive, vary or suspend the order for 21 days.

[FLA ss 68R(4), 68T]

Family Law Act orders and family violence orders may be directly or indirectly inconsistent. For example, a family violence order prohibiting the respondent from having any contact with his children is directly inconsistent with a Family Law Act order that provides for the child to spend time with the respondent. Orders may also be practically inconsistent, if a Family Law Act order allows child contact, but the family violence order prohibits any contact with the protected person. It will then be practically difficult to arrange contact visits and conduct handover without breaching the family violence order.

Courts must carefully consider whether the orders are inconsistent and how the orders will operate in practice. Research shows that handover for child contact is a time of increased risk of family violence. By exercising the power to modify Family Law Act orders at the same time as making a family violence order, the court can ensure consistency between the orders and minimise the risk to the protected person and the children.

[*Domestic violence laws in Australia*, The National Council to Reduce Violence against Women and their Children, 2009, 6.2.2, 6.2.3, 6.2.23, 6.2.24;
Family Law Council: Review of Division 11 – Family Violence, Letter of Advice, 16 November 2004, 3]

Mandatory considerations when exercising power under s 68R

When reviving, varying, discharging or suspending orders under s 68R, the court must consider:

- the purposes of Division 11 of the FLA, which are:

- to resolve inconsistencies between family violence orders and orders or injunctions under the FLA that require or authorise a person to spend time with a child; and
- to ensure that orders or injunctions under the FLA that require or authorise a person to spend time with a child do not expose people to family violence; and
- to achieve the objects of Part VII of the FLA; and
    - whether contact with both parents is in the best interests of the child concerned.

[FLA s 68R(5)]

A court must also consider the purposes and principles that apply to all decisions under Part VII of the FLA.

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

[FLA s 60B]

Section s 68S specifically excludes the operation of the following sections of the FLA when a court is exercising the power under s 68R:

- s 65C, governing who may apply for a parenting order; and
- s 65F(2), which creates a general requirement that parties must attend family counselling before the court may make a parenting order, subject to exceptions for consent orders and circumstances where counselling is not suitable; and
- s 60CG, which requires that a court, as far as possible consistent with the best interests of the child being the paramount consideration, ensure that an order under the FLA is consistent with any family violence orders; and
- s 69N, which requires a court to transfer proceedings to the Family Court or the Federal Magistrates' Court in some circumstances; and
- any provisions that would otherwise make the best interests of the child the paramount consideration (e.g., s 60CA); and
- any other provisions or the applicable Rules of Court that are specified in the regulations (currently, there are no relevant provisions specified in the rules or regulations).

A note to s 68S states that even though the best interests of the child are not the paramount consideration, the best interests of the child are still a relevant consideration due to s 68R(5)(b).

When the court is making an interim order or an interim variation, the court has a discretion on whether to apply FLA s 60CC(3)(a), which requires the court to take the child's views into account in determining his or her best interests.

Division 11 of the FLA has previously been criticised as unduly complex and that it is not reasonable to expect judicial officers in busy duty lists to understand and apply its provisions when making a family violence order. The Division has since been redrafted to reduce the complexity, though it arguably has not gone far enough.

[See *Family Law Council: Review of Division 11 – Family Violence*, Letter of Advice, 16 November 2004, 5]

Meaning of family violence under the Family Law Act 1975 (Cth)

Section 68R of the *Family Law Act 1975* (Cth) gives courts power to modify a 'family violence order', which is defined as an order under a prescribed law of a state to protect a person from family violence.

Recent amendments to the *Family Law Act 1975* (Cth) expanded the definition of 'family violence' and more closely align it with the corresponding definition in the *Family Violence Protection Act 2008*. The *Family Law Act 1975* (Cth) now defines 'family violence' as:

> (1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
>
> (2) Examples of behaviour that may constitute family violence include (but are not limited to):
>
> (a) an assault; or
>
> (b) a sexual assault or otherwise abusive behaviour; or
>
> (c) stalking; or
>
> (d) repeated derogatory taunts; or
>
> (e) intentionally damaging or destroying property; or
>
> (f) intentionally causing death or injury to an animal; or
>
> (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
>
> (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
>
> (i) preventing the family member from making or keeping connections with his or her family, friends and culture; or
>
> (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

[FLA s 4AB]

By way of comparison, the *Family Violence Protection Act 2008* defines family violence as:

(a) behaviour by a person towards a family member of that person if that behaviour-

(i) is physically or sexually abusive; or

(ii) is emotionally or psychologically abusive; or

(iii) is economically abusive; or

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

(FVPA s 5(1)]

While the definitions in each Act are now similar, differences remain. It is not immediately obvious whether these differences are of practical significance.

No power to make fresh parenting orders

Section 68R only gives the court power to "revive, vary, discharge or suspend" a Family Law Act order. Previously, the corresponding section (FLA s 68T) included a power for the court to *make* a Family Law Act order. The *Family Law Amendment (Shared Parenting Responsibility) Act 2006* amended this process and now courts cannot create new parenting orders when making or varying family violence orders. In proceedings under the FVPA, the court should focus on whether the affected family member and any relevant children require protection from family violence. It is the responsibility of the parties to arrange ongoing contact by agreement or to seek a parenting order in separate proceedings.

Section 68R and family dispute resolution

It is not necessary for a party to file a certificate from a family dispute resolution practitioner before the court exercises power under s 68R. The family dispute resolution provisions only limit applications for orders under Part VII, while s 68R is exercised on the court's own motion. In addition, the provisions do not apply if the court is satisfied that there are reasonable grounds to believe that there has been family violence by one of the parties (s 60I(9)(b)). Subject to the differences in the definition of family violence in the FLA and the FVPA, this condition will invariably be satisfied in any proceeding where the court is considering exercising the power in s 68R.

Exceptions to Family Law Act orders

The Magistrates' Court and the Children's Court have developed the following standard condition that it attaches to intervention orders to regulate the interaction between Family Law Act orders and the intervention order:

> If the respondent does not commit family violence while doing so, he/she will not contravene this order by:
>
> (a) doing anything that is permitted by a Family Law Act order, a child protection order or a written agreement about child arrangements.
>
> [*Family Violence Intervention Order Conditions Courtlink Code Mat for Magistrates*]

The VLRC has warned that a condition stating that an intervention orders applied "except for child contact" is unclear and does not adequately protect the protected person. Instead, in proceedings for contravention of the order, the condition forces the prosecution to prove that the impugned conduct was not "for child contact". This makes proving contravention of an order more difficult by requiring an investigation of the accused's subjective reasons for the contact. The current standard condition makes it clear that a Family Law Act order overrides the intervention order to the extent of any inconsistency and that the prohibition on committing family violence continues to apply.

[See VLRC, Final report, 346–347]

Effect of parenting plans

Parenting orders are subject to any later parenting plan agreed to in writing by the parents, unless the order contains a provision to the contrary (FLA s 64D). The interaction, however, between parenting plans and family violence orders is unclear.

As discussed in 2.6.5 Inconsistency between orders and invalidity, State laws cannot preclude, override or limit the exercise of jurisdiction under Commonwealth laws.

The issue then is whether a parenting *plan* overrides any inconsistent intervention order. The FLA does not confer any power on state courts or federal courts to modify a parenting plan and there is no penalty for contravening a parenting plan. Instead, it is a defence to a charge of contravening a parenting order to prove that the conduct complies with a valid parenting plan. The FLA also states that courts must have regard to parenting plans when exercising power to modify parenting orders following a contravention and must consider whether to include some or all of the terms of the plan in the parenting order (FLA s 70NBA, s 70NBB). Given this legislative framework, it is more likely that parenting plans are not equivalent to an exercise of jurisdiction under a Commonwealth Act, but merely give rise to a defence to a charge of contravening a parenting order.

If it is correct, then there is no need to give courts a power to suspend or modify parenting plans, whether the plans are made before or after the court makes a family violence order. However, judicial officers will still need to revive, vary or suspend the relevant parenting order to ensure consistency with the family violence order, even if the parties have made a subsequent parenting plan. Otherwise parts of the family violence order may be invalid due to inconsistency with an exercise of jurisdiction under a Commonwealth Act.

Registering s 68R orders

When the court makes a family violence order and exercises the power under s 68R to revive, vary, suspend or discharge a Family Law Act order, the court must send a sealed copy of the decision regarding the Family Law Act order to the registrar of the Family Court as soon as practicable.

Failure to do so does not affect the validity of either order.

[FLA s 68R(6); *Family Law Regulations 1984* (Cth) r 12CC]

"Residence" orders and s 68R

The power in s 68R(1) to modify an order only exists if the order "provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child" (FLA s 68R(1)). The court cannot, for example, modify a parenting order that relates only to the maintenance of a child, or the allocation of parental responsibility.

The FLA arguably draws a distinction in s 64B(2) between orders for a child to spend time with a person and orders for the child to live with a person. Sections 68P and 68R certainly apply to orders that a child spend time with a person, but it is unclear whether an order that the child must live with a person is an order that "implied requires or authorises a person to spend time with the child".

Division 11 (including the current s 68R) previously only dealt with inconsistencies between "contact orders" and "family violence orders". The *Family Law Amendment (Shared Parental Responsibility) Act 2006* changed the language throughout the FLA from "residence" and "contact" to "lives with" and "spends time with", respectively. The House of Representatives standing committee on Family and Community Affairs recommended this change so that the Act used more family friendly terms. The amendments abolished formal distinction between "residence" and "contact" orders and both are now treated as "parenting orders". The explanatory memorandum stated that:

> The changes will focus the court and the parties on parenting as the central issue. In particular, this will emphasise the need for parents to think more broadly about what parenting means and the impact of the proceedings upon the child.

[See *Family Law Amendment (Shared Parental Responsibility) Act 2006*, Explanatory Memorandum, Schedule 8; *Every Picture Tells a Story: Inquiry into child custody arrangements in the event of family separation*, 2003, 2.85]

Arguably, the term "spends time with" is broader than "contact orders" and could impliedly include the former "residence orders". However, this is inconsistent with the legislative history and it is unclear whether this shift to a general focus on "what parenting means" was meant to expand the scope of Division 11.

If Division 11 of the FLA does not cover "residence" or "lives with" orders, then a court making a family violence order cannot modify those orders and the orders under the FLA will prevail over any inconsistent family violence orders, due to s 109 of the *Australian Constitution*.

[See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218; *Dunne v P* [2004] WASCA 239]

If the court does not have power over "residence" orders, any condition the court attaches to an intervention order under FVPA s 93 prohibiting the respondent from living with the child will be invalid if it is inconsistent with a Family Law Act order. See 2.2.3.4 Safety of children for an analysis of the court's obligation to make orders regarding a child living with, spending time with or communicating with the respondent.

Interim Orders

The power to modify Family Law Act orders is more limited when the court is making an interim family violence order or an interim variation of an order:

- A court must not *discharge* an order, injunction or arrangement (FLA s 68R(4)); and
- If the court exercises the power under s 68R to revive, vary or suspend an order, injunction or arrangement, the modification lasts until the earlier of:
- When the interim order stops being in force;
- The time specified in the interim order as the time at which the revival, variation or suspension ceases;
- When the family law order, injunction or arrangement is affected by another court order - whether under s 68R or otherwise (FLA s 68T).

Before the commencement of the *Family Law Amendment (Family Violence and Other Measures) Act 2018*, s 68T imposed a 21 day limit on when an interim family violence order can affect a family law order under s 68R. This time limit had been criticised as impractical, as not all parties manage to have proceedings instituted and heard in the family law courts to confirm the variation within the time allowed.

[*Australian Law Reform Commission*, Family Violence - A National Legal Response (ALRC Report 114), 2010, [16.105]–[16.127]

Last updated: 17 September 2018

2.6.3 Powers of the Children's Court under the Family Law Act

Section 69J of the FLA gives "each court of summary jurisdiction of each State" jurisdiction in relation to matters arising under Part VII. Due to the combined effect of several distinct legislative provisions, it is likely that magistrates of the Children's Court have jurisdiction under Part VII, but that the President of the court does not.

Section 26 of the *Acts Interpretation Act 1901* (Cth) states that

> In any Act, unless the contrary intention appears:
> …

(d) *Court of summary jurisdiction* shall mean any justice or justices of the peace or other magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State, or of an external Territory, sitting as a court (other than the Federal Magistrates Court) for the making of summary orders or the summary punishment of offences under the law of the Commonwealth or part of the Commonwealth or under the law of the State or external Territory or by virtue of his or their commission or commissions or any Imperial Act.

The Children's Court of Victoria consists of a President and the magistrates and registrars of the Court (*Children, Youth and Families Act 2005* s 504). The President of the Children's Court must be a judge of the County Court (*Children, Youth and Families Act 2005* s 508).

The structure of a court consisting of both magistrates and a judge of an intermediate court is not unique to the Children's Court. In *Plancor v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170 at [24] Grey J made the following remarks about the Industrial Relations Court of South Australia:

> The doubt about whether the IRCSA could be characterised as a court of summary jurisdiction may have arisen because that court consists of both judges and industrial magistrates, by virtue of s 16 of the Fair Work Act. In addition, by virtue of s 9 of the Fair Work Act, the court is a court of record. *The definition of "court of summary jurisdiction" in s 26(d) of the Acts Interpretation Act does not focus on the nature of the institution. Instead, it focuses on the nature of the judicial officer constituting the court and the nature of the work being done by the court so constituted* (emphasis added).

The Federal Court has stated that whether a court is a "court of summary jurisdiction" depends on the formality of the court's procedures. The definition can apply in both civil and criminal proceedings (see *John L Pierce v Kennedy* (2000) 104 FCR 225). This must be determined on a case by case basis, depending on how a court exercises jurisdiction in relation to particular matters. In *Plancor*, Grey J noted the lack of a definitive test at [29]:

> The focus of the definition in s 26(d) of the Acts Interpretation Act on the nature of the judicial officer constituting the primary court, and on the nature of the task of that court, carries with it the possibility that a court like the IRCSA may be a court of summary jurisdiction when constituted in a particular way and dealing with particular types of cases, but not when otherwise constituted and dealing with other kinds of business. It is unfortunate that no more definite test can be formulated, having regard to the form of the definition in s 26(d) of the Acts Interpretation Act and the authorities on that definition.

As Magistrate Power notes in his research materials for the Children's Court (at 4.3.2):

> Section 215(1) of the CYFA provides that the Family Division of the Court:
>
> (a) must conduct proceedings before it in an informal manner;
>
> (b) must proceed without regard to legal forms;
>
> (c) must consider evidence on the balance of probabilities; and
>
> (d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary….
>
> However, s.527(6) of the CYFA [in the same terms as s.23(5) of the CYPA] imposes an obligation on the Family Division of the Children's Court to give a written statement of reasons in every case in which it makes a final order in a proceeding. This is certainly not one of the ordinary indicia of a court of summary jurisdiction.

Unless the obligation to provide written reasons means the Family Division of the Children's Court is no longer "sitting as a court … for the making of summary orders", it appears that the combined effect of *Acts Interpretation Act 1901* (Cth) s 26(d) and *Family Law Act 1975* (Cth) s 69J is that magistrates, but not the President, of the Children's Court can exercise jurisdiction under Part VII of the FLA.

For further analysis of the jurisdiction of the Children's Court under the *Family Law Act 1975* (Cth), see the Children's Court Research Materials at 4.3.2.

Last updated: 20 April 2010

2.6.4 Jurisdiction to make parenting orders in separate proceedings

Section 69N of the FLA limits the power of State courts to make parenting orders. When proceedings for a parenting order are instituted in a court of summary jurisdiction and the respondent seeks a different order, the court must transfer proceedings to the Family Court or the Federal Magistrates' Court unless each of the parties consents to the court hearing and determining the proceeding.

A State court of summary jurisdiction may make interim orders pending the disposal of the matter by the other court.

[FLA s 69N]

Judicial officers should not allow parties to make oral applications for parenting orders after the court makes a family violence order. Fees may be payable on family law application and doing so obscures the distinction between the family violence jurisdiction and the family law jurisdiction.

Last updated: 20 April 2010

2.6.5 Inconsistency between orders and invalidity

Section 109 of the *Constitution of Australia* states:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Subject to limited exceptions, one effect of s 109 is that when the Commonwealth confers jurisdiction on a court in a manner that is not intended to be constrained by State laws, then State laws which preclude, override or nullify the exercise of that jurisdiction are invalid.

[see *P v P* (1994) 181 CLR 583; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151; *Dunne v P* [2004] WASCA 239]

The FLA and the FVPA explicitly state that a family violence order is invalid to the extent of any inconsistency with any order or injunction that provides for a child to spend time with a person or requires or authorises a person to spend time with a child.

[FLA s 68Q, FVPA s 176]

The following people may apply to a court that has jurisdiction under Part VII of the FLA for a declaration that a *Family Law Act* order is inconsistent with a family violence order:

- the applicant or respondent in proceedings for the Family Law Act order; and
- the protected person or the respondent under the family violence order.

While an inconsistent family violence order is invalid even if the court has not made a declaration, the parties may benefit from the certainty that a declaration can provide.

Last updated: 20 April 2010

2.6.6 Orders and injunctions that do not relate to children

Sections 68B, 68C, 114 and 114AA give courts extensive powers to make orders and grant injunctions, including injunctions for the personal protection of a party to the marriage.

Section 114AB states that the injunction provisions are not intended to exclude or limit the operation of prescribed laws that are capable of operating concurrently. However, if there is an inconsistency between orders or injunctions under those sections and an order under the FVPA, the Commonwealth injunction or order prevails to the extent of the inconsistency, in accordance with s 109 of the *Constitution of Australia*.

Family Law Act 1975 (Cth) s 68R only gives State courts a power to modify injunctions that require or authorise a person to spend time with a child. The section does not give a general power to modify all injunctions under the *Family Law Act 1975* (Cth). If the injunction covers other subject matter, conditions in the order that would be inconsistent with the injunction will be invalid.

Last updated: 20 April 2010

2.7 Interface with Children, Youth and Families Act 2005

The interaction between child protection orders under the *Children, Youth and Families Act 2005* and the intervention order process is discussed in the following sections.

Definitions

Section 4 of the FVPA defines a "child protection order" as "an order for which the Children's Court has jurisdiction under section 515(1) of the *Children, Youth and Families Act 2005* to hear and determine an application".

Section 515(1) gives the Family Division of the Children's Court jurisdiction to hear and determine applications for the following:

> (a) an interim accommodation order; or
>
> (b) a finding that a child is in need of protection; or
>
> (c) a finding that there is a substantial and presently irreconcilable difference between the person who has custody of a child and the child to such an extent that the care and control of the child are likely to be seriously disrupted; or
>
> (d) a permanent care order; or
>
> (e) a therapeutic treatment order; or
>
> (f) a therapeutic treatment (placement) order; or
>
> (g) a temporary assessment order; or
>
> (h) the variation or revocation of—

(i) a therapeutic treatment order; or

(ii) a therapeutic treatment (placement) order; or

(iii) a temporary assessment order; or

(i) the variation of an interim accommodation order; or

(j) the variation or revocation of—

(i) a supervision order; or

(ii) a custody to third party order; or

(iii) a supervised custody order; or

(iv) a custody to Secretary order; or

(v) a permanent care order; or

(k) the extension of—

(i) a supervision order; or

(ii) a supervised custody order; or

(iii) a custody to Secretary order; or

(iv) a guardianship to Secretary order; or

(l) the revocation of—

(i) a guardianship to Secretary order; or

(ii) a long-term guardianship to Secretary order; or

(m) an order in respect of a failure to comply with—

(i) an interim accommodation order; or

(ii) an interim protection order; or

(iii) a supervision order; or

(iv) a supervised custody order; or

(n) an order regarding the exercise of any right, power or duty vested in a person as joint custodian or guardian of a child; or

(o) an order arising out of a child protection proceeding within the meaning of Schedule 1 transferred to the Court under an interstate law within the meaning of that Schedule.

Inconsistency between child protection order and family violence intervention order

If the protected person or the respondent is the parent of a child and the court decides to make a family violence intervention order, the court must enquire whether there are any child protection orders in force in relation to the child.

(FVPA s 89]

Family violence intervention orders, recognised DVOs made by a court and variations or extensions of recognised DVOs made by a court apply despite any child protection orders.

(FVPA s 173(1)]

When a court makes an intervention order or varies a recognised DVO that is or might be inconsistent with a child protection order, the appropriate registrar must give written notice of the order and its terms to the Secretary of the Department of Human Services.

[FVAP s 174]

Section 174 is triggered if the order "is or may be inconsistent". Registrars must notify the Secretary if there is potential inconsistency with a child protection order. This will assist the Secretary to determine whether to apply to the Children's Court to vary the child protection order.

The FVPA does not impose any obligation on a court to avoid or minimise a conflict between the intervention order and the child protection order (compare *Family Law Act 1975* (Cth) s 60CG).

On its terms, the obligation to enquire about child protection orders only applies if the protected person or the respondent is the parent of a child. The court will often depend on the parties informing the court of any relevant child protection orders if the protected person or the respondent is a child and the other party is not his or her parent.

Inconsistency between child protection order and bail conditions

If a person is arrested under s 50 of the FVPA and granted bail, the bail conditions prevail to the extent of any inconsistency with child protection orders.

(FVPA s 175]

Power of Children's Court to vary family violence intervention orders

Intervention orders, recognised DVOs made by a court and variations or extensions of recognised DVOs made by a court prevail over existing child protection orders. However, FVPA s 173(2) gives the Children's Court power to revoke or vary an intervention order or recognised DVO when it is hearing an application for a child protection order if:

- the court is hearing an application for a child protection order in relation to a child; and
- the child is a protected person or respondent under a family violence intervention order or recognised DVO.

The court may only revoke or vary the intervention order or recognised DVO to the extent it would be inconsistent with the order the court proposes to make under the *Children, Youth and Families Act 2005*.

The power to revoke or vary an order under s 173(2) is not a power to conduct a rehearing de novo or an appeal against the existing order. The court does not consider whether it would have made the existing order, or imposed the same conditions. The purpose of the provision is merely to ensure that the court can effectively exercise its jurisdiction to make child protection orders where there is an existing intervention order or recognised DVO made by a court (*DOHS v Mr D & Ms W*, Unreported, Children's Court of Victoria, 07/01/2009).

The power under s 173(2) is limited to a "family violence intervention order", a "recognised DVO made by a court of any jurisdiction" and "a variation or extension of a recognised DVO by a court of any jurisdiction" and this does not include a "counselling order" under Part 5 of the Act. In any event, it would be rare that an order requiring the respondent to attend compulsory counselling would be inconsistent with any child protection order the Children's Court might make (see *DOHS v Mr D & Ms W*, Unreported, Children's Court of Victoria, 07/01/2009).

Section 173(3) contains three provisions designed to ensure the court provides procedural fairness when exercising this power:

- The appropriate registrar must notify all the parties to the intervention order or recognised DVO proceeding of the court's intention to revoke or vary the order; and
- The court may only make an interim order varying the order before the parties have had an opportunity to be heard; and
- The court must not make a final order revoking or varying the intervention order or recognised DVO until all the parties have had an opportunity to be heard.

While s 173(3) states that the "appropriate registrar" must notify the relevant parties, the judicial officer may bypass this step and notify the parties himself or herself, if all the parties are present in court (*DOHS v Mr D & Ms W*, Unreported, Children's Court of Victoria, 07/01/2009).

Inconsistent child protection orders preclude family violence safety notices

Section 24(c) states that a police officer may only apply for a family violence safety notice if:

> the police officer has no reasonable grounds for suspecting that there is a Family Law Act order or child protection order in force that may be inconsistent with the proposed terms of the family violence safety notice, after making reasonable enquiries of the respondent, the affected family member and any other adults at the scene of the incident.

The FVPA does not specify the interaction between a safety notice and a child protection order if the police officer forms a mistaken belief that there is no inconsistent child protection order in force. The provisions for contravention of a safety notice do not specify that the accused has a defence if the notice was inconsistent with a child protection order.

Last updated: 13 February 2018

2.8 - Interaction between intervention orders and community correction orders

FVPA s 175A specifies how family violence intervention orders and recognised DVOs interact with community correction orders under the *Sentencing Act 1991*. The section states:

> (1) If a court makes a family violence intervention order in respect of a respondent that is inconsistent with a residence restriction or exclusion condition or a curfew condition attached to a community correction order to which the respondent is subject at the time the family violence intervention order is made, the family violence intervention order prevails to the extent of any inconsistency.
>
> (1A) If a court of any jurisdiction makes a recognised DVO, or varies or extends a recognised DVO, in a way that is inconsistent with a residence restriction or an exclusion condition or a curfew condition attached to a community correction order to which the respondent is subject at the time the recognised DVO is made, varied or extended, the recognised DVO prevails to the extent of any inconsistency.
>
> (2) In this section *community correction order*, *curfew condition* and *residence restriction or exclusion* condition have the same meaning as in the *Sentencing Act 1991*.

The effect of this provision is that an inconsistent family violence order prevails over a community correction order that was made earlier in time.

In addition, *Sentencing Act 1991* s 48G(5), 48H(4) and 48I(4) states that a court must not make a community correction order with a residence restriction or exclusion condition, a place or area exclusion condition or a curfew condition that is inconsistent with any existing family violence intervention order or recognised DVO made by a court.

The FVPA and the *Sentencing Act 1991* do not provide a rule for resolving a conflict between a community correction order with a place or area exclusion condition and an intervention order or recognised DVO. While s 48H(4) prohibits a court from **making** a place or area exclusion condition that would be inconsistent with an existing order, FVPA s 175A does not specify that the intervention order or recognised DVO takes precedence if there is an existing place or area exclusion condition.

Last updated: 13 February 2018

2.9 Rehearings

The court may rehear a matter on the application of the respondent if it is satisfied, on the balance of probabilities, that:

- the application for the order:
- was not personally served on the respondent, and
- was not brought to the respondent's attention following substituted service, or
- there are exceptional circumstances and a rehearing is fair and just in all the circumstances of the case.

(FVPA s 122]

Exceptional circumstances could include where a non-English speaking person attended the court venue on the required day but was inadvertently directed to the wrong courtroom and missed the hearing.

[*Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Act* 2010, Explanatory memorandum clause 29]

A respondent or a person declared to be a vexatious litigant applies for a rehearing by filing an application at the venue of the court that made the final order. The application must be supported by an affidavit. The applicant does not need to obtain the leave of the court before making the application for rehearing. However, if the rehearing application is struck out due to failure to attend, the respondent or declared vexatious litigant must obtain leave before applying for a further rehearing.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 13.01, *Children's Court (Family Violence Protection) Rules 2018* r 12.01]

A rehearing operates similar to a de novo appeal. The court must apply the test for a final order again on the evidence led at the rehearing. The applicant gains no benefit from succeeding at the first hearing and must again convince the court that the respondent has committed family violence against the AFM and is likely to do so again.

See 2.2.2.1 Power to make final intervention orders for a discussion of the test for making a final order.

Last updated: 20 April 2010

2.10 Appeals

The following sections examine general appeal rights under the FVPA.

Appeals against Vexatious Litigant Orders are examined in 3.1.5 - Appeals.

Who may appeal?

A party to a proceeding may appeal against an order or a refusal to make an order, except against an interim order or a refusal to make an interim order.

(FVPA s 114]

This new restriction was introduced in the Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018. The explanatory memorandum explains:

> Currently, these appeals are by way of rehearing, which in practice is a de novo hearing … If the appeal right continues to be available, it would entitle a party to a de novo appeal of a decision of a higher court to make an own motion interim order. This would be an unusual appellate process in cases involving decisions of the County Court or Supreme Court. Allowing appeals against interim orders, whether by the Court's own motion or attaching to an application for a family violence intervention order, may also undermine the urgent, protective and temporary nature of interim orders and delay final order proceedings … This clause does not change the right to judicial review or the appeal rights that exist for final orders.

[Explanatory Memorandum, Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018 (Vic), 60–1].

A "party" includes:

(a) the affected family member or protected person for the proceeding, whether or not the person is the applicant for the proceeding; and

(b) if the affected family member or protected person is not the applicant for the proceeding, the applicant; and

(c) the respondent for the proceeding or the respondent who is the subject of an order made in the proceeding.

(FVPA s 3]

Under s 76(3), the FVPA applies to an *associated final order* as if it were the original final order. Associated respondents and associated applicants may therefore appeal against the making or refusal to make associated final orders.

Limits on appeals

The FVPA imposes four restrictions on when an appeal is available under the FVPA:

First, only the *respondent* can appeal against the *making* of a *counselling order* by the Specialist Family Violence Court Division. The applicant, the protected person and the counselling provider cannot appeal against the decision to make the order. It appears that any party may appeal against the court's refusal to make a counselling order.

(FVPA s 114(2)(a)]

Secondly, if a person other than the protected person applied for a family violence intervention order, the Supreme Court or County Court must not start or continue hearing an appeal by the applicant for the order if any of the following people object to the appeal:

(i) the protected person;

(ii) for an application made in relation to a protected person who is a child and with the consent of a parent, the parent;

(iii) for an application made in relation to a protected person who has a guardian, the guardian.

(FVPA s 118]

This restriction only applies when "the application for the order was made by a person *other than the protected person*". Under s 3, a protected person is defined as a person protected by a family violence intervention order or a family violence safety notice. This section only applies once the court makes an intervention order. The effect is to prevent the original applicant appealing the decision to grant the order, unless the protected person, or a person on behalf of the protected person, consents. It does not prevent appeals by the applicant against a court's refusal to make a family violence intervention order.

According to the explanatory memorandum, this provision is designed:

> to ensure that a protected person or a person with the responsibility for a protected person can decide what matters are appealed on their behalf or on behalf of those for whom they have responsibility.

(FVPA, Explanatory memorandum, clause 118]

Thirdly, no one may appeal against the decision of the County Court or the Supreme Court on an appeal.

(FVPA s 120]

Fourthly, there is no appeal against an interim order or a refusal to make an interim order by either party from 31 July 2019. However, any appeal applications against interim orders lodged prior to this date, and any current interim order appeal proceedings, will continue..

(FVPA s 114(2)(c)]

Sections 114, 118 and 120 of the FVPA are provisions that alter or vary s 85 of the *Constitution Act 1975*.

(FVPA s 208]

In the second reading speech, the Attorney-General stated:

> Clause 120 provides that there is no further appeal from an appeal decision of the Supreme Court. This is appropriate as the rights of the parties in such cases have been tested in a hearing by the President of the Children's Court and the Supreme Court and further appeals could result in a proliferation of proceedings. This may result in the attendance of those subject to family violence at numerous traumatic court hearings. If new facts and circumstances emerge, then the respondent for an order may seek a variation or revocation of the family violence intervention order from the Magistrates' Court.
>
> [Victorian Parliamentary Debates, Legislative Assembly, 26 June 2008, 2648]

Sections 118 and 120 both contain exceptions stating that nothing in the section prevents appeal from the County or Supreme Courts on the basis of jurisdictional error. This ensures the limits on appeal rights are consistent with the High Court's judgment in *Kirk v Industrial Relations Commission of NSW*.

While the Attorney-General made these comments as part of a statement in accordance with the *Constitution Act 1975* s 85, FVPA s 120 also prevents appeals from the appellate jurisdiction of the County Court. Despite this, parties may apply to the Supreme Court for certiorari to correct a jurisdictional error by an inferior court.

[*see Kirk v Industrial Relations Commission of NSW* [2010] HCA 1; *Craig v South Australia* (1995) 184 CLR 163]

Commencement of appeals

A party commences an appeal by filing a notice of appeal with the court that made the decision within 30 days. The notice of appeal must be signed by the appellant and include:

- the name and address of the appellant; and
- the names and addresses of the other parties; and
- if the appeal relates to an intervention order where the protected person is a child:
- the name and address of the consenting parent, if the application for the order was made with the consent of the parent; and
- the name and address of a parent other than the respondent with whom the child regularly resides, if the child did not consent to the order; and
- the name and address of the guardian, if the decision relates to an intervention order for a protected person who has a guardian; and
- the venue of the Court that made the decision and the date of the decision; and
- the nature of the decision under appeal; and
- whether a counselling order was made; and
- a brief description of the grounds of appeal.

(FVPAs 116(1), (2);
Magistrates' Court (Family Violence) Regulations 2008 r 14.01;
Children's Court (Family Violence) Regulations 2008 r 13.01]

The appropriate registrar must transmit the notice of appeal to the relevant appellate Court and serve notice on:

- all other parties to the proceeding in which the relevant decision was made; and
- the consenting parent, if the appeal relates to an intervention order for a protected person who is a child and the application was made with the consent of a parent; and
- the parent with whom the child normally or regularly resides, if the appeal relates to an intervention order for a protected person who is a child and the application was not made with the consent of a parent; and
- the guardian, if the appeal relates to an intervention order for a protected person who has a guardian.

(FVPA s 116(3), (4)]

Where are appeals heard?

Appeals are heard in:

- the Trial Division of the Supreme Court, if the relevant decision was made by the President of the Children's Court; or
- the County Court, in all other cases.

(FVPA s 115]

Appeals and Stays

An appeal against a decision does not automatically stay the operation of that decision. However, a party may apply to the court that made the decision for an order staying the order under appeal, or any part of the order, pending the determination of the appeal. When staying an order, the court may impose bail conditions on the appellant as if he were an accused person released on bail, if the court considers that this is necessary:

- to protect the protected person; or
- to require a party to attend court for the appeal.

(FVPA s 117]

An application to stay the order must be filed with the appropriate registrar, who must serve the application on the other parties and any relevant parents or guardians. If there are exceptional circumstances, the court may grant a stay without serving the application on any other person.

[*Magistrates' Court (Family Violence Protection) Rules 2018* r 14.02;
Children's Court (Family Violence Protection) Rules 2018 r 13.02]

Counselling orders are automatically stayed if a person appeals against a final family violence intervention order and the Specialist Family Violence Court Division stays the intervention order, unless the court hearing the appeal makes an order to the contrary.

(FVPA s 131]

Strike out of appeal for failure to appear

If an appellant fails to appear at a mention date or at the hearing of the appeal, the County Court or the Supreme Court may strike out the appeal or adjourn the proceedings on any terms it considers appropriate

(FVPA s 118A(1)]

If the Court strikes out the appeal and any part of the decision had been stayed, the relevant parts of the decision are reinstated.

(FVPA s 118(2)]

Following the strike out of the appeal, the Court may reinstate the appeal if the appellant satisfies the court that his or her failure to appear was due to no fault or neglect on their part. If the court reinstates the appeal, the Magistrates' Court or the Children's Court may re-impose a stay.

The Magistrates' Court or the Children's Court may impose bail conditions on the appellant as if the appellant were an accused person being released from custody or bail, if:

- in reimposing a stay of the whole or part of the relevant decision, the court considers it necessary for the protection of the protection person; or
- in any case, if the court considers it necessary to require a party to the proceeding to attend court for the appeal

(FVPA s 118B]

Transitional matters

Sections 118A and 118B apply to an appeal filed on or after the commencement of s 53 of the *Family Violence Protection Amendment Act 2017*.

Conduct of Appeal

Appeals against decisions under the FVPA are by way of rehearing. The appellate court may:

- confirm the decision; or
- set aside the decision; or
- vary the decision and make any other order the Court could have made and exercise any powers that the Court may have exercised.

(FVPA s 119]

The provisions of the FVPA, and the *Magistrates' Court Act 1989* or the *Children, Youth and Families Act 2005* apply to appeals under Division 9 of Part 4.

(FVPA s 121]

Leave to appeal

Section 114 of the FVPA gives most parties a right of appeal against a decision under this Act. This right is restricted if the appellant has been declared a vexatious litigant, as he or she must first obtain leave to appeal from the appellate court. The vexatious litigant must obtain leave even if the other party to the appeal is not the person protected by the vexatious litigant order.

(FVPA ss 114(2)(b), 196(1)]

See 3.1 Vexatious litigant restraint orders for further details on vexatious litigant declarations.

Test for leave

When deciding whether to grant leave, the appellate court must have regard to all the circumstances of the case, including the statement of reasons for the vexatious litigant order.

(FVPA s 196(4)]

Procedural provisions

When a person applies for leave to appeal, the appropriate registrar must file a statement of the reasons for declaring the person a vexatious litigant with the relevant appellate court and serve a copy of that statement and a copy of the application for leave to appeal on:

- the Attorney-General; and
- the protected person in relation to the decision to be appealed; and
- if the protected person is not the person protected by the vexatious litigant order, the person protected by that order.

The FVPA specifically gives the protected person under the relevant order the right to be heard on the application for leave, even if the protected person was not a party to the proceeding that led to the vexatious litigant order. By implication, it appears that the three people listed above, as well as the respondent, will have the right to be heard on the application for leave to appeal.

(FVPA ss 196(2), (3)]

Nature of appeal

Section 119 states that "the appeal is by way of a rehearing by the County Court or the Supreme Court". The Supreme Court has said that a rehearing under s 119, *Family Violence Protection Act 2008*, is a broad appeal by rehearing where new evidence may be led.

[*AAA v County Court of Victoria* [2023] VSC 13, [63], [67] ('*AAA*')]

The jurisdiction is appellate in the sense that it is only engaged where there is factual, legal, or discretionary error in the decision of the court at first instance, identifiable in light of all the new evidence before the appellate court at the time of appeal.

[*AAA* [50], [67], citing *Forrest & Forrest Pty Ltd v Marmion, Minister for Mines and Petroleum* (2018) 53 WAR 156, 174–5 [58]]

Where an error has been identified, the appellate court may determine the case in the light of the record of the first instance court and the additional evidence before the appellate court at the time of appeal, applying the law at the time of the appeal.

[*AAA* [50], [67], citing *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194, 203 [13]; *Edwards v Noble* (1971) 125 CLR 296, 304]

Last updated: 23 May 2023

3 Other applications and orders under the Act

3.1 Vexatious litigation restraint orders

Before 31 October 2014, Part 11 of the *Family Violence Protection Act 2008* contained provisions which allowed the Court to declare a person a vexatious litigant in relation to family violence litigation. Now, litigation restraint orders (LROs) are made under the *Vexatious Proceedings Act 2014* (*VPA*). The Act contains general provisions for litigation restraint orders as well as specific provisions regarding vexatious litigation in relation to family violence intervention orders.

Unlike the old regime, the new Act introduces a tiered system of the following orders: Limited LROs, Extended LROs, General LROs, acting in concert orders, and appeal restriction orders. However, the only orders that may be made in relation to proceedings under the *FVPA* are Extended LROs. The *VPA* also contains a transitional provision which converts any vexatious litigant declarations under the *FVPA* to Extended LROs under section 19 of the *VPA*.

[*VPA* s 94]

An Extended LRO made under section 19 prevents a person from commencing or continuing a proceeding relating to intervention order legislation without leave of either the Magistrates' or Children's Court.

Last updated: 9 March 2017

3.1.1 Applying for an Extended LRO

Who can apply

An application for an Extended LRO can be made by the Magistrates' or Children's Court on its own motion, or by the following persons:

- The Attorney-General of Victoria;
- A person who has had a vexatious application made against them; or
- A person with sufficient interest in the matter.

For the purposes of the Act, a person with a sufficient interest in a matter may include a police officer, guardian or family member seeking to apply for an intervention order under intervention order legislation on behalf of a person.

[*VPA* ss 18(1) and 19(3)]

While the Attorney-General may apply for an Extended LRO as of right, other applicants must first obtain leave from the relevant court.

[*VPA* s 18(2)]

Applying for leave

An application for leave must be in Form 4 of the *Magistrates Court (Family Violence Protection) Rules 2008* and supported by an affidavit. Further, the applicant must *not* give notice of their application for leave to any person unless the court orders otherwise.

[*Magistrates' Court (FVP) Rules 2008* r 16.02]

The Magistrates' or Children's Court may grant leave if satisfied:

- there is **merit** in the application; and
- the making of the application would not be an **abuse of process**

[*VPA* s 18(3)]

Applying for an order

An application for an Extended LRO must be in Form 5 of the *Magistrates' Court (FVP) Rules 2008* and supported by an affidavit. For applicants other than the Attorney-General, a copy of the order granting leave to apply must be attached to the application.

[*Magistrates' Court (FVP) Rules 2008* r 16.03]

For applicants to the Children's Court against a person who is party to proceedings currently before the Court, the application must be filed at the venue of those proceedings. In any other case, the application must be filed at the venue of the Court that made the most recent order to which the person to be declared vexatious is a party.

[*Children's Court (Family Violence Protection) Rules 2008* r 11.03]

Notice of applications

The principal registrar of the Magistrates' or Children's Court (as required) must cause a copy of an application for an Extended LRO to be given to:

- The person **protected by** the order; and
- The person **subject to** the order.

[*VPA* s 44]

A court cannot make an Extended LRO until the person who will be subject to the order and the person to be protected by it are heard or given an opportunity to be heard. A person can be heard, for the purpose of the *VPA*, by making submissions either in writing or orally.

[*VPA* s 45]

Unlike for leave to proceed applications (see 3.1.8 Applications for Leave to Proceed), the *VPA* does not provide any rules or guidance on when parties should be permitted to make oral submissions rather than written submissions (compare *VPA* s 63).

This suggests that the Court is left with an open discretion, based on the needs of the case, standard court practice and the merits of the case when deciding whether an oral hearing is appropriate. Given the significant effect of an Extended LRO, it would seem likely that courts would hold an oral hearing in the ordinary course, unless there are special reasons for conducting a hearing on the papers.

Last updated: 9 March 2017

3.1.2 Making an Extended LRO

While any Court or Tribunal may make an Extended LRO, only the Magistrates' and Children's Courts may issue litigation restraint orders relating to intervention order litigation.

[*VPA* ss 19(1)(a) and 19(1)(b)]

The making of an Extended LRO relating to intervention order legislation contains three elements. The court must be satisfied that:

- The litigant has frequently commenced or continued;
- Vexatious proceedings;
- Under intervention order legislation.

Once these requirements are satisfied, the court may then take into account any matter it considers relevant. The meaning of these elements is outlined in the following topics.

[*VPA* s 19(1), (2)]

Frequently

The test for making an order is that the court must be satisfied that a person has instituted or conducted vexatious intervention order proceedings *frequently*. While other matters may be taken into account, whether vexatious proceedings were commenced or continued *frequently* is a threshold requirement.

[*Potier v AG for the State of NSW* [2015] NSWCA 129 [119]–[120] (Basten JA) affirmed in *Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [45]–[46] (Forrest J)]

There is no precise test for the meaning of "frequently"; its meaning depends on its context. Basten JA in *Potier v Attorney General for the State of NSW* [2015] NSWCA 129 notes two matters with regard to "frequently". Firstly, it is a plainly lowered threshold compared to the previous test of "habitually and persistently". Secondly, beyond merely a numerical inquiry, the nature and quality of the proceeding must inform any assessment of frequency. On this second point, Basten JA makes the following observation:

> [T]here are vexatious proceedings and vexatious proceedings. It is one thing to file urgent appeals or applications for judicial review which cause substantial disruption to courts and other litigants and participants in the legal system (for example, the adjournment of a trial), or to make serious allegations of fraud unfounded in the evidence. It is quite different to encounter some poorly known legal doctrine which

> denies reasonable grounds to the proceedings or renders them technically an abuse of process, or to file a series of applications for the annulment of decisions of magistrates…That is to say, both the quality of the vexatiousness of a proceeding, and the nature of the proceeding itself, inform the assessment of frequency.
> I can readily envisage circumstances where a litigant commences only a handful of large proceedings, making serious allegations without any proper basis, but which occupy a significant amount of time and resources of parties and the courts, which could satisfy the statutory test of "frequently". This illustrates the fact that "[t]he issue posed by the statutory term "frequently" is not to be assessed merely by an arithmetic calculation": *Viavattene* at [49].
>
> [*Potier v Attorney General for the state of NSW* [2015] NSWCA 129 [114]–[118] (Basten JA)]

Vexatious proceedings

According to the *VPA*, a *vexatious proceeding* includes:

- an abuse of the process of a court or tribunal;
- commenced to harass or annoy, to cause delay or detriment, or for another wrongful purpose;
- commenced or pursued without reasonable grounds;
- conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

[*VPA* s 3]

The following jurisprudence was developed for vexatious litigant declarations made under s 21 of the *Supreme Court Act 1986*, which is now repealed, and likely remain relevant to determinations made under the *VPA*.

When deciding whether to make a vexatious litigant order, the court must determine whether the proceedings brought by the applicant are vexatious, rather than consider whether the applicant as a person is vexatious.

[*Attorney-General of Victoria v Gargan* [2013] VSC 222 [6] (Pagone J)]

The focus of the inquiry is whether the proceedings are themselves vexatious and not whether they were instituted vexatiously.

[*Attorney-General of Victoria v Gargan* [2013] VSC 222 [10] (Pagone J)]

Proceedings may be vexatious due to being "commenced or pursued without reasonable grounds" because the proceedings are hopeless.

[*Attorney-General v Wentworth* (1988) 14 NSWLR 481. See also *Attorney- General v Weston* [2004] VSC 314]

Before the *Vexatious Proceedings Act 2014*,the test for an order included a requirement that the respondent had persistently and habitually instituted vexatious proceedings without any reasonable ground. Under that test, courts recognised that the "without any reasonable ground" requirement was often a reiteration of "vexatious". However, "reasonable ground" could have independent operation where a proceeding was vexatious on a basis *other than* hopelessness, for instance bad faith.

[*Attorney-General of Victoria v Gargan* [2013] VSC 222 [9] (Pagone J)]

As such, an inquiry into vexatiousness requires an analysis of the merits of former proceedings as well as considering whether or not the proceedings were an abuse of process. However, an analysis of the litigant him or herself should be avoided.

Under intervention order legislation

For the purpose of the *VPA*, "intervention order legislation" means:

- the *Crimes (Family Violence) Act 1987* as in force immediately before its repeal; and
- the *Family Violence Protection Act 2008*; and
- the *Personal Safety Intervention Orders Act 2010*; and
- the *Stalking Intervention Orders Act 2008* as in force immediately before its repeal.

[VPA s 3]

As such, any vexatious litigation commenced or continued in relation to those Acts constitutes a proceeding in relation to "intervention order legislation".

Any matter the court considers relevant

When introducing the legislation, the Attorney-General in the second reading speech explained that:

> In deciding whether to make a litigation restraint order, a court or VCAT is able to take into account any matter it considers relevant, including a person's full litigation history (in both Victoria and in other Australian jurisdictions) and the manner in which the person has conducted litigation in the past.

[Victoria, *Parliamentary Debates*, Legislative Assembly, Wednesday 19 February 2014, 371 (Mr Clark (Attorney-General))]

Once it has been established that vexatious intervention order proceedings have been instituted or conducted *frequently*, the court may also consider the proportion of prior proceedings which are vexatious as compared to successful. While proportionality is not part of the test, it is relevant to the court's exercise of discretion to make an order.

[*Potier v AG for the State of NSW* [2015] NSWCA 129 [119]–[120] (Basten JA) affirmed in *Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [45]–[46] (Forrest J)]

Last updated: 9 March 2017

3.1.3 Contents of an Extended LRO

An Extended LRO made by the Magistrates' or Children's Court in relation to intervention order litigation may direct that a person must not, without leave of the Court and for a specified time:

Continue or commence a proceeding in the Magistrates' or Children's Courts under intervention order legislation:

- Against a person protected by the order and their child, if the person is a parent; or
- In respect of a matter described in the order.

Furthermore, the Extended LRO may include any other direction or order that the Court considers appropriate in relation to proceedings in the Magistrates' or Children's Courts (regardless of which Court makes the order). This includes a direction that a person may commence or continue a specific proceeding in the Magistrates' or Children's Court.

[*VPA* ss 22(4)(b), 23(3)]

The Court must give reasons when making an Extended LRO.

[*VPA* s 46]

Last updated: 9 March 2017

3.1.4 Effect of an Extended LRO

Subject to the terms of the order, the effect of the Extended LRO is:

- a proceeding to which the order relates is **stayed**; and
- a proceeding that is commenced in contravention of the order **is of no effect**.

[*VPA* s 25]

However, the Extended LRO does not affect a person's right to make or continue other proceedings not related to the order. As such, the order does not affect the person's ability:

(a) to commence or continue a proceeding in the Magistrates' Court or the Children's Court against a person, the child of a person or in respect of a matter not specified in the order; or

(b) to commence or continue a proceeding in the Magistrates' Court or the Children's Court under legislation other than intervention order legislation; or

(c) to commence or continue a proceeding in any jurisdiction other than the Magistrates' Court or the Children's Court.

[*VPA* s 26(3), (4)]

Last updated: 9 March 2017

3.1.5 Duration of an Extended LRO

An Extended LRO remains in force for the duration specified by the Court. The Act does not impose any limits on the maximum duration of an order and specifically recognises that an Extended LRO may have an indefinite duration.

A Court may also extend an existing order if it considers that it is in the interests of justice to do so.

[*VPA* s 27]

Extending an order

When considering extending the duration of an order, Forrest J in *Attorney-General for the State of Victoria v Knight* [2016] VSC 488 took into account the litigious history of the person subject to the LRO. Further, Forrest J evaluated the future prospect of changes in litigious behaviour and to that end factored into his reasoning evidence given by a psychiatric professional.

[*Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [51]–[54] (Forrest J)]

When extending an order, the interests of justice are not restricted to an examination of the merits of the specific proceeding before the court at that time. Rather, "justice" includes core values such as *efficiency* and *effectiveness* of the justice system. Frequent vexatious proceedings place a strain on the administration of justice limiting access to justice for the community as a whole and may be considered when deciding whether to extend a litigation restraint order.

[*Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [46]–[47] and [56] (Forrest J)]

Last updated: 9 March 2017

3.1.6 After the order is made

The court must ensure a copy of any Extended LRO is given to the Attorney-General.

[*VPA* s 47]

In the case of Extended LROs relating to intervention order legislation, the principal registrar of the Magistrates' or Children's Court, as the case may be, must cause a copy of the order to be given to the Supreme Court, County Court, VCAT, and the Children's or Magistrates' Court, as required.

[*VPA* s 48]

Likewise, the principal registrar of the Magistrates' Court or the Children's Court must cause a copy of any Extended LRO relating to intervention order legislation to be given to:

- the person **subject to** the order, and
- the person **protected by** the order, and
- **the applicant** (if the applicant is not the person protected by the order)

[*VPA* s 49]

Last updated: 9 March 2017

3.1.7 Applications to vary or revoke an Extended LRO

In order to have an Extended LRO varied or revoked, the person subject to it must obtain leave and then apply to the court that issued the Extended LRO. This is the case despite anything to the contrary in the order itself.

[*VPA* s 65]

The applicant must apply for leave using Form 12 of the *Magistrates' Court (FVP) Rules 2008*.

[*Magistrates' Court (FVP) Rules 2008* r 16.08]

Once leave is granted, the application to vary or revoke must be in Form 13 of the *Magistrates' Court (FVP) Rules 2008* and a copy of the order granting leave must be attached to the application.

[*Magistrates' Court (FVP) Rules 2008* r 16.09]

Notice of applications

The court must direct the principal registrar to cause notice of an application to vary or revoke to be given to:

- The Attorney-General;
- The person (if any) who applied for the Extended LRO;
- The person protected by the Extended LRO.

[*VPA* s 68(2)]

Notice of the application must be in Form 14 of the *Magistrates' Court (FVP) Rules 2008* and accompanied by a copy of every order made or direction given by the Court in the application to which the notice relates and in the preceding leave application.

[*Magistrates' Court (FVPA) Rules 2008* r 16.10]

Furthermore, the notice must include a copy of the application to vary or revoke, and state that the person receiving the notice is entitled to make submissions. Additionally, the relevant court may make any order in relation to the notification of persons that it considers appropriate in the circumstances.

[*VPA* s 68]

Should the recipient of notice choose to make submissions, the court may direct that they are to be given opportunity to be heard either in written or oral form.

[*VPA* s 70]

The *VPA* provides that the court may determine the application to vary or revoke on the basis of written submissions alone, without appearances from the applicant or the person who received notice. However, the Court may conduct oral hearing if it considers:

- There are **exceptional circumstances**; and
- It is appropriate, having regard to the **interests of justice**.

[*VPA* s 71]

Making an order to vary or revoke an Extended LRO

The Magistrates' or Children's Court may revoke an Extended LRO, or vary it in a manner it considers appropriate, if it is in **interests of justice** to do so. A court may make a variation or revocation order on its own motion or on application from a person under s 65.

[*VPA* s 69]

Copies of orders

If the Magistrates' Court or Children's Court (as the case may be) varies or revokes an Extended LRO, the principal registrar must cause a copy of the order to be given to the Supreme Court, County Court, VCAT and either the Children's Court or the Magistrates' Court (as the case may be).

[*VPA* s 73(2) and (3)]

Variation or revocation application prevention orders

One of the new orders introduced by the *VPA* is the variation or revocation application prevention order. Part 9 of the *VPA* provides that the Magistrates' or Children's Courts may make a variation or revocation application prevention order if:

- The person has **frequently** made application for leave to vary or revoke; and
- Those applications were **vexatious**.

[*VPA* s 74(2)]

This order may direct that a person must not continue and/or apply for an application for leave to vary or revoke. The effect of the prevention order is that any existing application is stayed and of no effect.

[*VPA* s 75]

While s 76 of the Act provides that a variation or revocation application prevention order does not affect a person's right to commence or continue applications or proceedings, the substantive litigation restraint order may restrict the person's ability to bring or commence such proceedings.

[*VPA* s 76]

An application prevention order remains in force for a period specified in the order and the court may specify an indefinite duration. Furthermore, the court may extend duration if it considers it in interests of justice to do so.

[*VPA* s 77]

Last updated: 9 March 2017

3.1.8 Applications for leave to proceed

A person who is subject to an Extended LRO must seek leave of the court that issued the order before commencing or continuing proceedings otherwise prevented by the order.

[*VPA* s 52]

The person applying for leave must disclose by affidavit, unless the court rules or order state otherwise, the following in their application:

- Details of each application for leave to proceed they have made;
- Details of each application for leave to commence or continue a proceeding made by them under s 21 of *Supreme Court Act 1986*;

- Details of each interlocutory application made, or proceeding commenced or conducted by the person that is a vexatious application or proceeding, or which has been stayed or dismissed because it was made, commenced or conducted without merit;
- An explanation of how the application is materially different to each of the above mentioned applications;
- All other material facts.

[*VPA* s 56]

The *Magistrates' Court (FVP) Rules 2008* also requires that an application for leave to commence or continue a proceeding be in Form 7. For any other case, the application for leave to proceed must be in Form 8.

[*Magistrates' Court (FVP) Rules 2008* r 16.05]

The *Children's Court (FVP) Rules 2008* require that applications made under s 194(1) of the *FVPA*, which is equivalent to a leave to proceed application under the *VPA*, must be filed at the venue of the court that made the order declaring the person to be vexatious.

[*Children's Court (FVP) Rules 2008* r 11.03(2)]

If an application for leave to proceed is not materially different from a previous application, the principal registrar may exercise the jurisdiction to refuse leave. However, the Court may direct the principal registrar to accept an application.

[*VPA* s 57]

An explanation of how the application is materially different

Judgments in relation to General Litigation Restraint Orders (see description of this order in *Other orders under the VPA* section below), are also relevant to Extended LROs, and include the following.

An application for leave to proceed is not an opportunity for the court to re-examine the grounds on which an LRO has been made and does not operate as a second line of appeal against orders.

[*Kay v Attorney-General* (2000) 2 VR 436 [1] (Ormiston JA)]

There is an onus on the applicant to provide an explanation as to how the current application is materially different from previous applications and this onus must be discharged before leave may be granted.

[*Knight v Shuard* [2015] VSC 546 [6] (McDonald J); *Knight v Corrections Commissioner & Ors* [2015] VSC 545 [7] (McDonald J)]

In relation to the equivalent provision under the old regime, the Supreme Court held that a statement of claim that is in proper form and discloses a cause of action does not sufficiently establish the proposed proceeding is not an abuse of process.

[*Attorney-General v Lindsey* [2005] VSC 53 [13] (Gillard)]

The obligation that an application for leave be materially different requires that it be different "in substance" from previous applications.

[*Knight v Corrections Commissioner & Ors* [2016] VSC 50 [86] (Digby J)]

Granting leave to proceed

A Court may grant leave to commence or continue a proceeding against a person, their child or an entity protected by the order, or in respect of matter described in the order, if:

- The proceeding is **not vexatious**; and
- There are **reasonable grounds** for proceeding.

Comparison with previous test

Under the legislation in force before the commencement of the *VPA*, the test for leave to bring proceedings by a person subject to a form of litigation restraint order was that the Court was satisfied that the proposed proceedings were not or would not be an abuse of process of the Court.

[*Phillip Morris Ltd v Attorney-General (Vic)* (2006) 14 VR 538]

Under the *VPA*, the test is that the proceeding is not vexatious and there are reasonable grounds for proceeding. This is a more onerous test. As Cavanough J explained in *Knight v Money*:

> The definition of "vexatious proceeding" is inclusive and it extends to, among other things, 'a proceeding that is an abuse of a court or tribunal'... Not only must the Court be satisfied that the proposed proceeding would not be an abuse of process, it must also be satisfied that the proposed proceeding would not otherwise be a 'vexatious proceeding' (as defined) and, moreover, that there are 'reasonable grounds for the proceeding'.
>
> [*Knight v Money* [2015] VSC 105 [11]–[12] (Cavanough J)]

The obligation to establish that the proposed proceeding should be granted leave lies with the applicant. In *Attorney-General v Lindsey* [2005] VSC 53 Gillard J stated:

> While the court should be satisfied that there is some credible evidence that the proposed plaintiff has an arguable case, it is not the function of the court on the application to decide the factual issues which must be established by the plaintiff to succeed.
>
> [*Attorney-General v Lindsey* [2005] VSC 53 [13]]

In some cases, an application of leave to bring proceedings may itself be an abuse of process. This may occur when the applicant makes persistent and habitual applications on the same grounds that were previously rejected. This is a separate question from whether the proposed proceedings would be an abuse of process and, unless a party raises the issue, the court only needs to determine whether the proposed proceeding would be an abuse of process.

[see *Attorney-General (Vic) v Kay* [2009] VSC 337; *Phillip Morris v Attorney-General (Vic)* (2006) 14 VR 538]

Residual discretion

While the onus remains with the applicant to show that the application is not vexatious, the court has a "residual discretion" to refuse leave.

[*Knight v Money* [2015] VSC 105 [12] (Cavanough J) affirmed in *Knight v Thomas* [2015] VSC 283 [35] (Zammit J)]

One situation where the court has exercised this "residual discretion" has been where the applicant failed to produce an affidavit in compliance with s 56.

[*Knight v Thomas* [2015] VSC 283 [35] (Zammit J)]

Notice of application for leave to proceed

If the Magistrates' or Children's Court considers the application for leave should proceed, the Court must direct the principal registrar to cause notice to be given to:

- The Attorney-General; and
- The applicant (if any) of the Extended LRO; and
- Any person named in the proceeding to which the application for leave to proceed relates; and
- Anyone else the court deems appropriate.

The notice must include a copy of the application for leave as well as state that the notice recipient is entitled to make submissions.

[*VPA* s 61]

Additionally, the *Magistrates' Court (FVP) Rules 2008* require the notice be in Form 11 and accompanied by a copy of every order made or direction given by the Court in the application to which the notice relates.

[*Magistrates' Court (FVP) Rules 2008* r 16.07]

Any person who has been given notice of an application for leave to proceed may be heard in relation to the application.

The court may direct that this person make written submission or oral submissions. The court may determine the application on the basis of written submissions alone, without appearance of the person.

A court may only hold an oral hearing if it considers that:

- there are exceptional circumstances; and
- it is appropriate to do so, having regard to the interests of justice.

[*VPA* s 63]

Last updated: 9 March 2017

3.1.9 Other orders under the VPA

While Extended LROs are the main orders given to persons engaging in vexatious proceedings under the *FVPA*, such litigants may also be subject to other orders under the *VPA*, outlined in the following topics.

Acting in concert orders

Part 5 of the *VPA* provides for the making of acting in concert orders. These orders allow a court to address the problem of people assisting those who are subject to a litigation restraint orders and seeking to subvert the effect of that order. The order restricts a person from conducting proceedings that contravene someone else's Extended LRO.

According the Act, *acting in concert* means:

- Acting on **behalf** of the other person; or
- Acting for the **predominant benefit** of the other person; or
- Acting **on the instructions** of the other person; or
- Acting in **collusion** with the other person.

[*VPA* s 4]

The Magistrates' or Children's Court may make an acting in concert order on its own motion. In addition, the following persons can apply for an acting in concert order:

- A person who has applied for a litigation restraint order to which another person is subject;
- A person named in proceedings that, if made or commenced by the person subject to a litigation restriction order, would contravene the terms of that order.

An acting in concert order may be made if the court is satisfied that:

- The person acting in concert has commenced proceedings under intervention order legislation; and
- The proceeding, if commenced by the person subject to the Extended LRO, would contravene the terms of that Extended LRO.

[*VPA* ss 34 and 36]

Applications for acting in concert orders must be in Form 6 of the *Magistrates' Court (FVP) Rules 2008* and supported by an affidavit. Unlike Extended LROs, there are no leave requirements for seeking acting in concert orders.

[*Magistrates' Court (FVP) Rules 2008* r 16.04]

An acting in concert order may specify that a person is subject to an Extended LRO. This may be on the same terms as the person with whom they were acting in concert or any other terms available under an Extended LRO related to intervention order legislation. Furthermore, the acting in concert order may direct any other thing that the court considers appropriate, including that an interlocutory application be struck out, a proceeding stayed or order liability for costs.

However, an acting in concert order cannot subject a person to a General LRO.

[VPA s 35]

The effect of the acting in concert order is that the proceeding to which it relates is stayed.

[*VPA* s 36]

The requirements around giving persons the opportunity to be heard, providing copies of orders, appealing decisions and applications for leave to proceeds that apply to Extended LROs likewise apply to acting in concert orders.

Appeal restriction orders

Part 6 of the *VPA* gives courts the power to make appeal restriction orders against a person subject to an Extended LRO. This type of order gives the courts power to constrain a vexatious litigant's capacity to appeal interlocutory applications, or commence or continue proceedings.

A person may have an appeal restriction order made against them by the Magistrates' or Children's Court if they have **frequently** made vexatious applications for leave to proceed **and** it is in the interests of justice that the order is made.

The appeal restriction order may direct that a person have no right to appeal a decision of the relevant court to refuse leave to commence or continue a proceeding in that court for a specified time period. This order may be made despite anything to the contrary in Part 10 of the *VPA* and despite the terms of the person's Extended LRO.

[*VPA* s 39]

As with other orders in the *VPA*, the effect of an appeal restriction order is that the application for leave to appeal to which the order relates is **stayed** and any application for leave to appeal made in contravention of the order is **of no effect.**

[*VPA* s 40]

The making, commencing and continuing of other types of applications and proceedings in a Victorian court or tribunal other than the appeal are not affected by this order.

[*VPA* s 41]

General Litigation Restraint Orders (General LROs)

Only the Supreme Court may make a General LRO. This order prevents a person from continuing or commencing *any* proceeding in *any* Victorian Court or tribunal unless the person obtains leave.

[*VPA* s 30]

This order may only be made on the Supreme Court's own motion or by application by the Attorney-General.

[*VPA* s 28 and sub-s 29(4)(a)]

An order in force declaring a person vexatious under s 21(2) of the *Supreme Court Act 1986* is taken to be a General LRO under section 29 of the *VPA*.

[*VPA* s 91; *Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [7] (Forrest J)]

When the Supreme Court makes an LRO, it must select whether the respondent requires leave to proceed from the Supreme Court in all cases, or from the Court in which the person wishes to bring a proceeding.

[VPA s 30]

The Supreme Court has allowed a person subject to a General LRO to seek leave to proceed from the court where the person wishes to commence proceedings where it was sensible and cost effective because it was consistent with core values of the justice system, effectiveness and proportionality, as outlined by the Law Reform Committee Inquiry into Vexatious Litigants.

[*Attorney-General for the State of Victoria v Knight* [2016] VSC 488 [62] (Forrest J)]

However, in *David James Lindsay - Application under Vexatious Proceedings Act 2014* , the terms of the order itself required leave applications be made to the Supreme Court.

[*David James Lindsay - Application under Vexatious Proceedings Act 2014* [2015] VSC 316 [2] (Rush J)]

An application in the Magistrates' Court for leave to commence a proceeding must be in Form 10, while an application to continue an existing proceeding must be in Form 9 of the *Magistrates Court (FVP) Rules 2008*.

[*Magistrates' Court (FVP) Rules 2008* r 16.06]

Last updated: 9 March 2017

3.1.10 Appeals

Under Part 10 of the *VPA*, only the Supreme Court has the power to consider appeals. There are a number of decisions that may be appealed under this Part including the making of an Extended LRO made under s 19. The orders that can be appealed in relation to intervention order legislation are:

- A decision to refuse leave to apply for a litigation restraint order;
- A decision to make a litigation restraint order or an acting in concert order;
- A decision to refuse to make a litigation restraint order or an acting in concert order;
- A decision to vary or revoke a litigation restraint order;
- A decision to refuse to vary or revoke a litigation restraint order;
- Subject to any appeal restriction order, a decision to refuse an application for leave to proceed.

[*VPA* s 79]

To appeal any order under the *VPA*, a litigant must first obtain leave of the Supreme Court.

[*VPA* s 80]

If the Supreme Court considers the leave application should proceed, it must direct the Prothonotary to cause notice to be given to certain persons set out below:

- For applications for leave to appeal a decision to refuse leave to apply for an Extended LRO, the person who is the subject of the proposed order.
- For applications for leave to appeal a decision to make an Extended LRO:

- The Attorney-General;
- The person (if any) who applied for the order;
- The person (if any) who is protected by the order.
    - For applications for leave to appeal decisions to refuse to make an Extended LRO, the person who is or was subject of the Extended LRO.
    - For applications for leave to appeal the variation /revocation of Extended LRO, the person who is or was subject of the Extended LRO.
    - For applications for leave to appeal a decision to refuse to vary or revoke Extended LRO:

- The Attorney-General; and
- The person (if any) who applied for the order;
- The person (if any) who is protected by the order.
- For applications for leave to appeal a decision to refuse an application for leave to proceed
- The Attorney-General; and
- The person (if any) who made the application for the Extended LRO to which application for leave to proceed relates; and
- The person named in proposed proceeding.

The Supreme Court may also make any order regarding notification that it considers appropriate and the notice must include a copy of the application as well as state that the person receiving notice is entitled to be heard.

[*VPA* s 82]

While appearance from either party is not necessary, the Supreme Court may direct an oral hearing for leave to appeal applications if:

- There are **exceptional circumstances**; and
- It is appropriate, having regard to **interests of justice**.

[*VPA* s 84]

Last updated: 9 March 2017

3.1.11 Relevant Court Rules

The *Magistrates' Court (FVP) Rules 2008* and *Children's Court (FVP) Rules 2008* also contain provisions that allow the court to prevent an abuse of process and vexatious proceedings. The relevant rules are set out below:

Rule 3.03 Registrar refusing to accept documents

(1) A registrar may refuse to accept a document if the registrar considers that the form or contents of the document show that the document, if accepted, would be an abuse of the process of the Court.

(2) The Court may direct the registrar to accept a document for filing.

Rule 3.04 Scandalous matter

If a document for use in the Court contains scandalous, irrelevant or otherwise oppressive matter, the Court may order –

(a) that the offending matter be deleted; or

(b) if the document has been filed, that it be taken off the file.

[*Magistrates' Court (FVP) Rules 2008 r 3.03 and 3.04; Children's Court (FVP) Rules 2008* rr 3.03 and 3.04]

Rule 6.01 Stay of proceeding

If a proceeding is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the Court, the Court may, on the application of a respondent, stay the proceeding.

Rule 6.02 Striking out proceeding

If a proceeding –

(a) is scandalous, frivolous or vexatious; or

(b) may prejudice, embarrass or delay the fair hearing of the proceeding; or

(c) is otherwise an abuse of the process of the court –

the Court may order that the whole or part of the application be struck out or amended.

[*Magistrates' Court (FVP) Rules 2008 rr 6.01 and 6.02; Children's Court (FVP) Rules 2008 rr 6.01 and 6.02*]

These rules empower the court to protect its processes from abuse by rejecting documents that are scandalous, irrelevant or an abuse of process, and where appropriate, striking out proceedings.

[see *Attorney-General v Horvath* [2001] VSC 269]

Last updated: 9 March 2017

3.2 Allowing publication of report of proceeding

The *Family Violence Protection Act 2008* s 166 and the *Children, Youth and Families Act 2005* s 534 limit a person's right to publish details of proceedings or orders that may lead to the identification of a person involved in the proceedings, including a picture of a person. Breach of these provisions is an offence punishable by a fine of 100 penalty units or 2 years' imprisonment or both for a natural person, or a fine of 500 penalty units for a body corporate.

This prohibition is discussed in detail in 4.1.8 - Limitations on reporting. This section only discusses the power to permit

At first instance, the restrictions in the FVPA and the *Children, Youth and Families Act 2005* are mutually exclusive. The FVPA provisions do not apply in the Children's Court and the *Children, Youth and Families Act 2005* provisions only apply to proceedings in the Children's Court, or arising out of that court. Mechanisms for allowing publication are discussed in the following sections.

Publication restrictions and recognised DVOs

As explained in 3.3 – Interstate and New Zealand orders, the *National Domestic Violence Order Scheme Act 2016* makes interstate orders and registered New Zealand orders enforceable across Australia. Section 169E of the FVPA provides that the restrictions on publication and the provisions for allowing publication under the FVPA are, in the case of recognised DVOs, subject to any laws about publication regarding DVOs in the issuing jurisdiction and orders relating to publication that have been made by a court of the issuing jurisdiction.

Allowing publication under the FVPA

The Magistrates' Court may only make an order allowing publication of identifying particulars or a picture if the court reasonably considers that:

- it is in the public interest to allow publication; and
- it is just to allow publication in the circumstances.

(FVPA s 169]

The court must be satisfied that these criteria are met before it can allow publication. The Act includes an example that the court might allow publication to raise awareness of family violence.

In contrast to similar restrictions in the *Children, Youth and Families Act 2005* s 534, any magistrate may make this order. The power is not limited to the head of the jurisdiction.

Victim's consent

The *Family Violence Protection Amendment Act 2014* created an exception to s 169 for publications made with the consent of adult victims.

(FVPA s 169B]

An adult victim, or another person with the adult victim's written consent, may publish certain information, including the identity of the adult victim and/or the person subject to the order.

(FVPA s 169A (definition of 'permitted content')]

She or he may only do so where the accused or offender has been charged with or convicted of:

- Contravening a family violence safety notice, family violence intervention order or a recognised DVO; or
- Another offence that would have constituted a contravention of a family violence safety notice, family violence intervention order or a recognised DVO (i.e., where there was a safety notice or an order in place but there is no contravention charge or conviction); or
- Contravening a recognised DVO enforced as if the order were a family violence safety notice or a family violence intervention order; or
- An offence that contributed to the making of a family violence safety notice or a family violence intervention order.

(FVPA ss 169A–169B]

The adult victim's consent may be withdrawn at any time before the publication of any report.

(FVPA s 169B(3)]

Attorney-General Robert Clark explained the rationale behind the amendment in the Legislative Assembly:

> The proposed amendments will allow honest and open reporting and discussion about the extent of family violence and its impact on Victorian families, by giving victims the right to tell their stories publicly without having to seek permission from the court. These amendments will also contribute to perpetrator accountability.

[Second Reading Speech to the *Family Violence Protection Amendment Act 2014*, Hansard, Legislative Council, 20 August 2014, p 2622]

Allowing publication under the Children, Youth and Families Act 2005

Section 534 of the *Children, Youth and Families Act 2005* gives the President of the Children's Court the power to allow publication of reports of proceedings that contain particulars likely to lead to the identification of:

- the venue of the Children's Court where the proceeding was heard; or
- a child or other party to the proceeding; or
- a witness in the proceeding; or
- a child who is the subject of an order of the Court.

The President may also authorise the publication of a picture of a child, or another party, or a witness in, a proceeding before or arising out of the Children's Court.

[CYFA s 534(1)]

Unlike the FVPA s 169, the *Children, Youth and Families Act 2005* does not specify the factors the President must consider when making an order under this section.

Sections 534(1) and (3) allow the Secretary to the Department of Human Services to permit publication of details that may identify a child who is the subject of a custody to Secretary order, a guardianship to Secretary order or a long-term guardianship order. The Secretary may only exercise this power in special circumstances and in the absence of a court order to the contrary. Given the structure of s 534(3), it will generally not be appropriate for the Secretary to permit identification of a child respondent in family violence proceedings, even if the child is also the subject of a custody to Secretary order or other similar order.

Last updated: 13 February 2018

3.3 Interstate and New Zealand orders

Part 10 of the FVPA originally governed when orders from other Australian states and territories, or from New Zealand, would be enforceable in Victoria. Now, the application of non-Victorian orders is governed by a combination of Part 10 of the FVPA for New Zealand orders and the *National Domestic Violence Order Scheme Act 2016* for orders from other Australian jurisdictions.

Overview

The *National Domestic Violence Order Scheme Act 2016* commenced operation on 25 November 2017.

Under the National Scheme, domestic violence orders from other Australian jurisdictions are automatically recognised and enforceable in each participating State and Territory once the respondent has been notified of the original order under the law of the State or Territory that made the order (the 'issuing jurisdiction'). Once an order is enforceable nationally, the order can be varied or revoked by the court of any participating Australian jurisdiction, or any person authorised to do so by the law of the issuing jurisdiction. These variations or revocations are then recognised nationally.

The Act also provides that firearms and weapons conditions on domestic violence orders from other jurisdictions are enforced in Victoria as if the person was subject to an equivalent condition on a Victorian order.

Domestic violence orders from New Zealand are treated differently under the Scheme. New Zealand orders must be registered before they can be enforced in Australia. Once registered, variation or revocation of the original order by New Zealand courts is not recognised in Australia. Rather, the Australian registration of the New Zealand order must be varied or revoked. Similarly, Australian court orders that vary or revoke a registered New Zealand order have no impact in New Zealand. However, Australian variations or revocations of registered New Zealand orders apply across Australia.

What is a "Recognised DVO"

Section 10(1) specifies the three types of DVOs that are recognised DVOs in Victoria:

- A local DVO - that is, a family violence intervention order or a family violence safety notice;
- An interstate DVO made in a participating jurisdiction - see 3.3.1 below; and
- A foreign order that is a registered foreign order in any participating jurisdiction - see 3.3.2 below.

A DVO becomes recognised when it is made. A foreign DVO is 'made' for this purpose when it is registered.

Superseded orders – Later recognised DVOs prevail over earlier comparable orders

Section 13 provides that a new recognised DVO that is enforceable supersedes any comparable recognised DVO made earlier in time and any comparable local DVO made earlier in time regardless of whether the local DVO is a recognised DVO.

DVOs are comparable if they are against the same respondent and are for the protection of one or more of the same protected persons. However, to the extent that the new DVO does not cover a particular protected person under the old DVO, the old DVO remains in force in relation to that protected person.

Local DVOs that are superseded are revoked. Recognised DVOs that are superseded cease to be recognised DVOs.

Contravention of recognised DVOs

Section 15 provides that recognised DVOs (and recognised variations) are enforceable against respondents in Victoria. An order becomes enforceable when:

- In the case of local orders, the respondent is notified in accordance with the FVPA
- In the case of interstate orders, the respondent is notified in accordance with the law of the issuing jurisdiction
- In the case of foreign orders, the order is registered, either in Victoria or in another participating jurisdiction.

Orders are enforced as if the order were a local DVO and the respondent had been properly notified under the FVPA. Similarly, recognised variations that are enforceable in Victoria are enforced as if they were variations to a local DVO.

[*National Domestic Violence Order Scheme Act 2016* s 17]

The effect of s 17 is that a respondent does not need to be separately notified of the fact that the order is enforceable in Victoria and, in the case of a New Zealand order, does not need to be notified of the fact that the order has been registered in either Victoria or another Australian jurisdiction.

In the case of Victorian orders, the mandatory explanation of an order or a notice includes a statement that the order may be enforced in another State or Territory under the National Order Scheme legislation.

(FVPA ss 35, 57, 96]

For the purpose of enforcement, prohibitions, restrictions and conditions on non-local DVOs adopt the meanings of the issuing jurisdictions, but are enforced as if they were prohibitions, restrictions or conditions of a local DVO.

[*National Domestic Violence Order Scheme Act 2016* s 18]

Non-local DVOs and firearms and weapons licences

Section 19 of the *National Domestic Violence Order Scheme Act 2016* provides that recognised, non-local DVOs that disqualify a person from holding a non-local firearms licence or a type of non-local firearms licence result in equivalent disqualifications in Victoria. Section 19 provides that the Chief Commissioner of Police must cancel any local licences and refuse to issue or renew a licence if the person is disqualified from holding an equivalent licence under a recognised DVO.

Section 19 does not apply to final orders, because a person subject to a final DVO order is automatically prohibited from possessing firearms under the *Firearms Act 1996*.

Section 20 provides equivalent provisions in relation to weapons licences and the *Control of Weapons Act 1990*.

Non-local DVOs and costs

Section 21 specifies that non-local DVOs cannot be enforced in Victoria to the extent that they require payment of money, and Victorian courts cannot award costs for proceedings relating to a recognised DVO in another jurisdiction. However, Victorian courts can award costs in relation to Victorian proceedings for variation or revocation of a recognised DVO.

Variation and revocation of recognised DVOs

Power of courts to vary or revoke recognised DVOs

Part 4 of the *National Domestic Violence Order Scheme Act 2016* regulates when the Magistrates' Court and the Children's Court has power to vary or revoke non-local DVOs.

Section 23 gives the Magistrates' Court and the Children's Court power to vary or revoke non-local DVOs as if they were a local DVO. This is subject to the restriction in s 23(2) that a court cannot vary or revoke a non-local DVO if it is the kind of DVO that cannot be varied or revoked by a court in the issuing jurisdiction.

Once made, the variation or revocation applies in all participating jurisdictions under the National Scheme.

Exercising the power to vary or revoke a non-local DVO does not change the identity of the issuing jurisdiction. It remains an order of the jurisdiction which originally made the order.

Under section 24, applications to vary or revoke a non-local DVO are made as if they were applications to vary or revoke a local DVO, and must be made by a person who could apply if the DVO were a local DVO.

A court has a discretion whether to hear the application to vary or revoke. Under s 25(2), in deciding whether to hear the application to vary or revoke, the court may consider:

(a) the jurisdiction in which the respondent and the protected person or persons under the DVO generally reside or are employed;

(b) any difficulty the respondent to the proceeding may have in attending the proceeding

(c) whether there is sufficient information available to the court in relation to the DVO and the basis on which it was made;

(d) whether any proceeding is being taken in respect of an alleged contravention of the DVO and the jurisdiction in which that proceeding is being taken;

(e) the practicality of the applicant (if not the respondent under the DVO) applying for and obtaining a local DVO against the respondent with similar prohibitions or restrictions;

(f) the impact of the application on any children who are family members of the protected person or the respondent;

(g) any other matters the court considers relevant.

Section 25(3) explicitly recognises that a court may decline to hear an application to vary or revoke an order if the court is satisfied that there have been no material change of circumstances since the order was made and that the application is in the nature of an appeal against the order.

Section 25(5) prohibits a court from hearing an application to vary or revoke an order by the respondent during any period in which the respondent is prohibited from applying to vary or revoke the DVO under the law of the issuing jurisdiction.

Recognition of variations and revocations of recognised DVOs

Section 11(2) and (3) provide for variations to recognised DVOs and when those variations will be recognised in Victoria:

(2) a variation to a local DVO is a recognised variation in Victoria if the variation is done

(a) in Victoria by a court; or

(b) in another participating jurisdiction by a court under a corresponding law

(3) A variation to an interstate or foreign order is a recognised variation in Victoria if the variation is done-

(a) in the issuing jurisdiction by a court or any other person authorised to do so under the law of the issuing jurisdiction; or

(b) in any participating jurisdiction by a court under this Act or a corresponding law.

Section 12 contains similarly worded provisions for revocations of recognised DVOs and when those revocations will be recognised in Victoria.

The effect is that any variation or revocation of a recognised order takes effect automatically in Victoria when carried out under the law of the issuing jurisdiction or under the National Domestic Violence Order Scheme legislation.

Variation and revocation and foreign orders

A note to s 11(3) states that '[t]he issuing jurisdiction for a foreign order is the jurisdiction in which the order is registered'. This aligns with FVPA s 179 which provides that variations, revocations or extensions of New Zealand orders made by New Zealand courts have no effect in Victoria. In effect, once a New Zealand order is registered under the FVPA or in participating Australian jurisdiction, it becomes disconnected from the parent New Zealand order and subsequent variations, revocations or extensions in Australia and New Zealand have no effect on the order as it applies in the other country.

Relevant definitions

FVPA s 4 contains four definitions relevant to understanding Part 10. These are extracted below.

Corresponding interstate law means a law of another State or a Territory relating to the protection of persons from family or domestic violence that –

(a) substantially corresponds to this Act; or

(b) is prescribed for the purposes of this definition;

Corresponding interstate order means an order that –

(a) is made under a corresponding interstate law; and

(b) substantially corresponds to a final order;

Corresponding New Zealand law means a law of New Zealand relating to the protection of persons from family or domestic violence that –

(a) substantially corresponds to this Act; or

(b) is prescribed for the purposes of this definition;

Corresponding New Zealand order means an order that –

(a) is made under a corresponding New Zealand law; and

(b) substantially corresponds to a final order.

The effect of these definitions is that a corresponding order is:

- Made under a law of an Australian State or Territory, or New Zealand, that substantially corresponds with the FVPA, or is prescribed for this purpose; and
- Substantially corresponds to a final order.

A protected person cannot register an interim order.

Regulations 6 and 7 of the *Family Violence Protection Regulations 2008* prescribed the following corresponding laws:

State / Country	Corresponding law
Australian Capital Territory	*Domestic Violence and Protection Orders Act 2001* (ACT)
New South Wales	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)
Northern Territory	*Domestic and Family Violence Act 2007* (NT)
Queensland	*Domestic and Family Violence Protection Act 1989* (Qld)
South Australia	*Domestic Violence Act 1994* (SA)
Tasmania	*Family Violence Act 2004* (Tas)
	Justices Act 1959 (Tas)
Western Australia	*Restraining Orders Act 1997* (WA)
New Zealand	*Domestic Violence Act 1995* (NZ)

Corresponding interstate laws are only prescribed to the extent that the laws relate to the protection of persons from family or domestic violence. Some legislation, such as the *Justices Act 1959* (Tas) s 106B and *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 19, also deals with other kinds of intervention orders. These other kinds of orders are not prescribed for the purpose of the FVPA and cannot be registered under this Act.

While analogous mutual recognition provisions exist in the legislation for all other States and Territories, a person currently cannot register a Victorian order in South Australia or the Northern Territory. The equivalent definition of a "corresponding interstate law" in these jurisdictions only includes laws that are prescribed and the relevant regulations still list the *Crimes (Family Violence) Act 1987* (Vic) as the prescribed Victoria legislation.

[See *Domestic Violence Regulations 2006* (SA) reg 5; *Domestic and Family Violence Regulations* (NT) reg 3]

Effect of registration

An appropriate registrar for a court may register a corresponding interstate order or a corresponding New Zealand order.

(FVPA ss 177, 184]

Once registered, a corresponding interstate order or a corresponding New Zealand order has the same effect as a final order made under the FVPA and served on the respondent. Breach of the registered order in Victoria may be treated as a contravention under FVPA s 123.

(FVPA ss 179, 186]

Unless a Victorian court makes an order to the contrary, the protection offered by a registered order lapses when the order expires.

Changes by interstate court

Corresponding *interstate* orders are enforceable in Victoria in the form of the order at the date of registration. Subsequent variation, extension or revocation of the order by the issuing court has no effect on the respondent's obligations in Victoria.

(FVPA s 180]

Note that, in contrast, variation, extension or revocation of a corresponding *New Zealand* order does affect the enforceability of the registered order in Victoria.

(FVPA s 187]

Changes by New Zealand court

If a New Zealand court varies, revokes or extends a corresponding New Zealand order that is registered in Victoria, the order as registered is varied, revoked or extended accordingly.

When the New Zealand order is varied, revoked or extended, the appropriate registrar must notify the Chief Commissioner of Police of the change.

(FVPA s 187]

This is in contrast to registered interstate orders, which continue to apply in accordance with the form of the order at the date of registration, despite any subsequent variation, extension or revocation by a court of another State. A Victoria court also has no power to vary, extend or revoke a corresponding New Zealand order, unlike corresponding interstate orders.

[Compare FVPA ss 180, 181]

Changes by Victorian court

Section 181 gives Victorian courts power to vary, extend or revoke registered corresponding interstate orders. The following people can apply to vary, extend or revoke a registered interstate order:

(a) a person for whose protection the order has been made; or

(b) a person against whom the order has been made; or

(c) a police officer; or

(d) a person who has been granted leave by the court to make an application in respect of the order.

(FVPA s 181(2)]

A court can only make these alterations to a corresponding *interstate* order and may not make the alteration to a corresponding *New Zealand* order. A variation, extension or revocation does not affect the operation of the order in the issuing State.

A registered interstate order must not be varied or extended, or the registration revoked, on the application of a person other than the respondent to the order, unless notice of the application is served on the respondent. Similarly, the order must not be varied or the registration revoked on the application of the respondent unless notice of the application is served on the person protected by the order.

(FVPA s 182]

Applications under the FVPA must be personally served. See 2.1.6 Service and FVPA s 202.

Although not prescribed by the legislation, if a third party applies to vary or revoke the registration of an order (such as a police officer), procedural fairness requires that a copy of the order be served on the protected person. In addition, the court may require the protected person or the respondent to serve notice on the applicant for the original order, if that is suitable in the circumstances of the case.

If the court does vary the order or extend or revoke the registration, the appropriate registrar must give notice to:

- the interstate court that made the original order; and
- the Chief Commissioner of Police; and
- the Secretary to the Department of Human Service.

(FVPA s 183]

See *Magistrates' Court (Family Violence Protection) Rules 2008* r5.01 and *Children's Court (Family Violence Protection) Rules 200* giving notice to a person.

Notice of registration

After registering an interstate or New Zealand order, the appropriate registrar must:

- give notice to the court that made the order and the person protected by the order; and
- give a copy of the order to the Chief Commissioner of Police and the Secretary to the Department of Human Services.

(FVPA ss 178(1), 185(1)]

The appropriate registrar may also list the matter for hearing before the court to decide whether a copy of the registered order must be served on the respondent at the respondent's last known address. The court must decide this issue if the registrar lists the matter for hearing, and may only order service if, after hearing from the protected person, the court is satisfied that revealing the protected person is in Victoria would not jeopardise her safety or the safety of her children. If the court does order service, the appropriate registrar must arrange for the registered order to be served on the respondent.

(FVPA ss 178(2)–(5), 185(2)–(5)]

Refusing to order service of the order on the respondent, however, raises separate difficulties. Courts cannot currently make extra-territorial orders. The extra-territorial scope is created only when an order is registered under Part 10, and it is achieved by making the order enforceable as an order of a Victorian court. Procedural fairness requires, however, that the respondent be notified of the expanded scope of the order before it will be enforceable. Therefore, while the Act allows the court to make orders without notifying the respondent, those orders are likely to be unenforceable. In circumstances where the court believes that notifying the respondent of the registration would jeopardise the protected person's safety, it appears that the protected person will need to choose between the safety offered by keeping her presence in Victorian secret from the respondent or the safety offered by an enforceable local order. She cannot obtain both forms of protection.

Last updated: 13 February 2018

3.3.1 - Types of recognised DVOs - Interstate DVOs

Under section 10(1)(b) of the *National Domestic Violence Scheme Act 2016*, 'an interstate DVO made in a participating jurisdiction is a 'recognised DVO'.

Section 6 of the *National Domestic Violence Order Scheme Act 2016* defines an 'interstate DVO' as:

(1) An interstate DVO means a prescribed order that

(a) substantially corresponds to a local DVO; and

(b) is made under a law of another jurisdiction that contains provisions that substantially correspond to the Family Violence protection Act 2008.

(2) A registered foreign order is not an interstate DVO.

Regulation 5 of the *National Domestic Violence Order Scheme Regulations 2016* specifies the prescribed orders and states:

For the purpose of section 6(1) of the Act the following orders are prescribed—

(a) a domestic violence order made under the Domestic Violence and Protection Orders Act 2008 of the Australian Capital Territory, as in force immediately before its repeal;

(b) a protection order or an after hours order made under the Family Violence Act 2016 of the Australian Capital Territory;

(c) an apprehended domestic violence order or an interim apprehended domestic violence order made under the Crimes (Domestic and Personal Violence) Act 2007 of New South Wales;

(d) a court DVO or police DVO, including a DVO as varied, made under the Domestic and Family Violence Act of the Northern Territory;

(e) a domestic violence order, police protection notice or release conditions made under the Domestic and Family Violence Protection Act 2012 of Queensland;

(f) an intervention order made under the Intervention Orders (Prevention of Abuse) Act 2009 of South Australia that addresses a domestic violence concern;

(g) a family violence order (FVO), interim FVO or police family violence order (PFVO) made under the Family Violence Act 2004 of Tasmania;

(h) a family violence restraining order or a police order made under the Restraining Orders Act 1997 of Western Australia;

(i) a violence restraining order that addresses a domestic violence concern made under the Restraining Orders Act 1997 of Western Australia, as in force immediately before 1 July 2017.

Section 8 of the *National Domestic Violence Order Scheme Act 2016* defines when an order 'addresses a domestic violence concern', for the purpose of reg 5(f) and (i). For South Australian orders, the order must have been made:

'because it is reasonable to suspect that the respondent will, without intervention, commit an act of domestic abuse (within the meaning of that Act).'

For orders under the Western Australian Act, the order must have been made:

'because the respondent has committed, or because it is feared the respondent will commit, an act of family and domestic violence (within the meaning of section 6 of that Act)'.

In addition, s 4 of the *National Domestic Violence Order Scheme Act 2016* contains the following definition:

(a) an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009 of South Australia; or

(b) a violence restraining order under the Restraining Orders Act 1997 of Western Australia, other than—

(i) a violence restraining order made under section 11B of that Act; or

(ii) a police order under that Act;

Section 8(3) of the National Scheme Act states that:

(3) A general violence order is taken, for the purposes of this Act, to be an order that addresses a domestic violence concern if—

(a) it is declared to be an order that addresses a domestic violence concern by the issuing authority that makes the order; or

(b) a registrar of a court of the jurisdiction in which the order was made makes an order declaring the order to be a recognised DVO in that jurisdiction.

This provides an additional way in which Western Australian and South Australian orders can qualify as addressing a domestic violence concern.

Last updated: 13 February 2018

3.3.2 - Types of recognised DVOs - Registered foreign orders

Under section 10(1)(c) of the *National Domestic Violence Scheme Act 2016*, 'a foreign order that is a registered foreign order in any participating jurisdiction' is a 'recognised DVO'.

Section 7 defines 'registered foreign order' as a foreign order that is

> (a) a corresponding New Zealand order registered under Part 10 of the Family Violence Protection Act 2008; or
>
> (b) a prescribed order that is registered under a law of another jurisdiction that contains provisions that substantially correspond to Part 10 of the Family Violence Protection Act 2008.

Registration under Part 10

Part 10 provides that the registrar at the proper venue of the Court may register a "corresponding New Zealand order".

Section 4 of the FVPA states that:

> corresponding New Zealand order means—
>
> > (a) an order made under a corresponding New Zealand law that substantially corresponds to an interim order or a final order; or
> >
> > (b) a notice issued or an order made under a corresponding New Zealand law that substantially corresponds to a family violence safety notice;

Once a corresponding New Zealand order is registered, the registrar must notify the New Zealand court that made the order, the protected person, the Chief Commissioner of Police and the Secretary to the Department of Health and Human Services.

The registrar has a discretion whether to refer to the court for a decision on whether the respondent to the order be notified. The court can only order that the respondent be notified if, after hearing from the protected person, the court is satisfied that revealing that the protected person is in Victoria would not jeopardise the protected person's safety or the safety of the person's children. The respondent is only notified if the court orders that the respondent be notified.

(FVPA s 178]

Once a corresponding New Zealand order is registered in Victoria, variations, extensions or revocations by New Zealand courts or persons authorised by New Zealand law have no effect in Victoria.

(FVPA s 179]

However, the Victorian court can vary, extend or revoke the registration of the order on application by the protected person, the respondent, a police officer or any person with leave of the court. The court must not vary, extend or revoke the registration unless the respondent and the protected person have been notified.

(FVPA ss 180, 181]

If the registration is varied, extended or revoked, the registrar must notify the relevant New Zealand court, the Chief Commissioner of Police and the Secretary to the Department of Health and Human Services.

Registration in another State or Territory

Regulation 6 of the *National Domestic Violence Order Scheme Regulations 2016* provides that the following orders are prescribed for the purpose of s 7(b) of the *National Domestic Violence Scheme Act 2016*:

> (a) a foreign order registered under section 134B of the Family Violence Act 2016 of the Australian Capital Territory;
>
> (b) a registered external protection order under Part 13 of the Crimes (Domestic and Personal Violence) Act 2007 of New South Wales made to prevent a person acting in a manner specified in section 16 of that Act;
>
> (c) a registered external order under the Domestic and Family Violence Act of the Northern Territory;
>
> (d) a registered New Zealand order within the meaning of the Domestic and Family Violence Protection Act 2012 of Queensland;
>
> (e) a foreign intervention order registered under Part 4 of the Intervention Orders (Prevention of Abuse) Act 2009 of South Australia other than an order that is declared by the regulations not to be a foreign intervention order for the purposes of Part 3A of that Act;
>
> (f) an external family violence order registered under section 27 of the Family Violence Act 2004 of Tasmania;
>
> (g) a foreign restraining order registered under Part 7A of the Restraining Orders Act 1997 of Western Australia.

Last updated: 13 February 2018

3.4 Extending holding period of respondent

Part 3 of the FVPA preserves the "holding powers" provisions previously introduced by the *Crimes (Family Violence) (Holding Powers) Act 2006*, following the VLRC's *Family Violence Police Holding Powers: Interim Report*.

These provisions give the police the power to direct a person to remain at a place, to go to another place and remain there or to remain in the company of a police officer or another person. If the directed person fails to comply with this direction, the police may apprehend and detain the person at a police station, another place or, if necessary, a police gaol. A police officer may only exercise this power if:

- the officer:

intends to apply for an intervention order, a variation of an intervention order or a family violence safety notice; or

intends to apply for an order varying a recognised DVO; or

reasonably believes that an intervention order or safety notice has been issued but not served, and the officer intends to serve the order or notice on the person

reasonably believes that the person is a respondent to a recognised DVO and the officer intends to obtain a copy of the recognised DVO and serve it on the person if it has not been served; and

- the officer has reasonable grounds for suspecting that the person is an adult; and
- the officer believes on reasonable grounds that exercising the power is necessary to ensure the safety of a family member of the person or to preserve property of the family member.

For information on recognised DVOs, see 3.3 Interstate and New Zealand orders.

(FVPA ss 12–15]

Duration of direction or detention

An exercise of power under Part 3 lasts for up to 6 hours, unless the court extends the period, or one of the following events occur which will terminate the direction or detention at the specified time:

Despite this general rule, if the person was detained so that an application for an intervention order, safety notice or variation to a recognised DVO can be made, the holding power ends:

- If an intervention order, safety notice or variation to a recognised DVO is made, when the order or notice is served;
- If a warrant is issued under s 50 to arrest the person, when the person is arrested under that warrant;
- If a police officer decides not to make an application, or withdraws an application for a family violence intervention order or a safety notice against that person, at the time of the decision or withdrawal.

(FVPA s 18(1), (2)]

In addition, if the person was detained to allow service of a notice or order, the detention period ends:

- If the safety notice or intervention order is served on the person, when it is served;
- If the officer becomes aware that no safety notice, intervention order or recognised DVO has been made against the person, at that time;
- If the officer obtains a copy of the recognised DVO and it has not been served, when it is served;
- If the officer obtains a copy of the recognised DVO and it has been served, when the officer obtains the copy;

(FVPA ss 18(2A), (2B)]

A direction also ends:

- If a family violence intervention order is made or a family violence safety notice is issued in respect of that person, when the order or notice is served;
- If a warrant is issued under s 50 to arrest the person, when the person is arrested under that warrant;

- If a police officer decides not to make an application, or withdraws an application for a family violence intervention order or a safety notice against that person, at the time of the decision or withdrawal;
- If a family violence intervention order is refused in respect of that person, at the time of that refusal;
- If a family violence safety notice is refused in respect of that person, at the time of that refusal; and
- If a warrant under s 50 to arrest the person is refused, at the time of that refusal.

(FVPA s 18(4)]

The general rules above are subject to two qualifications. First, if an intervention order, safety notice or recognised DVO is served on the person and the police officer reasonably believes that it is necessary for the holding power to continue while taking further measures to protect the affected family member, the detention or direction will not end prematurely. The direction or detention will continue until the relevant time limit expires. Secondly, if an application for a safety notice or a warrant to arrest are refused, but an application for an interim intervention order remains on foot or the police officer intends to apply for a family violence intervention order, the direction or detention may continue to operate until it would otherwise expire.

(FVPA ss 18(3), (5)]

Extension of holding period by court order

A police officer may apply to the Magistrates' Court or the Children's Court for an order extending the maximum duration of the holding power if the officer considers an extension necessary. There is no power to extend a holding period if the person is given a direction under s 14 of the Act while the police officer applies for a family violence safety notice.

(FVPA s 19]

An application for an extension order must be made within the initial 6 hour period and must include the following prescribed particulars:

(a) the name, rank, number and station of the police officer making the application;

(b) the name, date of birth and gender of the person who has been directed or detained;

(c) the name, rank, number and station of the police officer who issued the direction;

(d) the time, date and place that the direction was issued;

(e) the grounds for issuing the direction;

(f) if the person has been detained—

(i) whether the person refused or failed to comply with the direction; and

(ii) the time and date that the person was apprehended and detained;

(g) the location of the person who has been directed or detained;

(h) the time and date of making the application;

(i) the duration of the direction or detention at the time of making the application;

(j) the proposed period of the extension;

(k) the grounds for making the application.

(FVPA s 19; *Magistrates' Court (Family Violence Protection) Rules 2018* r4.01; *Children's Court (Family Violence Protection) Rules 2018* r 4.01]

The court may order the extension of the holding power if satisfied that there are *exceptional circumstances*.

The court must specify the extended period and cannot allow the total holding period to last more than 10 hours. The police must serve a copy of the extension order on the directed person.

(FVPA s 19]

The court may, if practicable, hear from the directed person or the affected family member on the application for an extension order, including on a remote application for an extension order (see below), even if the person is detained under FVPA s 15. As this power is often exercised after-hours, the court will usually do this by speaking to the directed person or affected family member during a telephone conversation.

(FVPA s 23]

Remote applications for extension orders

Police officers may apply to the court for an extension order by telephone, fax or other electronic communication if:

- the application is made *after hours;* or
- the officer reasonably believes it is impracticable to apply in person.

Before making a remote application, the officer must complete an application setting out the grounds on which the order is sought and the prescribed particulars.

Apart from Part 3.10 (Privileges) of the *Evidence Act 2008*, the court is not bound by the rules of evidence when determining a remote application.

If the court makes the extension order on a remote application:

- The court must inform the officer of:
- the terms of the order; and
- the period of operation of the order; and
- the venue of the court for the first mention date for the application for the intervention order; and
- The officer must:
- complete a form of order in the terms specified by the court and must include the name of the magistrate who made the order and the date and time when the order was made; and
- ensure that the venue of the court for the first mention hearing receives the form of order before the hearing of the application for the intervention order, or otherwise as soon as practicable

(FVPA s 20]

Last updated: 13 February 2018

3.5 Issuing search and seizure warrants

This section of the Bench Book examines the power to issue a search and seizure warrant under Part 7 of the FVPA. The Act also regulates execution of search warrants, the power of police to enter and search premises and seize weapons and evidence and how the police must dispose of anything surrendered or seized during a search. These other matters are beyond the scope of this Bench Book and are covered by the Search Warrants Manual.

Issuing a search and seizure warrant

Victorian orders

A police officer may apply to a magistrate for a search warrant over specified premises (including any vehicle on or in those premises) or a particular vehicle located in a public place if:

- either:
- the police officer intends to apply for a family violence safety notice or a family violence intervention order against a person; or
- a family violence safety notice or a family violence intervention order has been issued against a person; or
- a person is a respondent to a recognised DVO under the *National Domestic Violence Order Scheme Act 2016*; and
- the police officer believes on reasonable grounds that:
- the person is committing or is about to commit an offence against the FVPA; or
- the person is in possession of any of the following items at premises or in a vehicle, other than premises or a vehicle where the police officer may enter and search without a warrant:
    - a firearm; or
    - a firearms authority; or
    - ammunition; or
    - a weapon.

(FVPA s 160(1)]

Recognised DVOs

Where a matter relates to a recognised or interstate DVO, a police officer may apply to a magistrate for a search warrant over specified premises (including any vehicle on or in those premises) or a particular vehicle located in a public place if:

- either:

        - the police officer intends to serve or has served on a person an application for a recognised DVO made against the person; or
        - the police officer intends to serve or has served on a person an interstate DVO made against a person or an application for an interstate DVO made against the person; and
    - the police officer believes on reasonable grounds that the person is in possession of any of the following items at premises or in a vehicle, other than premises or a vehicle where the police officer may enter and search without a warrant:
        - a firearm; or
        - a firearms authority; or
        - ammunition; or
        - a weapon.

(FVPA s 160(1A)]

See 4 Criminal offences arising from the Act for a discussion of the offences a person may commit against the FVPA.

Criteria for issuing, and content of, warrant

The magistrate may issue the warrant if he or she is satisfied by evidence on oath (whether oral or by affidavit) that there are reasonable grounds for suspecting that:

- an offence against the FVPA is being or is about to be committed; or
- the person is in possession of a firearm, firearms authority, ammunition or a weapon.

A warrant issued under Part 7:

- May authorise the police officer named in the warrant, and any assistants he or she considers necessary to:
- enter the premises or vehicle named or described in the warrant; and
- search for and seize:
    - any evidence of the offence named or described in the warrant; or
    - any firearms, firearms authority, ammunition or weapon specified in the warrant; and
- Along with any other requirements, the warrant must state:
- the offence suspected, if the warrant is issued because the officer believes a person is committing, or is about to commit, an offence;
- the reason it is necessary to search for the specified items, if the warrant is issued because the officer believes the person is in possession of a firearm, a firearms authority, ammunition or a weapon;
- the premises or vehicle to be searched;
- a description of the evidence, firearm, firearms authority, ammunition or weapon to be searched for;
- any conditions on the warrant;
- whether entry is authorised at any time, or only during specified hours; and
- when the warrant ceases to have effect, up to 7 days after the warrant is issued.

(FVPA ss 160(2), (3)]

The reference to the words "particular premises (including any vehicle on or in those premises) or a particular vehicle located in a public place" in s 160(1) clarifies that if a police officer obtains a warrant to search premises, this includes the power to search vehicles on those premises. A separate warrant for the vehicle is not required.

[*Justice Legislation Amendment (Victims of Crime and Other Matters) Act 2010*, Explanatory Memorandum, clause 30]

A search warrant must be issued in accordance with the *Magistrates' Court Act 1989* and in the prescribed form under that Act. The rules that govern search warrants under that Act also apply to search warrants under Part 7 of the FVPA.

(FVPA s 160]

The relevant form for a search warrant under the FVPA is Form 20 of the *Magistrates' Court Criminal Procedure Rules 2009*, with any necessary modifications.

[See *Magistrates Court General Regulations 2000* r 1301]

See *Magistrates' Court Act 1989* Part 4 for further information on the process of issuing warrants, including the obligation into the register, the issue of an execution copy, and the power to bring items seized under the warrant before the court.

Search without warrant

FVPA s 160 does not allow a police officer to apply for a warrant if the officer believes that a person has possession of a firearm, firearms authority, ammunition or weapon at:

> … premises at which the person resides or has resided or at which the person committed or allegedly committing family violence or a vehicle registered in the person's name.

(FVPA s 160(1)(b)(ii)]

This limitation exists because a police officer has the power to enter any of these premises without warrant if:

- a family violence safety notice has been issued or a family violence intervention order has been made against a person or a police officer is satisfied, on the balance of probabilities, that there are grounds for issuing a notice or making an order against a person; or
- the person is a respondent to a recognised DVO, or the police officer intends to serve or has served on a person an application for a recognised DVO made against the person, or a police officer intends to serve or has served on a person an interstate DVO made against the person or an application for an interstate DVO made against the person; and

> the police officer is aware, or has reasonable grounds to suspect, the person is in possession of a firearm, a firearms authority, ammunition or a weapon.

(FVPA s 159]

This is subject to the additional requirements for entering and searching premises or vehicles in relation to interstate orders (see below).

If a police officer searches a premises in accordance with FVPA s 159(2), he or she:

- must seize any firearm or firearms authority the officer is aware is in the person's possession; and
- may seize ammunition or a weapon the officer is aware is in the person's possession.

(FVPA s 163]

Additional requirements for entry and search relating to recognised DVOs orders

If a police officer intends to serve or has served an application for a recognised DVO on a person, he or she must not enter and search premises or a vehicle without warrant unless:

- he or she is satisfied, on the balance of probabilities, that the person has committed family violence against a person sought to be protected by the order and is likely to continue to do so or to do so again; or
- he or she believes on reasonable grounds that the entry and search are necessary to ensure the safety of a person sought to be protected by the order, pending final determination of the application.

(FVPA s 159A]

Effect of seizure of firearm etc if final order made

If a person's firearm, firearms authority or ammunition is seized pursuant to FVPA s 160 or s 163, and a final order, a final recognised DVO or a final interstate DVO is made against the person, that firearm, firearms authority or ammunition must be returned to the person if:

- he or she is declared, pursuant to the *Firearms Act 1996*, not to be a prohibited person; and
- the firearm, firearms authority or ammunition is not needed as evidence in further proceedings under any Act, or is not subject to forfeiture after a proceeding for an offence under any Act.

(FVPA s 164(1)(a)]

IIf FVPA s 164(1)(a) does not apply, and the person does not apply within 3 months for a declaration under *Firearms Act 1996* s 189 that he or she is deemed not to be a prohibited person or an application has been refused, the firearm, firearms authority or ammunition, as applicable, is forfeited to the Crown, or disposed of, either in accordance with directions in the order or, if there are no such directions, in accordance with the provisions of the *Firearms Act 1996*.

(FVPA s 164(1)(b)]

If a person's weapon is seized pursuant to FVPA s 160 or s 163, and a final order, a final recognised DVO or a final interstate DVO is made against the person, that weapon must be returned to the owner if:

- the person is declared, pursuant to the *Firearms Act 1996*, not to be a prohibited person; and
- the weapon is not needed as evidence in further proceedings under any Act, or is not subject to forfeiture after a proceeding for an offence under any Act.

(FVPA s 164(2)(a)]

If FVPA s 164(2)(a) does not apply and the person has not applied under *Firearms Act 1996* s 189 within three months of the final order or corresponding interstate order being made, or the person has made an application which has been refused, the weapon must be forfeited to the Crown or disposed of in accordance with directions in the order.

(FVPA s 164(2)(b)]

If any other item is seized from a person pursuant to FVPA s 160 or s 163 and a final order, a final recognised DVO or a final interstate DVO is made against the person, that item must be returned to him or her unless it is needed as evidence in further proceedings under any Act, or it is subject to forfeiture after a proceeding for an offence under any Act.

(FVPA s 164(3)]

If a firearm, weapon or other item is sold pursuant to FVPA s 164, in accordance with directions in an order, the owner of the item must be paid the proceeds of the sale.

(FVPA s 164(4)]

Effect of seizure of firearm etc if no final order made

If a person's firearm, weapon or other article is seized pursuant to FVPA s 160 or s 163 and one of the following occurs:

- a final order, final recognised DVO or final interstate DVO is not made; or
- an application for a family violence intervention order or a family violence safety notice against the person is not made within a reasonable time; or
- in the case of an interstate DVO or recognised DVO made by a police officer, that DVO expires or is revoked and no application for an interstate DVO or recognised DVO has been made against the person; and

the firearm, weapon or other item is not otherwise required as evidence in further proceedings under any Act and is not subject to forfeiture after a proceeding for an offence under any Act, it must:

- if the firearm, weapon or other item must be forfeited or disposed of under any Act, it must be forfeited or disposed of in accordance with that Act; or
- otherwise returned to the person.

(FVPA ss 165(1), (2)]

If a firearm, weapon or other item is sold pursuant to FVPA s 165, in accordance with directions in an order, the owner of the item must be paid the proceeds of the sale.

(FVPA s 165(3)]

Last updated: 13 February 2018

3.6 Counselling orders

Part 5 of the FVPA enables the court, in certain circumstances, to order respondents to intervention orders to attend counselling. These counselling orders were first introduced by the *Magistrates' Court (Family Violence) Act 2004*, when the Family Violence Court Division of the Magistrates' Court was established.

Counselling orders were initially introduced as part of a pilot program, and were subject to a sunset clause which would have repealed the counselling provisions on 31 December 2013.

However, recognising that these types of counselling programs are an important part of the justice system's response to family violence, this sunset clause was repealed. Thus, counselling orders are now an ongoing feature of the courts' response to family violence.

[See *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* ss 3(1A), 30]

Purpose of orders

Requiring a respondent to attend counselling is intended to:

- increase his accountability for the violence he has used against a family member; and
- encourage him to change his behaviour.

(FVPA s 127(b)]

Behaviour change programs are designed to address particular attitudes that support family violence. The programs are not designed as traditional anger management or alcohol abuse courses, as research indicates that these are separate problems that are often used by perpetrators to deny responsibility for their conduct.

[See, e.g., Men's Referral Service http://www.mrs.org.au/pages/for-service-providers/about-men-s-behaviour-change-programs/how-they-differ-from-anger-management.php (viewed 12 January 2010); Day A, O'Leary P, Chung D, Justo D, *Domestic Violence: Working with Men*, The Federation Press, 2009]

Minimum qualifying criteria

Which courts may make counselling orders?

Counselling orders cannot be made in all family violence matters in the Magistrates' Court.

For a court to be able to make a counselling order, it must be a 'relevant court', as defined in s 126 of the FVPA.

A 'relevant court' means:

- the Specialist Family Violence Court Division; or
- any venue of the Magistrates' Court which has been specified by the Attorney-General in a notice published in the Government Gazette; or
- the Children's Court sitting at a venue of the Court specified by the Minister by notice published in the Government Gazette.

'Approved counselling' means counselling approved under s 133 of the Act.

(FVPA s 126]

The Magistrates' Court at Moorabin and Frankston have so far both been designated as 'relevant courts' for this purpose.

Which respondents may counselling orders be made for?

Before the commencement of the Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018, the availability of counselling orders depended on the postcode of the respondent's place of residence at the time of the relevant family violence.

This restriction has been removed from the FPVA, but replaced by a Magistrates Court practice direction which reintroduces a requirement that the respondent lived in an eligible postcode.

[Magistrates Court of Victoria, Practice Direction No 4 of 2019: Postcode Eligibility for Family Violence Counselling Orders, 9 December 2019]

Under the FVPA, the counselling orders provisions only apply if:

- a relevant court makes a final intervention order; and
- the respondent to the order is an adult.

(FVPA s 128]

Currently, the postcode areas specified by the Practice Direction are:

- for proceedings at the **Heidelberg** Magistrates' Court: 3072, 3073, 3076, 3079, 3081, 3083, 3084, 3085, 3087, 3088, 3089, 3093, 3094, 3095, 3105 and 3752;
- for proceedings at the **Ballarat** Magistrates' Court: 3345, 3350, 3351, 3352, 3355, 3356, 3357, 3363 and 3460;
- For proceedings at the **Frankston** Magistrates' Court: 3148, 3168, 3192, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3910, 3911, 3912, 3913, 3915, 3916, 3918, 3919, 3920, 3926, 3927, 3928, 3929, 3930, 3931, 3933, 3934, 3936, 3937, 3938, 3939, 3940, 3941, 3942, 3943, 3944, 3977, 3978 and 3980;
- For proceedings at the **Moorabbin** Magistrates' Court: 3143, 3144, 3145, 3148, 3161, 3162, 3163, 3165, 3166, 3167, 3168, 3169, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3202 and 3204;
- For proceedings at **Shepparton** Magistrates' Courts: 3610, 3612, 3614, 3616, 3617, 3618, 3620, 3624, 3629, 3630, 3631, 3633, 3634, 3636, and 3638

[Magistrates Court of Victoria, Practice Direction No 4 of 2019: Postcode Eligibility for Family Violence Counselling Orders, 9 December 2019]

Magistrates at the above locations must carefully identify the postcode of the respondent's residence and check whether it is on the above list, as the respondent may not be eligible for counselling even if the relevant court is the proper venue (compare *Magistrates' Court Act 1989* s 3 (Definition (c) of "proper venue")).

Process of making counselling orders

There are two stages to making a counselling order. Once the relevant court makes a final family violence intervention order, the court will make an eligibility assessment order and, based on a report obtained under that order, the court may make a counselling order.

A counselling order is separate from a final intervention order. It is not a condition of the order, and may continue even i

Breach of an eligibility assessment order or a counselling order is an offence. The offence and relevant penalties are discussed in 4.1.5 - Co

Eligibility assessment order

When the relevant court makes an eligibility assessment order:

- a specified person must give the court a report, by a specified date, which states whether the respondent is eligible to attend approved counselling; and
- the respondent must attend an interview with the specified person for the purpose of preparing the report.

Provided the minimum qualifying criteria are met, the court must make an eligibility assessment order whenever it makes a final intervention order, unless:

- the respondent is already subject to an eligibility assessment order or a counselling order; or
- the court is satisfied that:
- it is not reasonably practicable for the respondent to attend any approved counselling; or
- in all the circumstances, it is not appropriate to make the order.

An eligibility assessment order must specify the time and place of the interview. The court may vary the time and place of the interview by the appropriate registrar giving reasonable written notice to the respondent.

There is a presumption under the Act that respondents are eligible to attend counselling. The specified person may only assess the respondent as ineligible if they consider that the respondent is not able to, or capable of, participating in counselling because of:

- character, personal history or language skills; or
- disabilities; or
- severe psychiatric or psychological conditions; or
- alcohol or other drug problems; or
- any other matters the assessor considers relevant.

(FVPA s 129]

In the Second Reading Speech to the *Magistrates' Court (Family Violence) Bill 2004*, the Attorney-General noted:

> Most defendants will be eligible to participate, but not if the defendant suffers from a disability or health condition which would rule out their participation.

[Hansard, Legislative Assembly, 26 August 2004, p191]

Failure to attend the assessment interview at the time specified in the order is an offence. The respondent is deemed to have failed to attend the interview if, after receiving reasonable notice from the appropriate registrar, he fails to attend at the place and time as varied by the court.

(FVPA ss 129(5), (6)]

Before making an eligibility assessment order, the court must explain to the respondent:

(a) the purpose, terms and effect of the proposed order; and

(b) the consequences that may follow if the respondent fails to comply with the terms of the proposed order; and

(c) the means by which the proposed order may be varied or revoked.

(FVPA s 136]

Counselling order

If the relevant court receives an eligibility assessment report and is satisfied that the respondent is eligible to attend approved counselling, the court *must* make a counselling order unless:

- the respondent is already subject to a counselling order; or
- the court is satisfied that:
- it is not reasonably practicable for the respondent to attend any approved counselling; or
- in all the circumstances, it is not appropriate to make a counselling order for any other reason.

(FVPA s 130]

In the second reading speech for the *Magistrates' Court (Family Violence) Act 2004*, the Attorney-General suggested that the respondent's unwillingness to undertake counselling would be irrelevant to the court's decision as to whether a respondent should be ordered to attend counselling.

[Hansard, Legislative Assembly, 26 August 2004, p191]

While it is not clear that the legislation fully reflects this view, unwillingness to participate will not usually be a reason to exempt the respondent from counselling. The purpose of the order is to require the respondent to participate in mandatory counselling and counselling providers can usually work with reluctant participants.

[Day A, O'Leary P, Chung D, Justo D, *Domestic Violence: Working with Men*, The Federation Press, 2009]

A counselling order must:

- require the respondent to attend counselling by a person or body specified in the order; and
- specify the time and place of the first counselling session; and
- require the person or body who will provide counselling to give the respondent reasonable written notice of the time and place of each subsequent counselling session.

The court may vary the time and place of the first counselling session by the appropriate registrar giving the respondent reasonable written notice.

Failure to attend the first counselling session is an offence. In order to ensure the respondent continues to attend counselling, the respondent is deemed to have failed to attend the first counselling session if, after receiving reasonable notice from the appropriate registrar or the counselling provider, he fails to attend at the place and time specified. The respondent may only be punished once for contravening the order, even if he fails to attend multiple counselling sessions.

(FVPA s 130]

This deeming provision ensures that the initial court order is sufficiently precise to be enforceable, while preserving the obligation to attend subsequent counselling sessions specified by the provider.

Before making a counselling order, the court must explain to the respondent:

(a) the purpose, terms and effect of the proposed order; and

(b) the consequences that may follow if the respondent fails to comply with the terms of the proposed order; and

(c) the means by which the proposed order may be varied or revoked.

(FVPA s 136]

State and Federal bodies have commissioned research to identify whether mandatory behaviour change programs are an effective tool for treating respondents and improving the safety of victims of family violence. Recent international empirical studies have produced mixed results. There is some debate on whether current program designs adequately addressed the causes of domestic violence. However, these studies generally focused on court-ordered treatment following a criminal conviction. Use of mandatory counselling following a civil order and the design of counselling program used in Victoria may reduce the relevance of previous studies.

[See, e.g. National Council's Plan for Australia to Reduce Violence against Women and their Children http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/national_plan/Documents/The_Plan.pdf, 2009–2021, (viewed 6 January 2010);
Feder, L, Wilson DB, Austin S, "Court-mandated interventions for individuals convicted of domestic violence http://www.campbellcollaboration.org/lib/download/218/", Campbell Systematic Reviews 2008:12, (viewed 6 January 2010)]

See 5.4.2 Men's behaviour change programs - the preferred approach for a further discussion of men's behaviour change

Approved assessors and providers only

Before a court can specify a particular person to conduct an eligibility assessment interview or provide counselling, that person must be approved by the Chief Executive Officer of Court Services Victoria. On request, the Chief Executive Officer must make available to a relevant court upon request:

- a list of approved counselling and the contact details of the particular persons who or bodies which provide the counselling; and
- a list of persons approved to prepare reports under s 133(1) and their contact details

(FVPA ss 129, 130, 133]

At present, programs have only been prescribed for men who are or were in intimate, heterosexual relationships. No programs have been approved for:

- female respondents;
- sibling relationships;

- parent/child relationships (including elder abuse);
- same-sex relationships.

Transitional matters

Section 37 of the *Family Violence Protection Amendment Act 2017* amended the *Family Violence Protection Act 2008* to transfer responsibility for authorising counselling providers from the Secretary to the Department of Justice to the Chief Executive Officer of Court Services Victoria. When section 37 commenced, any counselling that, immediately before that commencement, was approved by the Secretary under s 133(2) is taken to be approved counselling as if it had been approved by the Chief Executive Officer of Court Services Victoria.

Procedural fairness requirements

The Act contains several procedural provisions to ensure the respondent is treated fairly before the relevant court makes an eligibility assessment order or a counselling order.

First, the appropriate registrar must serve notice of the hearing for the order on the respondent. If the respondent fails to attend after receiving the notice, the court may make orders in his absence. This obligation does not apply to hearings for an eligibility assessment order if the respondent is present in court when the court makes a final family violence intervention order.

(FVPA s 132]

Secondly, the respondent may require the person who prepares an eligibility assessment report to attend to give evidence. The respondent must file a written notice as soon as possible and at least two working days before the hearing. The appropriate registrar must arrange for the person concerned to be notified that they must attend court on the relevant date. The respondent may require the assessor to give evidence and may cross-examine them on the contents of the report.

(FVPA s 134]

Thirdly, if the respondent disputes a matter in the eligibility assessment report, the court must not take that matter into consideration unless satisfied it is true on the balance of probabilities. If the assessor does not attend court when required to do so, the court must not take disputed matters into consideration unless the respondent consents.

(FVPA s 135]

Stay, variation, revocation and termination of counselling orders

When a person appeals against a final intervention order to the Supreme Court or the County Court, the counselling order is stayed if the operation of the whole of the final order is stayed, unless the appellate court makes an order to the contrary.

An appeal does not automatically stay a final order. Instead, a party may apply to the court that made the final order fo determination of the appeal. See 2.9 Appeals , for further details on appeals and stays.

(FVPA s 131(1)(a)]

If the appellate court sets the final intervention order aside, the counselling order ceases to be in force unless the appellate court makes an order to the contrary.

(FVPA s 131(1)(b)]

However, a counselling order does not otherwise cease to be in force merely because the final order against the respondent ceases to be in force.

(FVPA s 131(2)]

The relevant court may vary or revoke an eligibility assessment order or a counselling order on its own motion or on the application of:

- the respondent, in all cases; or
- the specified assessor, for an eligibility assessment order; or
- the specified counselling provider, for a counselling order.

The appropriate registrar must serve a copy of an application to vary or revoke an order on the other party who could apply for the order, whether that is the respondent, the assessor or the counselling provider, as the case may be.

In accordance with the general provisions of the Act, documents must be served personally on the recipient and the appropriate registrar may cause the document to be served. See 2.1.6 Service.

The court may vary or revoke:

- an eligibility assessment order if:
- there is no longer any approved counselling that is reasonably practicable for the respondent to attend; or
- in all the circumstances, the order is no longer appropriate for any other reason; and
- a counselling order if:
- there is no longer any approved counselling that is reasonably practicable for the respondent to attend; or
- in all the circumstances, the order is no longer appropriate for any other reason; or
- there has been a change in the circumstances in which the order was made that *significantly impacts* on the respondent's ability or capacity to participate in counselling.

(FVPA s 137]

Service of orders and reports

When the court makes an eligibility assessment order, a counselling order or an order varying one of these orders, the court must:

- arrange for the order to be drawn up and filed in the relevant court;
- serve the order on the respondent as soon as practicable, and not more than 10 days after it is made;
- give a copy of the order to:
- the specified assessor, for an eligibility assessment order or an variation of that order; or
- the counselling provider, for a counselling order or a variation of that order.

The appropriate registrar must also serve a copy of the following documents on the respondent as soon as practicable, and not later than 10 days after the relevant court receives the document:

- an eligibility assessment report; or
- a certificate of non-attendance.

(FVPA s 138]

Limitation on use of information

Information obtained by the relevant court in an eligibility assessment report or which relates to the respondent's participation in counselling may only be used for the purpose of Part 5, or proceedings for or with respect to contraventions of orders under that Part, unless a contrary order is made.

(FVPA s 142]

This restriction protects the privacy of respondents.

[Explanatory memorandum to the *Family Violence Protection Act 2008*, cl 142]

Last updated: 10 December 2019

3.7 Costs orders

Under the FVPA, the general rule is that each party must bear its own costs. This is subject to specific exceptions.

The court may make an order for costs if:

- exceptional circumstances warrant the order; or
- the application was frivolous, vexatious or made in bad faith.

The mere fact that the applicant withdrew his or her application is not exceptional and does not, of itself, mean that the application was frivolous, vexatious or made in bad faith.

(FVPA ss 154(3), (4)]

This provision should ensure that an applicant is not necessarily penalised by deciding to withdraw an application.

(FVPA, Explanatory Memorandum, clause 154]

As courts have frequently warned, it is dangerous to attempt to define when "exceptional circumstances" will be present. Instead, the court must judge each case on its own merits and should consider whether there are factors that are out of the ordinary, unusual or special (*Oxford English Dictionary*. See also *Owens v Stevens*, Unreported, VSC, 3 May 1991). Circumstances are not "exceptional" if they commonly or routinely arise (*San v Rumble (No 2)* [2007] NSWCA 259).

The financial circumstances of a party are generally not relevant to deciding whether to make an order regarding costs (*Board of Examiners v XY* [2006] VSCA 190).

The VLRC noted that it is common for victims of family violence to withdraw applications for a variety of reasons, including inadequate support from the police or interpreting services.

[VLRC, Final report, 5.31, 6.126–6.127]

If the court decides that there are grounds to award costs against a person who is not present, the court may adjourn proceedings and notify the parties that an order for costs will be made on the next mention date unless the subject of the order contests the matter on that date.

(FVPA s 154(5)]

Division 5 of Part 5 of the *Magistrates' Court Act 1989* and any rules made for the purposes of that Division apply in respect of the enforcement of an order for costs under s 154. Further, any rules made under that Act which relate to, or are necessary for, proceedings for the enforcement of a costs order apply for the purposes of proceedings for enforcement of the order.

(FVPA s 170(2)]

Last updated: 13 February 2018

3.8 Firearms orders

The *Firearms Act 1996* regulates the possession, carriage and use of firearms in Victoria. The definition of a *prohibited person* includes:

> (c) a person who is subject to—
>
> (i) final order under the Family Violence Protection Act 2008, a final interstate DVO or a final recognised DVO that does not include conditions cancelling or revoking a licence, permit or authority under this Act or, in the case of a DVO, a corresponding law of the jurisdiction in which the DVO was made;; or
>
> (ia) a final order under the Family Violence Protection Act 2008, a final interstate DVO or a final recognised DVO that does include conditions cancelling or revoking a licence, permit or authority under this Act or, in the case of a DVO, a corresponding law of the jurisdiction in which the DVO was made; or
>
> …

or, in relation to a person, not more than 5 years have expired since the person was subject to such an order.

[*Firearms Act 1996* s 3]

The effect of this definition is that the respondent to any final family violence intervention order, final interstate DVO or final recognised DVO is a prohibited person for the duration of the order and for 5 years after the order expires. The different limbs of the definition are relevant when the Act specifies different consequences depending on whether the court included conditions in the intervention order cancelling or revoking a licence, permit or authority under the *Firearms Act 1996*.

It is an offence for a prohibited person to possess, carry or use a registered or unregistered firearm, or a firearm without a licence and a prohibited person may not obtain a licence (*Firearms Act 1996* Part 2).

When a court makes a final family violence intervention order, any existing licence must be cancelled by the Chief Commissioner of Police if the final order contains a condition specifying this outcome. Otherwise, the Chief Commissioner must suspend the licence if there is no relevant condition in the final. Suspension of a licence lasts for 3 months and at the end of that time, the Chief Commissioner must cancel the licence, unless the respondent has applied for an order under s 189 of the *Firearms Act 1996*.

For information on recognition of firearms disqualifications in a recognised DVO under the *National Domestic Violence Order Scheme Act 2016*, see 3.3 Interstate and New Zealand orders.

A person who is a prohibited person due to definition (c)(i) may apply for a declaration that he:

(a) is deemed not to be a prohibited person by virtue of being or having been subject to a final order of a kind referred to in that subparagraph; or

(b) is so deemed for limited purposes only.

[*Firearms Act 1996* s 189(1)]

A person may apply for the declaration at any time, even while the intervention order remains in force.

[*Sweebs v Magistrates' Court of Victoria & Ors* [2017] VSC 229]

A person must apply to:

- the court that made the intervention order, if the order was made by a Victorian court; or
- the Supreme Court, if the order was made in another State or Territory.

The applicant must give 28 days written notice of the application to:

- the registrar of the court;
- the Chief Commissioner of Police; and
- the protected person under the final order.

The Chief Commissioner and the protected person may appear and be heard on the application for the declaration.

The *Firearms Act 1996* does not indicate whether the Chief Commissioner and the protected person are parties to the proceeding. In *Pickford v Chief Commissioner of Police* [2002] VSC 435, the Chief Commissioner was on the record as a party, but the protected person was not. The case does not discuss the reason for this difference or whether the Commissioner's role in administering many applications under the *Firearms Act 1996* means there is a relevant difference between the Commissioner's status and the protected person's status in proceedings under s 189. Section 189(2A) requires that the person applying for a declaration provide written notice of the application and s 189(2B) gives the Chief Commissioner and the protected person the right to appear before the court to be heard on the application. Implicit in this right to be heard will be a right to call evidence. This suggests that the Chief Commissioner and protected person's involvement is akin to an intervener, rather than an *amicus curiae*, and so they will have all the rights and obligations of a party (*Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391; *Bropho v Tickner* (1993) 40 FCR 165). The difference between whether the Chief Commissioner or the protected person are parties or *amici* may be important when the court makes an order excluding witnesses from the court. Parties are exempt from such orders as of right (*Horbelt v Elliott* (1995) 184 LSJS 31). If the court considers the Chief Commissioner or protected person to be *amicus curiae*, then it should also consider whether or not they should be exempt from a witness exclusion order.

The court cannot hear an application under s 189 until any appeal against the final order has been determined.

Section 189 does not allow a declaration where the person is or has been subject to an intervention order which **does** include a firearm condition (see *Firearms Act 1996* ss 3(1)(c)(ia) and 189). In *Stephensen v Lebessis* [2014] VSC 498 at [58], Ginnane J set out the circumstances in which a person who has been subject to an intervention order with a firearms condition can apply for a declaration under s 189:

> (a) subject to (b), a person, who has been subject to a final family violence intervention order including a firearms condition, cannot seek a declaration under s 189(1) of the Firearms Act 1996 that he or she be deemed not to be a prohibited person prior to five years having expired since he or she was subject to such an order;
>
> (b) if a person who has been subject to a family violence intervention order including a firearms condition, has that firearms condition revoked and thereafter remains subject to the intervention order without a firearms condition, then he or she falls within para (c)(i) of the definition of "prohibited person" contained in s 3(1) of the Firearms Act 1996 and can apply for a declaration under s 189 of the Firearms Act 1996 that he or she be deemed not to be a prohibited person.

In *Stephensen*, a Magistrate had made an intervention order against Lebessis which included a firearms condition. Following discussions between Lebessis and the protected person, Lebessis successfully brought an application to revoke the intervention order in its entirety. The result, Ginnane J found, was that Lebessis had only ever been a person who was a prohibited person within the meaning of s 3(1)(c)(ia), which includes a clause that the person had been a prohibited person under this definition within the past five years. The result was that there was no statutory power for a court to make a declaration under s 189 of the *Firearms Act 1996* and Lebessis needed to wait 5 years for the prohibited person status to expire. His Honour suggested that, if a person seeks revocation of an intervention order with a firearms condition, with the capacity to apply under s 189, the person will need to ask that the court not to make both orders simultaneously. Instead, the court will need to separately remove the firearms condition from the previous order and then, by separate and subsequent order, revoke the intervention order.

Making a declaration

The court may only make an order under s 189 if the court did not include a condition on the final order cancelling a firearms authority or revoking a weapons approval or application for a weapons exemption.

[see *Sweebs v Magistrates' Court of Victoria & Ors* [2017] VSC 229]

There are very few published decisions on when to make a declaration under s 189. In *Pickford v Chief Commissioner of Police* [2002] VSC 435 at [6], Nettle J stated that the purpose of the provision is to allow the court to relieve a person of the consequences of being a prohibited person when that status is not appropriate. The court will make this decision either based on the circumstances that led to the person being a prohibited person, or due to later developments. At [7], his Honour identified the following matters that were relevant in that particular case:

- whether firearms were involved in the circumstances that led to the intervention order;
- whether the intervention order was motivated by collateral motives;
- whether the applicant has a genuine and healthy interest in firearms and legitimate reasons for wanting to hold a firearms licence;
- whether the Chief Commissioner of Police opposes the application; and
- the applicant's criminal record.

While Nettle J considered the motivation for the intervention order in *Pickford v Chief Commissioner of Police*, this will often be a difficult issue for a judicial officer to consider, as it may involve questioning the correctness of the decision to make the order. In general, the court should only consider the protected person's motivation for seeking the order when there is clear evidence that raises this issue and should not allow applicants to mount collateral attacks on an intervention order.

The decision whether to make the declaration involves a process of risk assessment. The judicial officer should look at the history of the relationship between the parties and determine whether there is an unacceptable risk if the court allows the applicant to be a non-prohibited person. The court should consider:

- whether the applicant has ever used, or threatened to use, any other weapons while committing family violence; and
- whether there is a risk that the applicant may use or threaten to use a firearm against the protected person if the court grants the application; and
- the protected person's views about the application; and
- the motivation for the application; and
- whether the applicant requires a weapon or firearms authority as a condition of employment, or whether the applicant seeks the exemption to pursue a hobby.

In *Samuel v Magistrates' Court of Victoria*, Unreported, VSC, 13 June 1997, Chernov J held that a Magistrate must conduct the hearing in accordance with procedural fairness. A magistrate cannot use information from the court file to understand the history of the intervention order proceeding without disclosing this material to the applicant. The applicant must know the case he has to meet.

In cases where the intervention order was made by consent without admissions from the respondent, the protected person's original allegations will not have been tested in a court environment and cannot be relied upon to prove the history of the respondent's conduct. The untested nature of the allegations affects the weight the court should attach to the allegations, but it does not render the allegations irrelevant. The existence of serious allegations against the respondent that have not been rebutted is a factor that affects the court's assessment of the risks associated with granting a declaration under s 189.

The court may make the declaration that the person is not deemed to be a prohibited person for all purposes under the *Firearms Act 1996*, or is only deemed to be a prohibited person for some purposes (*Firearms Act 1996* s 189(1)). The court may structure the declaration so that the applicant is deemed *not* to be a prohibited person only for a limited purpose, such as for the purpose of particular divisions of the Act (see *Pickford v Chief Commissioner of Police* [2002] VSC 435 at [11]). The court must specify the purposes for which the person is deemed not to be a prohibited person in the order (*Firearms Act 1996* s 189(2)). If the court proposes to make a declaration for limited purposes, it should specify Division 1 of Part 2 of the Act, along with any relevance licensing provisions.

Last updated: 13 February 2018

3.9 Requests for information

Courts occasionally receive requests to examine items on the court file, or to subpoena documents from another party, or a third party. In the family violence jurisdiction, courts must be careful to balance a party's right to prove its case, or test its opponent's case, with the need to preserve the safety of the affected family member.

Access to the risk assessment and other documents on the court file or the court record

Sections 209 and 210 of the FVPA state that the Magistrates' Court and the Children's Court may make rules regarding access to records and documents held by the court. At present, the rules only cover the risk assessment and state:

> A risk assessment is confidential and must not be—
>
> (a) used in evidence in any proceeding; or
>
> (b) disclosed to the respondent or an associate of the respondent to the proceeding to which the risk assessment relates.
>
> [*Magistrates' Court (Family Violence Protection) Rules 2018* r 15.01; *Children's Court (Family Violence Protection) Rules 2018* r 14.01]

In the Magistrates' Court, s 18 of the *Magistrates' Court Act 1989* regulates the right of parties and the public to access documents on the court record:

> (1) The principal registrar must cause a register to be kept of all the orders of the Court and of such other matters as are directed by this Act or the Rules to be entered in the register.
>
> (2) An order made by the Court must be authenticated by the person who constituted the Court.

(3) Any person may, subject to any order made under section 126 and on payment of the prescribed fee, inspect that part of the register that contains the final orders of the Court.

(4) A party to a proceeding may inspect without charge that part of the register that relates to that proceeding.

This provision also applies with any necessary changes to the Children's Court, due to *Children, Youth and Families Act 2005* s 528, which incorporates the provision of the *Magistrates' Court Act 1989* unless a contrary intention appears.

In *Smith v Harris* [1996] 2 VR 335, while examining whether a defence of qualified privilege in a defamation case is available when a person publishes material that has been filed in court, Byrne J stated:

> Unlike the Supreme Court, the Magistrates' Court maintains a register of all orders of the court and of certain other matters: Magistrates' Court Act 1989 s 18(1). The registrar, in addition, keeps a file containing the original process issued out of the court and of other documents filed: s 20. The Act gives to a party to a proceeding the right to inspect that part of the register which relates to that proceeding: s 18(4). The right of access of the public is contained in s 18(3): Any person may, subject to any order made under s 126 and on payment of the prescribed fee, inspect that part of the register that contains the final orders of the Court. *There is no other right conferred by statute or rule to inspect documents filed in the Magistrates' Court or any record of its proceeding*.

[*Smith v Harris* [1996] 2 VR 335 at 350 (emphasis added)]

Later, in *HWT v Magistrates' Court* [2000] VSCA 242 at [37], Charles JA (Tadgell and Chernov JJA concurring) noted that while *Magistrates' Court Act 1989* s 20 requires the registrar to keep originals of all "process" issued out of the court (which includes all process by which a proceeding is commenced), the Act does not require the registrar to enter all process into the register. Instead, the register for the purpose of s 18 contains the final orders of the court and all other matters that, under an Act or court rules, must be entered in the register.

The FVPA does not direct the court to enter the information form, the risk assessment or any other material into the court record. This strongly suggests that respondents cannot seek to inspect these documents as of right. Instead, the respondent requires an exercise of discretionary power either as part of the power to control proceedings, or as part of the obligation to provide a fair hearing. In each case, the court should consider whether the material sought could have a meaningful impact on the conduct of the proceedings and whether the court should take any steps to protect the privacy or safety of the affected family member (such as withholding information on the affected family member's current address, contact details and financial information).

Documents from third parties - Subpoenas, witness summons and confidential communications

Order 7 of the *Magistrates' Court (Family Violence Protection) Rules 2008* and s 532 of the *Children, Youth and Families Act 2005* govern the issue of subpoenas or witness summons. The court may issue a subpoena or witness summons requiring a person to attend to give evidence, attend to produce a document or thing or attend to both give evidence and produce documents or things.

A party may apply to the court or a registrar for the issue of a subpoena or witness summons. The subpoena or summons must be personally served on the relevant person, together with conduct money. A person served with a subpoena or witness summons to produce documents or things may produce the requested items to a registrar of the court at least 2 days before the date of hearing, along with the subpoena or summons, instead of attending at the hearing.

FVPA s 65 states that Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* applies to proceedings for a family violence intervention order. This division requires a person to obtain leave from the court before:

- seeking to compel a person to produce a confidential communication;
- producing a document that would disclose a confidential communication; or
- adducing evidence that would disclose a confidential communication or disclose the contents of a document that contains a confidential communication.

A "confidential communication" is defined as:

> … a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred

[*Evidence (Miscellaneous Provisions) Act 1958* s 32B]

While proceedings under the FVPA are civil rather than criminal, some forms of family violence constitute sexual offences (see, e.g., FVPA s 5(2)(b)). An affected family member may therefore be "a person against whom a sexual offence has been, or is alleged to have been committed" and the court must consider whether the affected family member's medical or counselling records may contain a "confidential communication". If so, the respondent will require leave to seek to obtain these records.

Section 32D restricts when the court may grant leave:

> (1) A court must not grant leave to compel the production of, to produce or to adduce protected evidence unless it is satisfied, on the balance of probabilities, that—
>
> (a) the evidence will, either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave, have substantial probative value to a fact in issue; and
>
> (b) other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
>
> (c) the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1)(c), the court must take into account—
>
> (a) the likelihood, and the nature or extent, of harm that would be caused to the protected confider if the protected evidence is produced or adduced;
>
> (b) the extent to which the protected evidence is necessary to allow the accused to make a full defence;
>
> (c) the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged to do so, or the extent to which the effectiveness of counselling may be diminished, if the protected evidence were produced or adduced;
>
> (d) whether the party seeking to compel the production of or to produce or adduce the protected evidence is doing so on the basis of a discriminatory belief or bias;
>
> (e) whether the protected confider objects to the disclosure of the protected evidence;

(f) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.

This provision significantly limits the circumstances where it is appropriate to grant leave to issue a witness summons, or to produce or adduce evidence of a confidential communication.

In the review of Uniform Evidence Law, the VLRC, ALRC and NSWLRC noted that this kind of legislation encouraging victims of sexual assault to seek counselling serves an important public purpose. Failure to provide a privilege against disclosure may discourage victims of sexual offences from seeking counselling, or may limit a victim's willingness to disclose intimate details. Counselling agencies may also adopt minimalist note-keeping practices, to reduce the scope of any witness summons. One academic argued that counselling notes often serve little forensic purpose and that some complainants refuse to go to court if they know the notes are going to be read.

The *Evidence (Miscellaneous Provisions) Act 1958* requires the court to only grant leave if the public interest in admitting the evidence *substantially outweighs* the public interest in preserving confidentiality and protecting the confider from harm. This is a heavy onus, which will often be more difficult to meet in intervention order proceedings than in criminal proceedings, where confidential communications more often arise.

[See ALRC, NSW LRC, VLRC, *Uniform Evidence Law: Report*, December 2005, 513–524; VLRC, *Sexual Offences: Law and Procedure Final Report*, 2004, 211–223]

Last updated: 31 July 2019

3.10 Family Violence information sharing regime

The *Family Violence Protection Amendment (Information Sharing) Act 2017* added Part 5A to the Act. This Part allows various family violence-related organisations to share information about affected family members and respondents.

Commencement date

Part 5A of the Act commenced operation on 26 February 2018.

Last updated: 26 February 2018

3.10.1 Overview of Part 5A

Part 5A provides for prescribed organisations to share personal information related to family violence regardless of the operation of general principles of privacy law.

As stated in FVPA s 144H:

The objects of this Part are—

(a) to provide for the sharing of confidential information between specified persons and bodies for the purposes of establishing, assessing and managing risks of family violence; and

(b) to promote the coordination of services by those persons and bodies to further the purposes of the Act; and

(c) to enable certain information sharing entities to obtain consolidated and updated information from a central information point for the purposes of establishing, assessing and managing risks of family violence.

Organisations operating under the Part are governed by the following principles, which provide guidance on the collection, use or disclosure of confidential information:

(2) Information sharing entities should—

(a) work collaboratively to coordinate services in a manner that respects the functions and expertise of each information sharing entity; and

(b) give precedence to the right to be safe from family violence over the right to privacy; and

(c) only collect, use or disclose a person's confidential information to the extent that the collection, use or disclosure of the information is necessary—

(i) to assess or manage risk to the safety of a person from family violence; and

(ii) to hold perpetrators of family violence accountable for their actions; and

(d) collect, use or disclose the confidential information of a person who identifies as Aboriginal or Torres Strait Islander in a manner that—

(i) promotes the right to self-determination and is culturally sensitive; and

(ii) considers the person's familial and community connections; and

(e) have regard to and be respectful of a person's cultural, sexual and gender identity and religious faith.

(3) In addition to the principles set out in subsection (2), when collecting, using and disclosing confidential information relating to a child to assess any risk to the safety of the child from family violence or to protect the child from family violence, information sharing entities should—

(a) promote the agency of the child and other family members at risk of family violence by ensuring their wishes are taken into account having regard to the appropriateness of doing so and the child's age and maturity; and

(b) if the collection, use and disclosure of that information includes the confidential information of other family members at risk of family violence, take all reasonable steps to ensure the information is collected, used and disclosed in a way that—

(i) plans for the safety of those family members at risk of being subjected to family violence; and

(ii) recognises the desirability of preserving and promoting positive relationships between those family members and the child.

These Principles do not, however, affect the interpretation of the Act, or give rise to any legal rights or causes of action.

(FVPA s 144J(4)]

Definitions

Division 1 of Part 5A defines several terms used throughout the Part. For the purpose of this Bench Book, the most significant definitions are extracted below:

Confidential information

Under FVPA s 144A, confidential information is defined as:

> health information; or
>
> personal information, including sensitive information; or
>
> unique identifiers; or
>
> identifiers.

The Act picks up the definitions for these four terms from the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001*.

Excluded information

Under Part 5A, information sharing entities are not required to share "excluded information", which is defined as confidential information where the:

> …collection, use or disclosure of that information could be reasonably expected to-
>
> (a) endanger a person's life or result in physical injury; or
>
> (b) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance; or
>
> (c) prejudice a coronial inquest or inquiry; or
>
> (d) prejudice the fair trial of a person or the impartial adjudication of a particular case; or
>
> (e) disclose the contents of a document, or a communication, that is of such a nature that the contents of the document, or the communication, would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege; or
>
> (f) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law; or
>
> (g) contravene a court order or a provision made by or under this Act or any other Act that—
>
> (i) prohibits or restricts, or authorises a court or tribunal to prohibit or restrict, the publication or other disclosure of information for or in connection with any proceeding; or

(ii) requires or authorises a court or

(h) be contrary to the public interest

Person of concern

Section 144B provides that:

> (1) … [A] person is a *person of concern* if an information sharing entity reasonably believes that there is a risk that the person may commit family violence.
>
> (2) Without limiting subsection (1), a respondent may be a person of concern.

Primary person

Section 144E provides that:

> … [A] person is a *primary person* if an information sharing entity reasonably believes that there is a risk that the person may be subjected to family violence.
>
> (2) Without limiting subsection (1), any of the following persons may be a primary person—
>
> (a) an affected family member;
>
> (b) a child;
>
> (c) a protected person

Linked person

Section 144A provides that:

> *linked person* means any person whose confidential information is relevant to a family violence assessment purpose or family violence protection purpose other than a person who—
>
> (a) is a primary person; or
>
> (b) is a person of concern; or
>
> (c) is alleged to pose a risk of family violence;

Guidelines

Section 144P requires the responsible Minister to issue guidelines which information sharing entities must comply with to demonstrate their ability to handle confidential information responsibly and appropriately under the Part.

A copy of the guidelines is available here (https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjugY2m5rrZAhUHLpQKHRB5BigQFgg2MAI&url=https%3A%2F%2Fwww.vic.gov.au%2Fsystem%2Fuser_files%2FDocuments%2Ffv%2FMinisterial%2520Guidelines%2520-%2520Family%2520Violence%2520Information%2520Sharing%2520Scheme.pdf&usg=AOvVaw2gb723gJ_3VnnR3QCjIEEJ).

Interaction with other laws

The general policy of Part 5A is that it adds to existing laws which permit information sharing and does not provide the sole basis on which information sharing entities can disclose confidential information.

Division 8 of Part 5A specifies that certain permissions or prohibitions in other legislation do not apply in relation to information sharing entities prescribed under Part 5A. This includes:

- Exempting information sharing entities from the obligation to allow a person to access their confidential information under other privacy laws where the person is a person of concern or is alleged to pose a risk of committing family violence and the entity believes on reasonable grounds that giving the person access would increase the risk of family violence to a primary person (FVPA s 144QA);
- Authorising information sharing entities to collect, use or disclose confidential information in accordance with Part 5A despite anything to the contrary in specified Acts (FVPA s 144QC);
- Providing that sections 3 and 4 of the *Judicial Proceedings Reports Act 1958* do not prevent disclosures under Part 5A (FVPA s 144QD);
- Limiting the operation of the *Freedom of Information Act 1982* in its operation to the Central Information Point (FVPA s 144QE).

Last updated: 26 February 2018

3.10.2 Information Sharing and Courts

Part 5A of the FVPA limits the operation of the information sharing regime in its operation to Courts.

Part 5A does not require collection, use or disclosure of confidential information in relation to the judicial or quasi-judicial functions of the following entities:

(a) a court or tribunal;

(b) the holder of a judicial or quasi-judicial office or other office pertaining to a court or tribunal in their capacity as the holder of that office;

(c) a registry or other office of a court or tribunal;

(d) the staff of such a registry or other office in their capacity as members of that staff.

(FVPA s 144I]

The entities listed in FVPA s 144I are also exempt from the obligation to share information with a risk assessment entity or an information sharing entity in response to a request.

(FVPA ss 144KC(2), 144LC(2)]

The court and court-like entities listed in FVPA s 144I are also exempt from the obligation to comply with guidelines issued by the Minister on the operation of the information sharing regime.

(FVPA s 144P(6)]

Last updated: 26 February 2018

3.10.3 Risk Assessment and Information Sharing

Division 2 and 3 of Part 5A regulate information sharing for:

- family violence assessment purposes;
- family violence protection purposes.

Sharing for family violence assessment purposes

Division 2 applies to confidential information about:

- A primary person;
- A person of concern;
- A person who is alleged to pose a risk of family violence;
- A linked person.

Under Division 2:

- An information sharing entity can voluntarily disclose confidential information to a risk assessment entity if:
    - The information is not excluded information; and
    - Disclosure is permitted under Division 5 (FVPA s 144KA).
- A risk assessment entity can request information from an information sharing entity for a family violence assessment purpose (FVPA s 144KB);
- An information sharing entity (that is not a court or tribunal-like body specified in s 144I) must disclose information to a risk assessment entity in response to a request if:
    - The information is not excluded information; and
    - Disclosure is permitted under Division 5 (FVPA s 144KC).

Under s 144A:

> **family violence assessment purpose** means the purpose of establishing or assessing the risk of-
>
> (a) a person committing family violence; or
>
> (b) a person being subjected to family violence.

The entities which have been designated risk assessment entities and information sharing entities are listed in 3.10.3.1 – Designated entities.

Sharing for family violence protection purposes

Division 3 applies to confidential information about:

- A primary person;
- A person of concern;
- A linked person.

Under Division 3:

- An information sharing entity can voluntarily disclose confidential information to another information sharing entity if:
    - The information is not excluded information; and
    - Disclosure is permitted under Division 5 (FVPA s 144LA).
- An information sharing entity can request information from another information sharing entity for a family violence protection purpose (FVPA s 144LB);

- An information sharing entity (that is not a court or tribunal-like body specified in s 144I) must disclose information to another information sharing entity in response to a request if:
    - The respondent entity reasonably believes the disclosure is necessary for a family violence protection purpose;
    - The information is not excluded information; and
    - Disclosure is permitted under Division 5 (FVPA s 144LC).

Under FVPA s 144A:

> Family violence protection purpose means the purpose of managing a risk of-
>
> (a) a person committing family violence and includes the ongoing assessment of the risk of the person committing family violence; or
>
> (b) a person being subjected to family violence and includes the ongoing assessment of the risk of the person being subjected to family violence.

Voluntary disclosure to primary person

Under Division 4, information sharing entities may disclose confidential information about a person of concern to a primary person if:

- The information is provided for a family violence protection purpose; and
- The information is not excluded information (FVPA s 144M(1)).

Information sharing entities may also disclose non-excluded confidential information about a person of concern to the following people if the primary person is a child:

- The child;
- A parent of the child who is not a person of concern in relation to the child (FVPA s 144M(2)).

Unlike FVPA s 144M(1), the information sharing power in s 144M(2) is not explicitly limited to sharing for a family violence protection purpose. The Scrutiny of Acts and Regulations Committee wrote to the Minister asking whether s 144M(2) should be limited to sharing for a family violence protection purpose. The Minister, in his reply, stated that it was intended that information would only be shared under s 144M(2) for a family violence protection purpose and that:

> When read in conjunction with section 144MA, I believe that section 144M(2) could not be sensibly construed as permitting an information sharing entity to disclose information to a child victim or a child victim's parent for any purpose other than assisting the child or their parent to manage the risk of the child being subjected to family violence.

[Scrutiny of Acts and Regulations Committee, Alert Digit No 8 of 2017, 42]

A person who receives information under FVPA s 144M must only use the information for the purpose of managing family violence risk (FVPA s 144MA).

Division 5 – Consent to disclosure

Division 5 specifies when an information sharing entity must obtain the consent of a person before collecting, using or disclosing that person's information.

Consent is not required in relation to information from the following people:

- A person of concern;
- A person who is alleged to pose a risk of family violence;
- A primary person who is a child, if the collection, use or disclosure is for a family violence protection purpose or a family violence assessment purpose relating to a child primary person (FVPA ss 144N, 144NC).

Consent is generally required to collect, use or disclose information from:

- A primary person; or
- A linked person (FVPA ss 144NA, 144NB).

Despite this general rule, consent is not required if:

- The information sharing entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health, safety or welfare (FVPA ss 144NA, 144NB); or
- The information relates to confidential information about a primary person who is a child, and is collected, used and disclosed for a family violence protection purpose or a family violence assessment purpose (FVPA s 144NC(2)).

Last updated: 26 February 2018

3.10.3.1 Designated entities

Information Sharing Entities

Regulation 5 of the *Family Violence Protection (Information Sharing) Regulations 2018* specifies that the following persons or bodies are information sharing entities:

(a) a police officer;

(b) a police recruit within the meaning of the **Victoria Police Act 2013**;

(c) the Chief Commissioner of Police;

(d) a community based child protection worker who is co-located in a Support and Safety Hub established by Family Safety Victoria, and their supervisor or manager;

(e) a person employed, engaged or contracted by the Secretary to the Department of Health and Human Services to disclose information to, or request information from, the Central Information Point under Part 5A of the Act;

(f) a person employed, engaged or contracted by an entity provide specialist women's family violence case management services that are specified in a State contract as family violence information sharing functions of that entity;

(g) a person employed, engaged or contracted by an entity to provide specialist men's family violence services (including men's behaviour change programs) that are specified in a State contract as family violence information sharing functions of that entity;

(h) a person or body approved to assess or provide counselling services under section 133 of the Act;

(i) a person employed, engaged or contracted by an entity to provide Child and Family Information Referral and Support Team services that are specified in a State contract as family violence information sharing functions of that entity;

(j) a person employed, engaged or contracted by an entity to provide services to victims and survivors of sexual assault that are specified in a State contract as family violence information sharing functions of that entity;

(k) a person employed, engaged or contracted by an entity to provide case management services to victims of crime that are specified in a State contract as family violence information sharing functions of that entity;

(l) a person or body employed, engaged or contracted to provide services for family violence protection purposes and family violence assessment purposes in relation to a Support and Safety Hub established by Family Safety Victoria;

(m) a person or body providing correctional services under an agreement under section 9 of the **Corrections Act 1986**;

(n) a person employed or appointed under section 12 of the **Corrections Act 1986**;

(o) a person, a person in a class of persons or a body employed or contracted by the Department of Justice and Regulation to perform functions for a family violence protection purpose or a family violence assessment purpose in relation to victims of crime services or programs;

(p) a person employed, engaged or contracted by an entity to provide offender rehabilitation and reintegration services and programs that are specified in a State contract as family violence information sharing functions of that entity;

(q) a person employed, engaged or contracted by an entity to provide prisoner services or programs that are specified in a State contract as family violence information sharing functions of that entity;

(r) a person or body to the extent that it participates in a Risk Assessment and Management Panel meeting, including preparation for and attendance at a meeting and associated follow-up actions or activities;

(s) a court official within the meaning of section 3(1) of the **Magistrates' Court Act 1989**;

(t) a court official within the meaning of section 3(1) of the **Children, Youth and Families Act 2005**.

Risk Assessment Entities

Regulation 6 prescribes the following persons or bodies as risk assessment entities:

(a) a police officer;

(b) a police recruit within the meaning of the **Victoria Police Act 2013**;

(c) the Chief Commissioner of Police;

(d) a community based child protection worker who is co-located in a Support and Safety Hub established by Family Safety Victoria, and that worker's supervisor or manager;

(e) a person employed, engaged or contracted by the Secretary to the Department of Health and Human Services to disclose information to, or request information from, the Central Information Point under Part 5A of the Act;

(f) a person employed, engaged or contracted by an entity to provide specialist women's family violence case management services that are specified in a State contract as family violence information sharing functions of that entity;

(g) a person employed, engaged or contracted by an entity to provide specialist men's family violence services (including men's behaviour change programs) that are specified in a State contract as family violence information sharing functions of that entity;

(h) a person or body approved to assess or provide counselling services under section 133 of the Act;

(i) a person employed, engaged or contracted by an entity to provide Child and Family Information Referral and Support Team services that are specified in a State contract as family violence information sharing functions of that entity;

(j) a person employed, engaged or contracted by an entity to provide services to victims and survivors of sexual assault that are specified in a State contract as family violence information sharing functions of that entity;

(k) a person employed, engaged or contracted by an entity to provide case management services to victims of crime that are specified in a State contract as family violence information sharing functions of that entity;

(l) a person or body employed, engaged or contracted to provide services for family violence assessment purposes in relation to a Support and Safety Hub established by Family Safety Victoria;

(m) a person, a person in a class of persons or a body employed or contracted by the Department of Justice and Regulation to perform functions for a family violence assessment purpose in relation to victims of crime services or programs.

Last updated: 26 February 2018

3.10.4 Central Information Point

Division 6 of Part 5A creates the "Central Information Point", or "CIP" as well as "CIP data custodians" and "CIP requesters".

The Division allows CIP requesters to request information from the Central Information Point and for CIP data custodians to provide information to the Central Information Point in response to a request, if the custodian could have disclosed the information in response to a request under Divisions 2 or 3 of Part 5A.

Unlike requests under Divisions 2 or 3, disclosure to the Central Information Point in response to a request is voluntary, not mandatory.

(FVPA s 144OE]

A CIP data custodian or CIP requester may provide information to the Central Information Point on its own motion, but only to provide updated information relevant to a previous request and where the disclosure would have been permitted if a request had been made under Divisions 2 or 3.

(FVPA s 144OG]

The following persons or bodies have been designated CIP data custodians under regulation 7 of the *Family Violence Protection (Information Sharing) Regulations 2017*:

(a) a police officer;

(b) a police recruit within the meaning of the **Victoria Police Act 2013**;

(c) the Chief Commissioner of Police;

(d) a court official within the meaning of section 3(1) of the **Magistrates' Court Act 1989**;

(e) a person employed, engaged or contracted by the Secretary to the Department of Health and Human Services to disclose information to, or request information from, the Central Information Point under Part 5A of the Act;

(f) a person employed, engaged or contracted by the Secretary to the Department of Justice and Regulation to disclose information to, or request information from, the Central Information Point under Part 5A of the Act.

Last updated: 26 February 2018

3.10.5 Unauthorised information sharing Offences

Division 9 of Part 5A creates two offences regarding unauthorised use or disclosure of confidential information.

Section 144R(1) states:

> A person who uses or discloses confidential information in accordance with this Part must not use that information or disclose that information to another person except in accordance with this Part.
>
> Penalty: In the case of a natural person, 60 penalty units;
>
> In the case of a body corporate, 300 penalty units.

For this offence, it is a defence for the accused to prove that the use or disclosure was done in good faith and with reasonable care (FVPA s 144R(2)).

Section 144RA(1) creates an aggravated version of this offence:

> A person authorised to use or disclose confidential information in accordance with this Part must not use or disclose that information in a manner that is unauthorised under this Part and that the person—
>
> (a) knows is unauthorised under this Part; or
>
> (b) is reckless as to whether the use or disclosure of the information is unauthorised under this Part.
>
> Penalty: In the case of a natural person, 600 penalty units or imprisonment for 5 years or both;
>
> In the case of a body corporate, 3000 penalty units.

These two offences do not apply where:

(a) a use or disclosure made with the consent of the person to whom the information relates;

(b) a use or disclosure made with the consent of a person (other than a person of concern or a person alleged to pose a risk of family violence) who is a parent of the person who is a child to whom the information relates;

(c) a disclosure made to a court or tribunal in the course of legal proceedings;

(d) a use or disclosure made pursuant to an order of a court or tribunal;

(e) a use or disclosure made to the extent reasonably required to enable the investigation or the enforcement of a law of this State or of any other State or of a Territory or of the Commonwealth;

(f) a disclosure made to an Australian legal practitioner for the purposes of obtaining legal advice or representation;

(g) a use or disclosure made as required or authorised by or under this Act or any other Act (FVPA ss 144R(3), 144RA(2)).

The offences also do not apply to:

- Use or disclosure of information by a primary person who is given information under section 144M; or
- Use or disclosure that does not comply with Ministerial guidelines issued under section 144P(1).

(FVPA ss 144R(4), (5), 144RA(3), (4)]

Corporate Criminal Liability

Division 1A of Part 13 provides specific provisions concerning corporate criminal liability for offences under the Act.

Under FVPA s 208A, the conduct of an employee, agent or office of a body corporate acting within the actual or apparent scope of employment or authority is also engaged in by the body corporate.

If a body corporate commits an offence against ss 144R or 144RA, then an officer of the body corporate also commits that offence if the officer:

(a) authorised or permitted the commission of the offence by the body corporate; or

(b) was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the body corporate (FVPA s 208B(1)).

For the purpose of FVPA s 208B, an officer can rely on any defence that would be available to the body corporate, and carries the same burden of proof which the body corporate would bear (FVPA s 208B(3)). This provision ensures that the officer bears the onus of establishing that the use or disclosure was done in good faith and with reasonable care in relation to charges under FVPA s 144R.

Liability of an officer of a body corporate under FVPA s 208B does not depend on the body corporate having been prosecuted or found guilty of the offence (FVPA s 208B(4)).

Last updated: 26 February 2018

3.10.6 Information sharing and subpoenas

Part 5A of the Act does not specify any interaction between information sharing entities, risk assessment entities or the Central Information Point and the law relating to subpoenas.

In comparison, some other information sharing regimes (such as the ACT information sharing regime relating to children and young people), restrict when a court can order a person to disclose certain types of information: see, e.g., *Children and Young People Act 2008* (ACT) s 866).

When an entity regulated by Part 5A objects to production of material on subpoena, the Court must apply the conventional principles relating to challenges to subpoenas. For information on subpoena challenges, see Victorian Criminal Proceedings Manual at 13.20.

Last updated: 28 February 2018

4 Criminal offences

4.1 Criminal offences arising under the Act

This section considers the offences that may be committed when a family violence intervention order is contravened.

4.1.1 Contravention of a family violence intervention order

Contravening a family violence intervention order is a criminal offence. There are two elements to this offence:

- either:
- the accused has been served with a copy of the order; or
- the accused has received an explanation of the order in accordance with s 57(1) or s 96(1); and
- the accused breached the order.

(FVPA s 123]

Sections 57 and 96 provide for the court to give an oral explanation of an order in court when it makes the order if the respondent is an adult. However, in the case of a child respondent, an oral explanation is not sufficient to allow the order to be enforced.

In determining whether an accused has contravened a family violence intervention order, it is irrelevant whether:

- any or all of the accused's conduct, which constitutes the contravention offence, occurred outside Victoria, as long as the protected person was in Victoria at the time that the accused's conduct occurred; or
- the protected person was outside Victoria at the time when the accused's conduct, which constitutes the contravention offence, occurred, as long as the conduct occurred in Victoria.

(FVPA ss 123(2A), 123(2B)]

It is important to convict offenders for contravention of an intervention order pursuant to the Act under which the original intervention order was made, whether that is the *Family Violence Protection Act 2008* or the *Personal Safety Intervention Orders Act 2010*. It is likely that any conviction recorded under the wrong Act will be set aside on appeal.

[See e.g. *Ellis v Caine* [2010] VSC 386]

Penalty

The maximum penalty for contravention of an intervention order is level 7 imprisonment (2 years), a level 7 fine (240 penalty units) or both.

(FVPA s 123(2)]

Fault element

In *DPP v Cormick* [2023] VSCA 186, a majority of the Court of Appeal held that the fault element of an offence under s 123(2) is one of general intent (that is, intent to commit the conduct alleged, such as sending a text message), and not specific intent to cause any particular consequence of an act of family violence (such as causing the victim to fear for their safety or wellbeing). This is of particular note in relation to the definition of 'emotional or psychological abuse' in s 7, which means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. The majority noted that while conduct which torments, intimidates, or harasses the other person would most commonly be intentional, it is possible for offensive conduct to be unintentional.

[*DPP v Cormick* [2023] VSCA 186, [87]]

Accordingly, care should be taken when giving an explanation of an intervention order under ss 57 or 96 to explain the prohibition on unintended emotional or psychological abuse, including that encompassed by giving 'offence'. If an order simply contains a general condition prohibiting a respondent from committing 'family violence' against another person, it is not up to the respondent to interpret the ambit of the conduct that is covered by the order. A respondent cannot be said to have contravened an order if the obligations encompassed in the order were not explained to them, and therefore cannot be convicted of a contravention offence on that basis.

[*DPP v Cormick* [2023] VSCA 186, [105]–[108]]

Defences

It is a defence to a charge of contravening a family violence intervention order that:

- an accused was a respondent under a family violence intervention order;
- a family violence safety notice in relation to the same protected person and the accused was in force at the time the contravention of the intervention order was alleged to have occurred; and
- the accused's conduct did not contravene the family violence safety notice.

(FVPA s 37(3)]

The onus is on the defence to establish this defence on the balance of probabilities.

[*Evidence Act 2008* s 141(2); *R v Carr-Briant* [1943] KB 607]

This defence, along with a similar defence for contravention of a safety notice, means that if the accused is the respondent under both a family violence safety notice and an intervention order in respect of the same protected person, the order with the least restrictive conditions prevails, to the extent of any inconsistency between the two.

Contravention and recognised DVOs

Under *National Domestic Violence Order Scheme Act 2016*, a recognised DVO (that is, a family violence order made in another State or Territory that is recognised under that Act, or a New Zealand family violence order that has been registered in Victoria or another Australian State or Territory) can be enforced as if it were a Victorian order and the respondent had been properly notified of the order under the law of Victoria.

[*National Domestic Violence Order Scheme Act 2016* s 17]

Section 123(4) provides a defence to a charge of contravening a recognised DVO:

> (4) In a proceeding for an offence against subsection (2) constituted by contravening a recognised DVO, it is a defence to the charge for the accused to prove that—
>
> (a) the accused was the respondent under the recognised DVO; and
>
> (b) a family violence safety notice in relation to the same protected person and respondent—
>
> (i) was issued after the recognised DVO was made; and
>
> (ii) was in force at the time the offence was alleged to have been committed; and
>
> (c) the accused's conduct complied with the family violence safety notice; and
>
> (d) the accused could not have complied with the recognised DVO at the same time.

This defence operates in conjunction with FVPA s 40, which provides that if the respondent cannot simultaneously comply with both a safety notice and a recognised DVO, then the respondent must comply with the safety notice.

Section 125B provides protection against double jeopardy in relation to recognised DVOs across multiple jurisdictions. If the contravening conduct is an offence under FVPA ss 37, 37A, 123 or 123A and an offence against the law of another State or Territory, and the accused has been punished for that conduct in another State or Territory, then the accused cannot also be punished in Victoria.

(FVPA s 125B]

Contravention intending to cause harm or fear for safety

It is an offence for an accused to contravene a family violence intervention order intending to cause, or knowing that their conduct will probably cause, the protected person:

- physical or mental harm, including self-harm; or
- to be apprehensive or fearful for their own safety or that of anyone else.

(FVPA s 123A(2)]

Mental harm, for the purposes of this offence, includes psychological harm and suicidal thoughts.

(FVPA s 123A(1)]

Before an accused may be prosecuted for such an offence, they must have been served with the relevant family violence safety notice and had the notice explained to them, in accordance with the requirements set out in FVPA ss 57(1) or 96(1), whichever applies in the particular case.

(FVPA s 123A(2)]

Sections 57 and 96 provide for the court to give an oral explanation of an order in court when it makes the order if the respondent is an adult. However, in the case of a child respondent, an oral explanation is not sufficient to allow the order to be enforced.

In determining whether an accused has contravened a family violence intervention order, it is irrelevant whether:

- any or all of the accused's conduct, which constitutes the contravention offence, occurred outside Victoria, as long as the protected person was in Victoria at the time that the accused's conduct occurred;
- the protected person was outside Victoria at the time at which the accused's conduct, which constitutes the contravention offence, occurred, as long as the conduct occurred in Victoria.

(FVPA ss 123A(3), 123A(4)]

Penalty

The maximum penalty for this offence is level 6 imprisonment (5 years) or a level 6 fine (600 penalty units) or both.

(FVPA s 123A(2)]

Defences

It is a defence to a charge of contravening a family violence intervention order that:

- an accused was a respondent under a family violence intervention order;
- a family violence safety notice in relation to the same protected person and the accused was in force at the time the contravention of the intervention order allegedly occurred; and
- the accused's conduct did not contravene the family violence safety notice.

(FVPA s 123A(5)]

The onus is on the defence to establish this defence on the balance of probabilities.

[*Evidence Act 2008* s 141(2); *R v Carr-Briant* [1943] KB 607]

This defence, along with a similar defence for contravention of a safety notice, means that if the accused is the respondent under both a family violence intervention order and a safety notice in respect of the same protected person, the order with the least restrictive conditions prevails, to the extent of any inconsistency between the two orders.

The defence of honest and reasonable belief that the conduct would not torment, intimidate, harass or offend the protected person is also available. The onus will be on the respondent to prove that the response of the protected person was not reasonable.

[*DPP v Cormick* [2023] VSCA 186, [89]]

Transitional matters

Section 123A applies to any contravention of a family violence intervention order occurring on or after 17 April 2013, irrespective of when the family violence intervention order was issued.

(FVPA s 224D(4)]

Contravention and recognised DVOs

Under *National Domestic Violence Order Scheme Act 2016*, a recognised DVO (that is, a family violence order made in another State or Territory that is recognised under that Act, or a New Zealand family violence order that has been registered in Victoria or another Australian State or Territory) can be enforced as if it were a Victorian order and the respondent had been properly notified of the order under the law of Victoria.

[*National Domestic Violence Order Scheme Act 2016* s 17]

Section 123A(5) provides a defence to a charge of contravening a recognised DVO:

> (5) In a proceeding for an offence against subsection (2) constituted by contravening a recognised DVO, it is a defence to the charge for the accused to prove that—
>
> (a) the accused was the respondent under the recognised DVO; and
>
> (b) a family violence safety notice in relation to the same protected person and respondent—
>
> (i) was issued after the recognised DVO was made; and
>
> (ii) was in force at the time the offence was alleged to have been committed; and
>
> (c) the accused's conduct complied with the family violence safety notice; and
>
> (d) the accused could not have complied with the recognised DVO at the same time.

This defence operates in conjunction with FVPA s 40, which provides that if the respondent cannot simultaneously comply with both a safety notice and a recognised DVO, then the respondent must comply with the safety notice.

Section 125B provides protection against double jeopardy in relation to recognised DVOs across multiple jurisdictions. If the contravening conduct is an offence under FVPA ss 37, 37A, 123 or 123A and an offence against the law of another State or Territory, and the accused has been punished for that conduct in another State or Territory, then the accused cannot also be punished in Victoria.

(FVPA s 125B]

Last updated: 16 November 2023

4.1.1.1 Prevalence of contravention offences

In 2014/2015, the Magistrates' Court made 27,478 family violence intervention orders. This was a 54% increase on the number of order make in 2009/2010. Over the same period, the number of charges for contraventions sentenced each year rose from 3.850 per year to 8.787 per year. This corresponded to an increase from 1 contravention per 4.6 FVIOs to 1 contravention per 2.7 FVIOs. While limitations in the available data mean that it is not possible to accurately determine the number of orders contravened each year, this data shows that the rate of contravention proceedings is increasing faster than the growth in the underlying number of orders. This means that contravention proceedings are becoming more prevalent, either due to changes in charging practices, or due to increased prevalence of offending.

[Sentencing Advisory Council, *Sentencing for contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015) at pp 19–21]

Last updated: 29 March 2018

4.1.1.2 Sentencing contravention offences

The *Family Violence Protection Act 2008*, the *Sentencing Act 1991* and the *Children, Youth and Families Act 2005* do not contain specific principles for sentencing family violence offences.

For adults, s 5(1) of the *Sentencing Act 1991* specifies the only permissible purposes of sentences:

(a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

(b) to deter the offender or other persons from committing offences of the same or a similar character; or

(c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or

(d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or

(e) to protect the community from the offender; or

(f) a combination of two or more of those purposes.

As intervention orders are designed to protect an individual from the respondent, the Sentencing Advisory Council has argued that protection of the community should be the "central purpose against which other sentencing purposes are balanced" when sentencing an adult for contravention of an intervention order.

The Council also argued that denunciation, deterrence and punishment are important purposes, as courts must maintain the perception that breach of an intervention order will attract serious consequences.

[Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (June 2009), 6.10]

Under the *Children, Youth and Families Act 2005*, different sentencing principles apply. The court must consider the following factors:

> (a) the need to strengthen and preserve the relationship between the child and the child's family; and
>
> (b) the desirability of allowing the child to live at home; and
>
> (c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
>
> (d) the need to minimise the stigma to the child resulting from a court determination; and
>
> (e) the suitability of the sentence to the child; and
>
> (f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and
>
> (g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

[CYFA s 362(1)]

Unlike the *Sentencing Act 1991*, the *Children's, Youth and Families Act 2005* does not specify the permissible purposes of sentencing. Some of the purposes in s 5(1) may continue to apply to sentencing of children as common law principles. However, matters such as retribution and general deterrence are inconsistent with the factors in s 362(1) that focus on the welfare and rehabilitation of the child.

[See *CNK v R* (2011) 32 VR 641]

The preamble of the FVPA contains the following principles that may be relevant to sentencing for breach of an intervention order:

> (a) that non-violence is a fundamental social value that must be promoted;
>
> (b) that family violence is a fundamental violation of human rights and is unacceptable in any form;
>
> (c) that family violence is not acceptable in any community or culture;
>
> (d) that, in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.

These principles may be relevant when assessing other mandatory considerations under s 5(2) of the *Sentencing Act 1991* or s 362(1) of the *Children, Youth and Families Act 2005*.

Sentencing for family violence offences often requires an understanding of the causes and consequences of such actions are discussed in 5 - Social context.

Sentencing principles

The effective enforcement of intervention orders and the imposition of appropriate sentences for contraventions of such orders are crucial to ensuring that victims of threatened violence are actually protected (*DPP v Johnson* [2011] VSCA 288 at [5] per Neave JA).

Further:

> If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – 'not worth the paper they are written on' – by victims and perpetrators alike.
>
> [Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (February 2006), p372.]

In *R v Cotham* [1998] VSCA 111 at [14], the Court explained that breaches of intervention orders must be severely punished:

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

This passage was cited with approval in *DPP v Johnson* [2011] VSCA 288 at [43] per Redlich JA.

Similarly, in *Director of Public Prosecutions v Smeaton* [2007] VSCA 256, Dodds-Streeton JA at [21] stated:

> Violence, and in particular violence by men against women as a means of control in current relationships or in relationships which have ended, is a prevalent and even critical social evil. As in the present case, the perpetrator not uncommonly expresses remorse immediately after a violent assault, but nevertheless seeks to blame the victim for causing the attack. Although the respondent did appear to regret the assault, as the sentencing judge observed, his letter to the court denigrated the victim's character and effectively sought to blame her for his backsliding into drug use and for provoking the attack. In the police interview, he denied the crime, at one point apparently claiming that the victim had assaulted him, and called her a lying dog.

In *Filiz v The Queen* [2014] VSCA 212 (1 September 2014) at [21], the Court of Appeal, discussing the importance of general deterrence in sentencing of contravention cases, said that:

> Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violence rate. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves a breach of an order which exist for the victim's protection

In its 2016 report, the Sentencing Advisory Council set out a number of general principles for the sentencing of family violence offenders which it felt were evident within the contemporary justice landscape of Victoria:

- That it is important to effectively enforce intervention orders through sentencing
- That intimate partner violence is no less serious than stranger violence
- That the effects of family violence are pervasive and long-lasting, that effects are not merely confined to physical injury, and that family violence can impact the affected family member's financial and job status.
- That deterrence and denunciation are important sentencing considerations, particularly given the unique context of family violence.

[Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) at p 57–58]

For further consideration of the principles applying to contraventions of intervention orders, see *R v Duncan* (2007) 172 A Crim R 111; [2007] VSCA 137 at [37] per Vincent JA; *El Tahir v R* [2011] VSCA 46 at [23] per Mandie JA (Buchanan and Redlich JJA agreeing); *R v Xe Van Pham* [2004] VSC 271 at [14] per Teague J; *R v Maher* [2011] VSCA 136 at [7], [16] per Ashley JA (Bongiorno JA agreeing); *R v Crowley* [2009] VSCA 176 at [14]–[15] per Buchanan JA (Dodds-Streeton JA and Lasry AJA agreeing); *Kanakaris v R* [2010] VSCA 120 at [70]–[71] per Coghlan AJA (Neave and Redlich JJA agreeing); *R v Propsting* [2009] VSCA 45 at [13]–[14] per Vincent JA (Buchanan JA agreeing); *R v Yasso* [2007] VSCA 306 at[60] per Maxwell P (Redlich JA and Habersberger AJA agreeing).

Courts in other jurisdictions have also made similar statements (see *R v McMutrie* [2002] SASC 253 at [15]–[23]; *Norris v Sanderson* [2007] NTSC 1 at [33] and *Maingay v Seabourne* [2009] TASSC 67 at [22]–[24]).

Sentencing child offenders

Principles of general deterrence do not apply when sentencing children pursuant to the *Children, Youth and Families Act 2005*.

[*CNK v The Queen* 2011) 32 VR 641]

A court should not use sentences against children as a vehicle to communicate the court's opposition to the use of violence in relationships. Instead, the court should focus on the specific deterrence of the child in a manner that is consistent with the *Children, Youth and Families Act 2005* s 362(1).

In Chapter 5 of its final report on Sentencing Practices for Breach of Family Violence Intervention Orders, the Sentencing Advisory Council identified a number of factors that are relevant to sentencing for contravention of an order:

- the impact of the conduct on the victim, including physical and psychological harm;
- the presence of an abuse of power;
- the presence of children at the time of the offence;
- subject to established restraints and with extreme caution, the attitude of the victim;
- with caution, any contribution the victim made towards the offending behaviour;
- the vulnerability of the victim;
- culpability of the offender;
- any prior convictions of the offender and the relevance of other convictions;
- with caution, any previous good character of the offender;
- timing of the contravention (a contravention in close proximity to the making of the order is likely to be considered an aggravating feature of the offence).

Several of these factors call on the court to exercise caution. In particular, a court should be very careful when allowing the attitude of the victim to influence sentencing. Doing so may escalate future violence, as the offender blames the victim for the earlier sentence.

In addition, the court should be careful when treating the victim's contribution to the offending as a mitigating factor. Some offenders seek to avoid responsibility for violent behaviour. An intervention order is a court order that restrains the respondent. It is the respondent's duty to comply with the order and the protected person cannot waive this duty. The court should be careful about sending a message that the victim can consent to a breach, or that the victim is responsible for the offender's behaviour.

Finally, as the Sentencing Advisory Council argues, evidence of previous good character should receive little weight when the evidence establishes a history of family violence. Some offenders commit family violence while maintaining a positive public profile and this "dual personality" should not lead to a reduced sentence.

[Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report*, (June 2009), Chapter 5]

The above factors form the core of the guiding principles the Council published that attempts to promote consistency of approach in sentencing for breach of an intervention order. The Council has released a short publication regarding these principles that is available from its website (https://sentencingcouncil.vic.gov.au/).

This publication was developed in relation to adult offenders and judicial officers in the Children's Court must exercise caution when utilising these factors. While the gravity of the offence is relevant to sentencing in the Children's Court, the *Children, Youth and Families Act 2005* generally requires the court to place greater weight on the welfare and rehabilitation of the child in the sentencing synthesis.

[See Fox & Freiberg, *Sentencing: State and Federal Law in Victoria*, 11.202–11.204]

Ascertaining the circumstances of the offence and the impact on the victim

Section 5(2) of the *Sentencing Act 1991* contains a list of factors a court must consider when determining the appropriate sentence for an adult, including:

- the nature and gravity of the offence;
- the impact of the offence on any victim of the offence;
- the personal circumstances of any victim of the offence; and
- any injury, loss or damage resulting directly from the offence;

For child offenders, these matters may also be relevant to assessing the need to protect the community or another person from the violent or wrongful acts of a child under *Children, Youth and Families Act 2005* s 362(1)(g).

A court can receive evidence on these matters from witnesses on the plea hearing and in an affidavit. In addition, Division 1A of Part 6 of the *Sentencing Act 1991* and ss 358 and 359 of the *Children, Youth and Families Act 2005* allows the victim of an offence to make a victim impact statement that describes the impact of the offence and any injury, loss or damage suffered as a result of the offence.

A court can also able to draw on its own knowledge of human behaviour and experience when assessing the impact of an offence on a victim. It may infer the existence of harm from the nature of the offender's conduct and does not always require a victim impact statement or expert evidence

[*R v Rankin* [2001] VSCA 158 at [10]].

In this regard, understanding the effects of family violence assists the court to assess the gravity of the offence and formulate an appropriate sentence.

The Sentencing Advisory Council's draft report on sentencing for breach of an intervention order included a recommendation that police and police prosecutors should provide judicial officers with sufficient information about the context of the breach to enable the court to sentence on the correct factual basis. This information would include:

- details of the circumstances of the breach;
- the behaviour that led to the original order;
- the history of the relationship between the victim and offender; and
- the offender's prior convictions, especially those relating to the victim or other family violence offences.

In its final report, the Council discussed the feedback it received on the recommendation. While there was some support for the recommendation, the Council withdrew the recommendation due to concerns raised by Victoria Police and the Law Institute of Victoria. The Council was concerned that:

> Obtaining such information may expose the protected person to potentially harmful cross-examination;

- At present, intervention orders are often made by consent without admissions and so the original allegations are untested. Use of those untested allegations at contravention hearings may reduce respondent's willingness to consent to final orders;
- There may not be sufficient admissible evidence available to establish the history of the relationship as an aggravating factor beyond reasonable doubt;
- Use of contextual information risks breaching the prohibition on punishing an offender for uncharged acts.

[Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (June 2009), 2.89, 5.26–5.28, 5.33–5.48]

Current practice among judicial officers reflects a diverse approach. Many judicial officers accept the concerns identified by the Sentencing Advisory Council and feel compelled to sentence on an admittedly incomplete factual foundation. In particular, judicial officers are concerned that using the history of the relationship will involve punishing the offender for uncharged acts.

Other judicial officers are more willing to seek material in order to fully understand the circumstances of the offence. Some judicial officers seek a copy of the application that led to the intervention order and an explanation of the offender's prior convictions. These judicial officers argue that it is permissible to use the application as evidence of the protected person's state of mind at the time of making the application and to assess the context of the offending, which may assist the court to determine the impact of the offending. The application also provides part of the context of the offence.

At common law:

> … the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted.… The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence

[*De Simoni v R* (1981) 147 CLR 383 per Gibbs CJ].

A court must be satisfied of an aggravating fact beyond reasonable doubt. In contrast, the standard of proof for mitigating facts is the balance of probabilities (*Cheung v R* (2001) 209 CLR 1; *Olbrich v R* (1999) 199 CLR 270; *R v Storey* [1998] 1 VR 359).

In *Weininger v R* (2003) 212 CLR 629, the High Court held that not all issues in a sentencing hearing involve a choice between finding an aggravating factor or finding a mitigating factor. Human behaviour and fixing sentences is not that simple. Gleeson CJ, McHugh, Hayne and Gummow JJ explained that "[t]he absence of persuasion about a fact in mitigation is not the equivalent of persuasion of the opposite fact in aggravation"

[*Weininger v R* (2003) 212 CLR 629 at [24]]

Use of uncharged acts in sentencing requires some understanding of the use of representative counts. A court may only sentence a person to a count that is said to be representative of other offending if the offender consents. The court may use the offender's consent to a representative count in two ways. First, a representative count precludes an argument that the offending was isolated or one-off behaviour. Secondly, while the court does not punish the offender for the represented offences, it may reflect the fact that the offending occurred in a wider context.

[*R v SBL* [1991] 1 VR 706].

Only the second of these uses is specific to representative counts. In all cases, a court may use evidence of uncharged acts to find that the offending was not an isolated event that was immediately regretted

[See *DPP v McMaster* (2007) 19 VR 191 at [51]–[58]; *R v Parfitt* [2006] VSCA 91; *R v Dunne* [2003] VSCA 150; *R v VN* (2006) 15 VR 113].

A court can also use uncharged acts to refute other potentially mitigating circumstances, such as good character, good prospects of rehabilitation or the lack of need for specific deterrence. While on a theoretical level this involves punishing the accused for uncharged acts, courts have maintained a distinction between adding to the sentence and refraining from reducing the sentence, despite criticism that this is "semantic" or "metaphysical"

[*DPP v McMaster* (2007) 19 VR 191; *R v CJK* [2009] VSCA 58; *R v Rainer* (1974) 8 SASR 102; *Siganto v R* (1998) 194 CLR 656; *Weininger v R* (2003) 212 CLR 629].

Similarly, the distinction between using uncharged acts to deny mitigation and using acts to show the whole circumstantial case can be difficult. Courts routinely examine other conduct to understand the context of the offending. This does not involve punishing the offender for uncharged acts or require that the accused consent to a representative count

[See *R v Rankin* [2001] VSCA 158; *R v Parfitt* [2006] VSCA 91; *R v Dunne* [2003] VSCA 150].

For example:

- the court may find that the accused charged with a single count of trafficking a drug of dependence was involved in a wider trafficking operation (*Ha v R* [2008] NSWCCA 141; *Weininger v R* (2003) 212 CLR 629); and
- the court may look at the injuries incurred by participants in an affray to judge the seriousness of the offence, even if the accused is not charged with injuring a particular victim (*R v Feretzanis* [2003] VSCA 8).

It is clear that finding the relevant sentencing facts in this area is difficult. Judicial officers should be aware of the risks the Sentencing Advisory Council identified that increased use of the facts alleged in an application may lead to more opposed orders or applications to cross-examine the protected person on the plea hearing. Despite this, judicial officers are required under s 5(2) of the *Sentencing Act 1991* to consider the circumstances of the offence and the impact on the victim and under s 362(1)(g) of the *Children, Youth and Families Act 2005*, to consider the need to protect the community or a person from the violent or wrongful acts of a child.

It therefore seems that judicial officers may use allegations in the original application and any other evidence the prosecution tenders to rebut arguments that the conduct constituting the contravention was out of character, or that the breach was "trivial". In doing so, judicial officers must:

- maintain the distinction between finding aggravating factors and refusing to find mitigating factors;
- apply the correct standard of proof; and
- not punish the offender for uncharged acts.

Considering the attitude of the victim

The nature of family violence means that giving effect to the attitude of the victim is fraught with danger. In many cases, a victim may face "an intolerable choice between the bonds of affection which often persist despite the violence and their need for protection against recurrence and for the offender to be held accountable".

[*Talukder v Dunbar* [2009] ACTSC 42 at [82]; see also *R v Hester* [2007] VSCA 298 at [27] per Neave JA]

An additional dynamic that is present in family violence offences is that an offender will often look for a basis for blaming the victim for any punishment he or she receives. This can lead to further violence. To minimise this risk, judicial officers often give the attitude of the victim minimal weight and state this fact in the sentencing remarks. This approach can demonstrate that the court is responsible for determining the appropriate sentence and an offender will not benefit from pressuring the victim into supporting a lenient sentence.

Aggravating factors

Involvement of children

Contraventions of family violence intervention orders involving a child who is protected by the intervention order may constitute an aggravating feature of the contravention. This is because such orders are granted pursuant to a legislative regime that places 'particular emphasis on the protection of children from family violence'.

[*DPP v Johnson* [2011] VSCA 288 at [45] per Redlich JA]

Further, exposing children, whether directly or indirectly, to family violence is highly detrimental, both in the short and long term. It is therefore important that sentencers take into account exposure of children to family violence when sentencing for breaches of intervention orders, and that appropriate condemnation of it is expressed in open court.

[Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (June 2009), 5.95–5.96]

Timing of contravention

Contraventions of intervention orders which occur in close proximity to the making of the order are likely to be viewed more seriously than those which occur a longer time after the making of the order.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p32]

Repeat contravention

The Court of Appeal has recognized that repeat contravention of a family violence intervention order is an aggravating factor for offending. In such cases, general and specific deterrence principles may assume particular significance.

[*DPP v Johnson* [2011] VSCA 288 at [42]–[43]]

There is evidence to support the view that lower courts also treat repeat contravention of family violence intervention order as increasing the gravity of an offence, with sentences for contraventions which are second or subsequent contraventions becoming more severe over time. Evidence of this may be found in the fact that the rate of imposition of fines for such offences has almost halved, while the use of custodial sentences has increased. Imprisonment was the most common sentence for repeat contraventions between July 2009 and June 2012.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p38]

There is also evidence to suggest that there has been greater escalation in sentencing for subsequent contraventions between July 2009 and June 2012 than that which occurred between July 2004 and June 2007. Thus, between July 2004 and June 2007, where a fine was imposed for a first contravention, a fine was also imposed for subsequent contraventions in a slim majority (50.9%) of cases. However, between July 2009 and June 2012, the use of fines halved (a decline of 49.3%), while the use of community orders increased by 41%. In the same time, the use of wholly suspended sentences increased by 191.6% and the use of immediate sentences of imprisonment increased by 60.2%.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p40]

Last updated: 29 March 2018

4.1.1.3 Current sentencing practices

The Sentencing Advisory Council has published two reports regarding sentencing practices for contravention of a family violence intervention order. The first, published in 2009, analysed the period between July 2004 and June 2007. The second, published in 2013, considered the period July 2009 to June 2012. The Council drew the following conclusions regarding sentencing practices for contravention of intervention orders from these two periods:

- in total, the use of fines declined by 30.5%, the use of adjourned undertakings increased by 27.1% and community orders increased by 9.1% in family violence intervention order contravention cases;
- the use of fines decreased by 34.1% in cases where the contravention offence was the only offence sentenced, and by 32.3% in cases where other offences, which occurred at the same time as the contravention, were sentenced with the contravention offence;
- the use of fines decreased by 44.4% in cases involving a second or subsequent contravention offence; and
- custodial sentences increased in cases involving a second or subsequent contravention – immediate terms of imprisonment increased by 34% and wholly suspended sentences of imprisonment increased by 68.5%.

Between 2004–05 and 2006–07, fines were imposed in 37.1% of contravention cases, adjourned undertakings were imposed in 18.4% of cases and community orders in 17.6% of cases.

While the use of fines has decreased over time, it remains the most common sentencing disposition, with adjourned undertakings the second most common disposition, followed by community orders.

Thus, between 2009–10 and 2011–12, fines were imposed in 25.8% of contravention cases, adjourned undertakings in 23.4% of cases and community orders were imposed in 19.2% of cases.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p 51]

The Sentencing Advisory Council's 2015 report provides some updates statistics regarding sentencing practices. The report indicates that between 2009/2010 and 2014/2015:

- the use of imprisonment, community sentences and fines increased in sentencing of family violence intervention order contravention cases
- the use of suspended sentences, low-end orders and diversion plans declined
- the rate of imprisonment for non-aggravated contraventions of family violence intervention orders increased from 12.2% to 16.2%
- the offences of aggravated contravention and persistent contravention of family violence intervention order were more likely to receive sentences of imprisonment (28 to 29% of these cases received imprisonment) or community correction orders (29 to 31% of aggravated offences) than non-aggravated offences for contravention of family violence intervention orders
- the use of fines increased between 2009/2010 to 2014/2015 for contravention-only cases from 31.5% to 40.7% (where no other charges such as assault/cause injury were co-sentenced)
- the use of low-end orders in the same period decreased from 40.9% to 37.7% for contravention-only cases
- generally, for all contraventions of family violence intervention cases, there was a decrease in the use of low-end orders from 26% in 2009/2010 to 22.3% in 2014/2015

[Sentencing Advisory Council, *Sentencing for contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015) at pp 32–48]

Reasons for changes in practices

Along with the statistical evidence regarding changed practices when sentencing for contraventions of family violence intervention orders, anecdotal evidence also suggests that sentencing practices have changed over recent years. This, in turn, reflects a cultural change which has occurred within criminal justice institutions, including the courts and Victoria Police.

Two particular improvements in Victoria Police's response to family violence have been identified as being likely to have influenced sentencing for contravention offences. These are the decline in the concept of 'technical' contraventions and secondly, the improvement in evidence collection.

Police must now investigate all alleged intervention order or safety notice contraventions, irrespective of how serious such alleged contraventions appear to be. This is significant, because family violence often takes the form of a series of acts which often escalate over time, rather than a single instance of offending. A contravention which may appear 'trivial' may cause significant fear to the victim when it is considered along with the offender's other behaviour. It may also form part of an escalating cycle of violence which may culminate in a particularly violent episode.

There is also anecdotal evidence to suggest that the amount and quality of evidence presented to the court at proceedings for contraventions of intervention orders and safety notices has improved.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), pp 44–45]

Alongside changes in police practices, courts have broadened their understanding of family violence. This is believed to have led to a change in sentencing practices, where it may no longer be considered appropriate to impose a fine for a contravention of a family violence intervention order.

The decrease in the use of fines may also be attributed to a shift in sentencing practice for offenders who do not have a criminal record. It appears that adjourned undertakings have been more likely to be imposed on such offenders, rather than a fine. And with the more comprehensive family violence intervention order regime under the *Family Violence Protection Act 2008*, as well as greater reporting of family violence, a wider cross-section of offenders are now the subject of family violence intervention orders and sentenced for contraventions. These offenders include those who do not have criminal records. This trend appears to have contributed to the increase in the use of the adjourned undertaking.

The trend towards the use of adjourned undertakings or community orders may also reflect an increased emphasis on imposing sanctions which intervene in an offender's behaviour. The use of such orders is influenced by therapeutic justice principles. These principles attempt to address the underlying causes of offending, and avoid sanctions which may lead to further offending by an offender. Rehabilitation and community protection, through offender rehabilitation, are central to therapeutic justice approaches. By imposing adjourned undertakings or community orders, the court is able to incorporate conditions which address the offender's behaviour, with a view to achieving their rehabilitation and reducing the risk of them reoffending. A fine is unable to achieve these same purposes.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), pp46, 48]

Convictions for contravention offences

For contraventions of intervention orders, courts have frequently attached convictions to fines and community orders, but have been less likely to attach a conviction to adjourned undertakings.

Over time, the rate at which convictions have been recorded for contraventions of intervention orders has declined. In 2006–07, convictions were recorded for 77.2% of contravention offences. From 2009–10 to 2011–12, this rate decreased to 70.8%. This decline appears to be partly the result of the change in the types of sanctions imposed i.e. the decrease in the imposition of fines and the increase in the use of adjourned undertakings.

This trend is consistent with practice in the Magistrates' Court for other types of offences more generally. For all offence types, the Court generally attaches convictions to fines, but is less likely to attach convictions to adjourned undertakings.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), p 41]

Last updated: 29 March 2018

4.1.1.4 Sentencing for contravention of an intervention order accompanied by other offences

Cumulation and concurrency

Contraventions of intervention orders need to be treated seriously, given that they constitute 'disobedience of a court order'.

[*Maher v The Queen* [2011] VSCA 136 at [16] per Ashley JA (Bongiorno JA agreeing); cited with approval in *DPP v Johnson* [2011] VSCA 288 at [53] per Redlich JA]

When sentencing for contravention of an intervention order, along with any other offences related to that contravention, consideration should be given to the factual components of each offence. Some degree of cumulation of sentences would be appropriate where there are distinctions between such offences.

[*Maher v The Queen* [2011] VSCA 136 at [16] per Ashley JA (Bongiorno JA agreeing); cited with approval in *DPP v Johnson* [2011] VSCA 288 at [51]–[53] per Redlich JA]

While some cumulation of sentences may be appropriate, it is important to bear in mind that any orders made must not offend against the totality principle. It may therefore be necessary to ameliorate in some way the individual sentences imposed for the contravention and all other counts.

[*Maher v The Queen* [2011] VSCA 136 at [16] per Ashley JA (Bongiorno JA agreeing); cited with approval in *DPP v Johnson* [2011] VSCA 288 at [53] per Redlich JA]

Where a person is sentenced for both contravention of an intervention order, along with other distinct offences related to that contravention, it is important that the sentence for the contravention offence has a 'real impact' upon the total sentence imposed.

[*Maher v The Queen* [2011] VSCA 136 at [16] per Ashley JA (Bongiorno JA agreeing); cited with approval in *DPP v Johnson* [2011] VSCA 288 at [53] per Redlich JA]

While ensuring that the sentence for the contravention offence is appropriately recognised in the total sentence, the court must also avoid the possibility of double punishment when formulating sentences for each offence.

[See *De Simoni v R* (1981) 147 CLR 383; *R v Austin* (1985) 121 LSJS 181; *R v Duncan* (2007) 172 A Crim R 111; [2007] VSCA 137]

While practices differ, some judicial officers argue that the court should not impose an aggregate sentence for both a contravention offence and separate offences which are related to it. Instead, if the court intends to impose an aggregate sentence, it should separate out the portion for the contravention and record a separate sentence for that offence. This practice ensures that the offender recognises the significance of the contravention offence and may allow the judicial officer to tailor a more appropriate penalty for that offence.

Deterrent effect of sentence for contravention

It is important that an offender who commits a separate offence in contravention of an intervention order is adequately punished for both offences. This is because the intervention order is:

… designed by parliament to provide the protection of the law to vulnerable individuals, usually, as in this case, women and children, who legitimately fear for their safety. Offenders who disregard such orders and occasion injury to persons whose personal security is intended to be guaranteed through this means must anticipate that an extremely stern view will be adopted by the courts of their conduct and, save in the most unusual circumstances, will be subject to condign punishment.

[*R v Pham* [2005] VSCA 56 at [21] per Vincent JA; see also *R v Duncan* (2007) 172 A Crim R 111; [2007] VSCA 137 at [37] per Vincent JA]

As discussed in 4.1.1.2 - Sentencing contravention offences this elevation of general deterrence may be unsuitable when sentencing a child offender. Instead, the court should consider the need to ensure that the child is aware that he must bear responsibility for his offences and the need to protect the community and the victim from the offender's conduct.

[See *Children, Youth and Families Act 2005* ss 362(1)(f), (g)]

Last updated: 16 June 2014

4.1.1.5 Types of sanctions

The Sentencing Advisory Council has examined the sanctions commonly imposed for contravention of a family violence intervention order. The Council was concerned that penalties should be appropriate and serve the purposes of rehabilitation, denunciation and protection of the victim.

The Council particularly criticised using fines as a sanction, as these are often unpaid, may lead to further harassment of the victim and do not rehabilitate the offender in any way. In addition, fines can ultimately harm the victim's financial position.

The Council was also critical of the use of adjourned undertakings. It stated:

> In its most simple form (that is, with no conditions attached) an adjourned undertaking merely requires an offender not to breach a court order; which seems an inappropriate sentence to impose for breach of a court order. Arguably, such an adjourned undertaking is not an appropriate sanction for an offender who has already shown disregard for a court order. From the Council's consultations, it appears that some magistrates are using this sanction as a vehicle through which to attach the conditions of participation in a men's behavioural change program. However, as there is often no supervision – judicial or otherwise – of the offender's participation in any program, this sanction provides little in the way of deterrence, punishment, denunciation or community protection, particularly where there is no conviction imposed.

[*Sentencing Practices for Breach of Family Violence Intervention Orders, Final Report*, Sentencing Advisory Council, 6.6]

Instead, the court should make greater use of intermediate sanctions when sentencing adult offenders, especially community correction orders. These provide more flexibility in sentencing and can incorporate community work conditions and mandatory attendance at a behavioural change program. The Council considered the hierarchy of sentences and produced a table of suggested sentences (http://www.sentencingcouncil.vic.gov.au/).

[*Sentencing Practices for Breach of Family Violence Intervention Orders, Final Report*, Sentencing Advisory Council, 6.8]

In its 2016 report, the Sentencing Advisory Council expanded upon its reasons for cautioning against the use of fines in sentencing family violence contravention offences:

- Fines provide inadequate deterrence
- When fines remain unpaid, offenders escape consequences for their accounts. Moreover, fines that remain unpaid negate any accountability or punishment of the offender's behaviour.
- Fines are an inappropriate rehabilitative method, and do not provide protection of the community generally or of the affected family member
- Most concerning, fines may compound the harm suffered by the affected family member. The Council provides the example of when offenders and victims are in a mutually dependent financial relationship, and the fine diminishes the resources of the family generally rather than punishing the individual offender. Additionally, the offender may seek to coerce the victim into paying the fine themselves

[Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) at p 64]

In the Children's Court, the equivalent intermediate sanctions are probation orders and youth supervision orders. The differences in sentencing purposes between adult and child offenders may mean that these intermediate sanctions are too onerous for child offenders. This may suggest that, despite the Council's criticism, accountable undertakings or good behaviour bonds with appropriate special conditions are more likely to be appropriate for juvenile offenders.

Behaviour change programs

A sentencing court may require an offender to attend counselling or any other behaviour change program as a condition of an adjourned undertaking or a community correction order. The power to attach a counselling condition to a sentence exists separately from the counselling order regime in Part 5 of the FVPA. Instead, this power comes from the court's power to attach treatment and rehabilitation conditions under s 48D of the *Sentencing Act 1991* and special conditions under ss 72 or 75 of the *Sentencing Act 1991*.

Previously, there was some uncertainty whether Corrections Victoria could supervise offenders on a community correction order that were required to attend programs run by third-parties. Corrections Victoria and the Sentencing Advisory Council have confirmed that supervision for third-party programs is available.

Historically, there have been some difficulties in communicating the progress of offenders on behaviour change courses. Judicial officers should ensure that the conditions of any order include appropriate reporting mechanisms to inform the court of the offender's compliance with the order.

Finally, some programs may be subject to extensive waiting lists. The court may need to be aware of this, as it would be futile to require an accused to attend a specific program that is not available in the time specified in the order.

[*Sentencing Practices for Breach of Family Violence Intervention Orders, Final Report*, Sentencing Advisory Council, Chapter 4]

Judicial officers are encouraged to identify the programs available in their region. The Men's Referral Service maintains a register of programs that operate in a safe and ethical manner.

- See http://www.mrs.org.au (http://www.mrs.org.au/) or call 9428 2899 or 1800 065 973.
- See also http://www.ntv.org.au (http://www.ntv.org.au/).

Judicial officers will also need to consider the practices at their court to know whether there is a mechanism for bringing the offender back before the court during the adjournment and whether court staff will receive reports from program providers on the offender's progress.

Protective conditions

It is the responsibility of the protected person or the police to apply for a fresh order if the order lapses while the affected family member still requires protection. In appropriate cases, judicial officers may encourage a party to make a fresh application. It will generally be inappropriate to use the conditions of an adjourned undertaking or a community correction order to replicate the conditions of a family violence intervention order.

Last updated: 29 March 2018

4.1.1.6 Consent of the protected person

Two issues arise where a protected person purports to consent to a respondent's contravention of a family violence intervention order or family violence safety notice. First, it may raise a question of the respondent's intention to contravene the order. Secondly, it may raise the question of the protected person's liability for aiding, abetting, counselling or procuring the contravention.

When a court explains an interim order or a final order, it must tell the respondent that the order is a civil order of the court and that the protected person cannot give permission to contravene the order.

(FVPA ss 57A(2)(e), 96(1)(e), 96A(2)(f)]

In most cases, this will prevent any argument that the accused mistakenly believed that the protected person could consent to a contravention of the order. In *Tudor-Stack v Hill* [2003] NTCA 15, the Northern Territory Court of Appeal held that under its intervention order legislation, the mistake of fact defence was not available and the accused was guilty of breaching the order even if he believed that the order had expired due to statements by the protected person, who had instigated contact. These two matters suggest that the consent of the protected person will not give rise to a defence to a charge of contravening a family violence intervention order.

The second issue concerns the protected person's culpability for contributing to the contravention. Under s 52 of the *Magistrates' Court Act 1989*, a person who aids, abets, counsels or procures the commission of a summary offence may be dealt with as a principal offender. This provision establishes secondary liability for summary offences. For indictable offences, the equivalent provision is s 323 of the *Crimes Act 1958*.

Section 125 of the FVPA limits the operation of s 52 of the *Magistrates' Court Act 1989* and s 323 of the *Crimes Act 1958* in relation to protected persons. The section states that a protected person does not aid, abet, counsel or procure an offence against the FVPA and is not punishable as a principal offender because they encourage, permit or authorise conduct by the respondent that contravenes a family violence intervention order or a family violence safety notice.

Previously, police could charge a protected person with the offence of aiding and abetting a breach if the protected person contacted the respondent or consented to the breach.

[*Keane v Police* (1997) 69 SASR 481]

The VLRC recommended that the legislation remove liability for aiding and abetting so that a respondent could not intimidate a protected person by suggesting that reporting a breach would result in both of them being charged. Instead, the legislation should focus on the protection of victims of family violence by prohibiting conduct by the respondent. As an intervention order is a court order, the protected person cannot waive the respondent's obligation to comply. A protected person who wishes to resume contact with the respondent should apply to the court to vary or revoke an order.

[VLRC Report pp 162–163]

Last updated: 29 March 2018

4.1.2 Contravention of a family violence safety notice

Contravening a family violence safety notice is a criminal offence with three elements:

- the accused has been served with a family violence safety notice;
- the accused received the explanation prescribed under s 35; and
- the accused contravened the notice.

(FVPA s 37]

In determining whether an accused has contravened a family violence safety notice, it is irrelevant whether:

- any or all of the accused's conduct, which constitutes the contravention offence, occurred outside Victoria, as long as the protected person was in Victoria at the time that the accused's conduct occurred; or
- the protected person was outside Victoria at the time at which the accused's conduct, which constitutes the contravention offence, occurred, as long as the conduct occurred in Victoria.

(FVPA ss 37(2A), 37(2B)]

A family violence safety notice is not invalid if a police officer fails to comply with s 35(4). The relationship between this provision and s 37(1)(b), which requires proof of the explanation before an accused can be liable for contravention of a notice, is unclear. It is difficult to reconcile the two sections as, when read together, they appear to state that while the notice is not invalid, contraventions of the notice will not be sanctioned. Arguably, a police officer may explain the notice at any time between issuing the notice and the contravention, but this seems an unsatisfactory solution.

Penalty

The maximum penalty for this offence is level 7 imprisonment (2 years), a level 7 fine (240 penalty units) or both.

(FVPA s 37(2)]

Defences

It is a defence to a charge of contravening a family violence safety notice that:

- an accused was a respondent under a family violence safety notice;
- a family violence intervention order in relation to the same protected person and the accused was in force at the time the contravention of the safety notice was alleged to have occurred; and
- the accused's conduct did not contravene the family violence intervention order.

(FVPA s 37(3)]

The onus is on the defence to establish this defence on the balance of probabilities.

[*Evidence Act 2008* s 141(2); *R v Carr-Briant* [1943] KB 607]

This defence, along with a similar defence for contravention of an intervention order, means that if the accused is the respondent under both a family violence safety notice and an intervention order in respect of the same protected person, the order with the least restrictive conditions prevails, to the extent of any inconsistency between the two.

Contravention and recognised DVOs

Under *National Domestic Violence Order Scheme Act 2016*, a recognised DVO (that is, a family violence order made in another State or Territory that is recognised under that Act, or a New Zealand family violence order that has been registered in Victoria or another Australian State or Territory) can be enforced as if it were a Victorian order and the respondent had been properly notified of the order under the law of Victoria.

[*National Domestic Violence Order Scheme Act 2016* s 17]

A person who is subject to both a family violence safety notice and a recognised DVO must comply with both orders if possible. If that is not possible, the respondent must comply with the family violence safety notice.

(FVPA s 40]

For this purpose, the fact that the respondent's conduct was permitted under a recognised DVO is not a defence to a charge of contravening a safety notice.

(FVPA s 37(4)]

Section 125B provides protection against double jeopardy in relation to recognised DVOs across multiple jurisdictions. If the contravening conduct is an offence under FVPA ss 37, 37A, 123 or 123A and an offence against the law of another State or Territory, and the accused has been punished for that conduct in another State or Territory, then the accused cannot also be punished in Victoria.

(FVPA s 125B]

Contravention intending to cause harm or fear for safety

It is an offence for an accused to contravene a family violence safety notice intending to cause, or knowing that their conduct will probably cause the protected person:

- physical or mental harm, including self-harm; or
- to be apprehensive or fearful for their own safety or that of anyone else.

(FVPA s 37A(2)]

Mental harm, for the purposes of this offence, includes psychological harm and suicidal thoughts.

(FVPA s 37A(1)]

Before an accused may be prosecuted for such an offence, they must have been served with the relevant family violence safety notice and had the notice explained to them, in accordance with the requirements set out in FVPA s 35.

(FVPA s 37A(2)]

In determining whether an accused has contravened a family violence safety notice, it is irrelevant whether:

- any or all of the accused's conduct, which constitutes the contravention offence, occurred outside Victoria, as long as the protected person was in Victoria at the time that the accused's conduct occurred; or
- the protected person was outside Victoria at the time when the accused's conduct, which constitutes the contravention offence, occurred, as long as the conduct occurred in Victoria.

(FVPA ss 37A(3), 37A(4)]

Penalty

The maximum penalty for this offence is level 6 imprisonment (5 years) or a level 6 fine (600 penalty units) or both.

(FVPA s 37A(2)]

Defences

It is a defence to a charge of contravening a family violence safety notice that:

- an accused was a respondent under a family violence safety notice;
- a family violence intervention order in relation to the same protected person and the accused was in force at the time the contravention of the safety notice was alleged to have occurred; and
- the accused's conduct did not contravene the family violence intervention order.

(FVPA s 37A(5)]

The onus is on the defence to establish this defence on the balance of probabilities.

[*Evidence Act 2008* s 141(2); *R v Carr-Briant* [1943] KB 607]

This defence, along with a similar defence for contravention of an intervention order, means that if the accused is the respondent under both a family violence safety notice and an intervention order in respect of the same protected person, the order with the least restrictive conditions prevails, to the extent of any inconsistency between the two.

Transitional matters

Section 37A applies to any contravention of a family violence safety notice occurring on or after 17 April 2013, irrespective of when the family violence safety notice was issued.

(FVPA s 224D(3)]

Contravention and recognised DVOs

Under *National Domestic Violence Order Scheme Act 2016*, a recognised DVO (that is, a family violence order made in another State or Territory that is recognised under that Act, or a New Zealand family violence order that has been registered in Victoria or another Australian State or Territory) can be enforced as if it were a Victorian order and the respondent had been properly notified of the order under the law of Victoria.

[*National Domestic Violence Order Scheme Act 2016* s 17]

A person who is subject to both a family violence safety notice and a recognised DVO must comply with both orders if possible. If that is not possible, the respondent must comply with the family violence safety notice.

(FVPA s 40]

For this purpose, the fact that the respondent's conduct was permitted under a recognised DVO is not a defence to a charge of contravening a safety notice intending to cause harm or fear for safety.

(FVPA s 37(4)]

Section 125B provides protection against double jeopardy in relation to recognised DVOs across multiple jurisdictions. If the contravening conduct is an offence under FVPA ss 37, 37A, 123 or 123A and an offence against the law of another State or Territory, and the accused has been punished for that conduct in another State or Territory, then the accused cannot also be punished in Victoria.

(FVPA s 125B]

Sentencing contravention offences

A family violence safety notice is designed to provide immediate protection for affected family members against adult respondents if the court is closed and normal procedures are unavailable.

[Explanatory Memorandum to the *Family Violence Protection Bill 2008*, cl24]

The notice lasts until either the court refuses to make a family violence intervention order on the first mention date, or, if the court makes an order, the order is served on the accused.

(FVPA s 30]

As the notice is a temporary measure to protect an affected family member until a court can consider making an interim order, it is likely that the relevant principles to sentencing for contravention of an intervention order apply equally to contravening a safety notice.

Between 2009/2010 and 2014/2015, the number of family violence safety notices issued increased from 3,378 to 19, 956 per year. During this same period, the number of contravention charges rose from 156, or 1 charge per 21.7 FVSNs to 532, or 1 charge per 18.9 FVSNs.

[Sentencing Advisory Council, *Sentencing for contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015) at p 33]

For further information, see 4.1.1.2 Sentencing contravention offences.

Last updated: 13 February 2018

4.1.3 Persistent contravention of intervention order or safety notice

It is an offence to persistently contravene a family violence intervention order or family violence safety notice.

(FVPA s 125A(1)]

The elements of the offence are:

- an accused engages in conduct which constitutes a contravention of an intervention order in accordance with s 123 or a contravention of a safety notice in accordance with s 37; and
- on at least two occasions in the preceding four weeks, that accused engaged in conduct which constitutes a contravention of an intervention order in accordance with s 123 or a contravention of a safety notice in accordance with s 37; and
- that conduct occurred in relation to:
- the same protected person; or
- the same family violence intervention order (whether interim or final) or family violence safety notice, irrespective of whether it was directed at the same protected person; or
- a family violence safety notice and a family violence intervention order (whether interim or final), provided that the relevant safety notice constituted the application for the relevant intervention order, irrespective of whether the conduct of the accused was directed at the same protected person; and
- on each occasion in which the accused engaged in the relevant conduct, the accused knew or ought to have known that the conduct constituted a contravention of the intervention order or safety notice.

(FVPA s 125A(2)]

If, on the trial of a person for an offence against s 125A(1), the jury is not satisfied that they are guilty of the offence but are satisfied that the accused engaged in conduct which constituted a contravention of a family violence intervention order or a family violence safety notice, the jury must acquit the accused of the offence against s 125A(1), but may find the accused guilty of the alternative contravention offence.

(FVPA s 125A(4)]

Where a person is convicted of an offence against s 125A(1), they cannot subsequently be prosecuted for an offence against:

- s 37 (contravention of a family violence safety notice);
- s 37A (contravention of a family violence safety notice intending to cause harm or fear for safety);
- s 123 (contravention of a family violence intervention order); or
- s 123A (contravention of a family violence intervention order intending to cause harm or fear for safety), in respect of the same conduct or the same four week period which was the subject of the conviction under s 125A(1).

(FVPA s 125A(5)]

Penalty

The maximum penalty for persistent contravention of an intervention order or safety notice is level 6 imprisonment (5 years), a level 6 fine (600 penalty units) or both.

(FVPA s 125A(2)]

Defences

The defences which are available for contraventions of family violence safety notices and family violence intervention orders are also available for the offence of persistent contravention of a family violence safety notice or family violence intervention order.

(FVPA 125A(3)]

Transitional matters

Section 125A applies to any contravention of a family violence safety notice or family violence intervention order occurring on or after 17 April 2013, irrespective of when the family violence safety notice or family violence intervention order was issued.

(FVPA s 224D(5)]

Last updated: 19 April 2013

4.1.4 Bail and family violence offences

The *Bail Act 1977* contains five key provisions regarding bail, family violence intervention orders and family violence offences.

First, the existence of an intervention order or safety notice is a matter a bail decision maker must take into account as part of the 'surrounding circumstances', which are relevant to both the exceptional circumstances or compelling reason tests, and the unacceptable risk test.

[*Bail Act 1977* s 3AAA]

Second, when considering the release of a person on bail, a bail decision maker must ask the prosecutor whether there an intervention order or safety notice in force against the accused.

[*Bail Act 1977* s 5AAAA(1)]

Third, where the accused is charged with a family violence offence, the bail decision maker must consider

> (a) whether, if the accused were released on bail, there would be a risk that the accused would commit family violence; and
>
> (b) whether that risk could be mitigated by—
>
> (i) the imposition of a condition; or
>
> (ii) the making of a family violence intervention order.

[*Bail Act 1977* s 5AAAA(2)]

The definition of 'family violence offence' covers both breaches of safety notices or intervention orders, as well as any offence where the accused's conduct is family violence, within the meaning of the *Family Violence Protection Act 2008*.

Fourth, the following offences are Schedule 2 offences under the Act:

- making a threat to kill in circumstances that make it a family violence offence (see *Crimes Act 1958* s 20);
- contravening a family violence safety notice or intervention order (*Family Violence Protection Act 2008* ss 37, 37A, 123, 123A) in circumstances where:
    - the accused used or threatened violence as part of the contravention; and
    - the accused has been found guilty or convicted of an offence, in the course of which he or she used or threatened violence, within the past 10 years; or
    - the bail decision maker is satisfied the accused has on another occasion used or threatened violence against the person protected by the notice or order (whether or not that other occasion resulted in a charge or conviction);
- persistent contravention of a family violence intervention order (*Family Violence Protection Act 2008* s 125A(1));

A person charged with a Schedule 2 offence must generally show that a compelling reason exists that justifies the grant of bail. However, a person charged with a Schedule 2 offence while on bail, summons, at large awaiting trial, serving a CCO, otherwise serving a sentence or released on parole for a previous Schedule 1 or Schedule 2 offence moves into the higher test and must show that exceptional circumstances exist that justify the grant of bail.

[*Bail Act 1977* s 4AA]

Regardless of whether the 'exceptional circumstances' or 'compelling reason' test applies, bail must be refused if the prosecution shows establishes that the person is an unacceptable risk of endangering the safety or welfare of a person, committing an offence while on bail, interfering with a witness or obstructing the course of justice or failing to surrender into custody in accordance with the conditions of bail. The example to the provision refers to 'an unacceptable risk that the accused, if released on bail, would commit a family violence offence'.

[*Bail Act 1977* s 4E]

Fifth, s 5AAA(3) gives a bail decision maker the power to impose a conduct condition that is inconsistent with a condition of a safety notice or intervention order if the bail decision maker is satisfied that the proposed condition would better protect the safety or welfare of the alleged victim or a protected person under the *Family Violence Protection Act 2008*.

However, this power must be exercised with caution, as *Family Violence Protection Act 2008* ss 175AA, 175AB and 175AC have the effect that the safety notice or intervention order prevail if it is not possible to comply with both orders. The inconsistent bail conditions may, however, prompt the protected person or a prosecuting agency to apply to change the safety notice or intervention order to remove the inconsistency.

Caselaw on bail and family violence

Cases have established the following principles about the relevance of family violence, or family violence intervention orders, to bail decisions:

- Contravention of a family violence intervention order in force at the time of the alleged offending may demonstrate the accused is not deterred by conditions, which is relevant both to whether exceptional circumstances are established and whether the accused poses an unacceptable risk of offending while on bail – *Re Goldsworthy* [2020] VSC 500; *Re McKay* [2020] VSC 558

- A significant history of family violence is relevant to the existence of unacceptable risk where the accused would need to continue to live with his domestic partner and her children, in circumstances where people must remain at home during the COVID-19 pandemic – *DPP (Vic) v Walker* [2020] VCC 447
- A history of family violence allegations by the complainant against the accused, even if previously withdrawn or not proved, is relevant to assessing future risk where the accused is charged with committing an offence in circumstances of family violence – *Re Bertucci* [2020] VSC 88

Further, see *Re Erol* [2020] VSC 395 for a thorough and methodical example of bail decision making in the context of persistent contravention of an intervention order.

Last updated: 3 September 2020

4.1.5 Counselling orders

Under Part 5 of the FVPA, when a relevant court makes a final intervention order, it may be required to make orders requiring the respondent to attend counselling.

There are two parts to counselling orders. First, the court orders the respondent to attend an interview to assess his or her suitability for counselling. Then, the court makes an order requiring the respondent to attend an initial counselling session and for the approved counselling provider to notify the respondent of future sessions.

Counselling orders are explained in more detail in 3.6 - Counselling orders.

Breach of eligibility assessment order

It is an offence to fail to comply with an order to attend for an eligibility assessment interview. The prosecution must prove that:

- the relevant court made an order under s 129 requiring the accused to attend an interview with a counselling assessor for the purpose of preparing a report on the accused's eligibility for counselling;
- the accused failed to attend the interview at the time and place directed by the court; and
- the accused's failure was without reasonable excuse.

(FVPA s 129]

The court may vary the time and place specified in the eligibility assessment order by giving the respondent reasonable notice of the variation. If the respondent fails to attend at the varied time, then they are deemed to have contravened the interview order (FVPA s 129(6)).

Penalty

The maximum penalty for failing to comply with an interview is a fine of 10 penalty units (s 129(5)).

Breach of counselling order

Once the relevant court receives a report on the respondent's eligibility for counselling, it may make an order which requires the respondent to attend an initial counselling session at a specified place and time and requires the counselling provider to give the respondent reasonable notice of the time and place of each subsequent counselling session.

Failure to comply with a counselling order is an offence. The prosecution must prove that:

- the relevant court made an order under s 130 of the FVPA requiring the accused to attend an initial counselling session;
- the accused failed to attend counselling; and
- the accused's failure was without reasonable excuse.

(FVPA s 130]

Under s 130(5), a person is deemed to have contravened a counselling order if they do not attend the initial counselling session at the time and place specified in the order or do not attend further counselling at the time and place specified by the counselling provider. This section effectively expands the respondent's obligation to one which requires them to attend all counselling specified by the provider, not only the initial session specified by the court.

Penalty

The maximum penalty for breach of a counselling order is a fine of 10 penalty units.

A person may only be prosecuted once for failing to comply with a counselling order and may not be prosecuted separately for each failure to attend counselling.

(FVPA ss 130(4), (6)]

Discussion

In the second reading speech for the *Magistrates' Court (Family Violence) Act 2004*, the Attorney-General explained that:

> If the defendant fails to attend either the eligibility interview or the counselling without reasonable excuse, the matter may be referred to local police for investigation and possible prosecution. Attempts will be made to encourage compliance with the court order. Criminal sanction will not be the first resort of those administering the pilot as the purpose of the pilot is to get these defendants to counselling and achieve long-term behaviour change.

[Hansard, Legislative Assembly, 26 August 2004, p191]

This statement indicates that courts should avoid adopting an overly punitive approach. Instead, the aim should be to encourage respondents to attend counselling.

Breach of confidentiality

Part 5 of the FVPA also contains three offences designed to preserve the confidentiality of the eligibility assessment report and subsequent counselling sessions.

First, it is an offence to disclose information obtained while conducting an eligibility assessment interview or while preparing a report. The prosecution must prove that:

- the accused conducted an interview or prepared a report in accordance with an order under s 129 of the FVPA;
- the accused disclosed information obtained while conducting the interview or preparing the report; and
- the disclosure was to a person who was not entitled to receive or have access to the report.

(FVPA s 140(1)]

Secondly, it is an offence to disclose information in a report to an unauthorised person. The prosecution must prove that:

- the accused received or otherwise had access to all or part of a report or a copy of a report prepared in accordance with an order under s 129 of the FVPA;
- the accused disclosed information in the report; and
- the disclosure was to a person who was not entitled to receive or access the information.

(FVPA s 140(2)]

Thirdly, it is an offence to disclose information provided in the course of counselling. There are also three elements to this offence:

- the accused provides counselling in accordance with an order under s 130 of the FVPA;
- the accused disclosed information obtained in the course of providing counselling; and
- the disclosure was to a person who was not entitled to the information.

(FVPA s 141(1)]

Exceptions

Some disclosures are exempt from the breach of confidentiality offences contained in FVPA ss 140 and 141. These are disclosures that:

- are by or authorised in writing by the respondent;
- are to a legal practitioner in connection with giving legal advice or providing representation in a proceeding under the Act;
- are authorised by the relevant court as necessary for the purposes of Part 5 of the Act;
- are required, authorised or permitted by law or by a court;
- are authorised under Health Privacy Principles 2.2(a), 2.2(b), 2.2(f), 2.2(g), 2.2(h), 2.2(k), 2.2(l) or 2.5 as set out in Schedule 1 to the *Health Records Act 2001*; and
- do not identify the respondent or do not allow respondent's identity to be reasonable ascertained.

(FVPA ss 140(3), 141(2)]

The disclosures permitted under the specified Health Privacy Principles involve:

- use of information for a secondary purpose directly related to the primary purpose of collecting the information;
- disclosures with the consent of the individual;
- internal use of information for training, funding, evaluation or management purposes;
- use of personal information in research;
- preventing harm to individuals or the public; and
- use of personal information in civil proceedings.

Penalty

The maximum penalty for the three offences involving breach of confidentiality is a fine of 10 penalty units.

Last updated: 10 December 2019

4.1.6 Knowing false certification

The FVPA often requires statements to be on oath, affidavit or certified as true and correct. Certification requires that:

- the person must certify that the information contained in the document is true and correct to the best of the person's knowledge; and
- the document must include a statement that the person understands that making a certification knowing the document to be false in any particular constitutes an offence.

False certification is an offence. There are two elements the prosecution must prove:

- the accused certified a document under the FVPA; and
- the accused know that the document is false in any particular.

(FVPA s 153(2)]

Penalty

The maximum penalty for false certification is a fine of 600 penalty units or 5 years' imprisonment, or both.

(FVPA s 153]

Discussion

The certification process is designed to be quicker than making a statement on oath or affidavit, as this requires two or more people. Instead, the Act allows the court to use a certified document and exposes the author to penalties for making a knowingly false statement.

[See FVPA, Explanatory Memorandum clause 153]

The penalty was increased from 120 penalty units, to 600 penalty units and/or 5 years' imprisonment to align this penalty with the penalty for knowingly making a false statement in a declaration of truth.

[Explanatory Memorandum, Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018 (Vic), 28]

Last updated: 31 July 2019

4.1.7 False declaration of truth

After the commencement of the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*, applications for a family violence intervention order may be made on oath, by affidavit or by declaration of truth if the applicant is not a police officer.

A declaration of truth:

- must include the applicant's full name and date of birth; and
- must include an acknowledgment that the content of the application is true and correct to the best of the applicant's knowledge and belief; and
- must include an acknowledgment that the applicant knows that making a declaration of truth that the applicant knows to be false is an offence with a penalty of 600 penalty units or 5 years imprisonment or both; and
- must otherwise comply with any requirements of the rules of court (if any); and
- is not required to be witnessed by, or executed before, any other person

(FVPA s 43]

Knowingly making a false statement in a declaration of truth is an offence. There are two elements the prosecution must prove:

- the accused made a declaration of truth under FVPA section 43(4); and
- the accused knew that one or more statements in the declaration of truth was false.

(FVPA s 153(2)]

Penalty

The maximum penalty for knowingly making a false statement in a declaration of truth is 600 penalty units or 5 years' imprisonment or both.

(FVPA s 153A]

Discussion

The purpose of a declaration of truth is to enable an application for a family violence intervention order, executed by a declaration of truth, to be filed with the Court online. A declaration of truth is distinguishable from an oath, affirmation or affidavit as it does not need to be witnessed or executed before a third party. The use of a declaration of truth is limited to an application for a family violence intervention order by an applicant who is not a police officer.

The explanatory memorandum for the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* indicates that the acknowledgement requirements could be satisfied by an applicant being required to complete tick boxes on the application form acknowledging that they understand these requirements.

[Explanatory Memorandum, Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018 (Vic), 13–4]

The penalty is set at this level to be consistent with the penalty for making a statement in a statutory declaration that a person knows to be untrue under the Oaths and Affirmations Act 2018.

[Explanatory Memorandum, Justice Legislation Amendment (Family Violence Protection and Other Matters) Bill 2018 (Vic), 28–9]

Last updated: 31 July 2019

4.1.8 Limitations on reporting

In family violence proceedings, the court may make the following orders if it is necessary to do so in order to prevent undue distress or embarrassment to an affected family member, a protected person or a witness:

- order that the whole or part of the proceedings be heard in closed court; or
- order that only specified persons or specified classes of persons be present during the whole or part of the hearing.

(FVPA s 68(1)]

This power is broader than the power to close the court under the *Open Courts Act 2013* in order to prevent undue distress or embarrassment. Under that Act, the court's power to close the court such circumstances is limited to cases involving sexual offences, family violence offences or criminal proceedings where a child is a witness.

[*Open Courts Act 2013* s 30(2)]

If the court makes an order closing the court, the appropriate registrar must post a copy of the order on the door of the court or in another conspicuous place.

Breach of closed court order

Contravention of a closed court order is an offence consisting of three elements:

- the court made an order under s 68 of the FVPA;

- the court posted a copy of the order in a conspicuous place; and
- the accused breached the order.

Penalty

The maximum penalty for contravention of an order under s 68 is imprisonment for 3 months or a fine of 1000 penalty units.

(FVPA s 68(2), (3)]

Prohibition on reporting

Publishing reports of proceedings or about orders under the Act that may lead to the identification of parties is an offence. The elements of the offence are:

- a person publishes or causes to be published a report;
- The report relates to:
  - a proceeding under the FVPA; or
  - an order made under the FVPA; and
- The report contains;
  - if a party or witness in the proceeding or the subject of the order is a child:
    - the location of the particular venue of the court or particularly likely to lead to the identification of the particular venue of the court; or
    - any particulars likely to lead to the identification of the child or any other person involved in the proceeding, either as a party or a witness or the subject of the order; or
  - Otherwise:
    - any particulars likely to lead to the identification of any person involved in the proceeding or the subject of the order, unless the court orders that such particulars may be published; or
  - a picture of a person concerned in a proceeding for a family violence intervention order, unless the court orders that the picture may be published.

(FVPA s 166(2)]

This provision is contained in Part 8 of the FVPA. It has been noted that:

> In enacting Part 8 of the Act, and s 166 in particular, Parliament must be taken to have decided that, to the extent indicated in Part 8, the open justice principle is to give way to the need to protect the identities of persons involved in proceedings under the Act.
>
> [*YY v ZZ & Anor* [2013] VSC 743 at [12]]

While it is doubtful that s 166 applies to a proceeding in the Supreme Court for judicial review of a decision made under the FVPA, it has been suggested that for the Supreme Court to publish information which would otherwise be prohibited from publication under s 166 would prejudice the administration of justice, and:

> [a]s far as possible, justice must be administered in accordance with all relevant laws, including all relevant and valid statutory provisions prohibiting the publication of specified kinds of information.

Penalty

The maximum penalty for publishing proscribed information is 2 years imprisonment, a fine of 100 penalty units or both in the case of a natural person.

If the accused is a body corporate, the maximum penalty is a fine of 500 penalty units.

Discussion

In *Howe v Harvey* [2008] VSCA 181, the Victorian Court of Appeal examined analogous provisions restricting reporting under s 26(1) of the *Children and Young Persons Act 1989*. The court held that:

- determining whether a publication is a report on a proceeding is a factual question and does not depend on whether the ordinary reasonable reader or viewer would realise that a report concerns proceedings under the relevant Act;
- the offence only relates to a report on a proceeding and does not prohibit a publication that mentions a party to a proceeding in other contexts, such as a report on a person's sporting prowess.

Section 167 endeavours to clarify the scope of the prohibition. The sections states:

> To remove any doubt, it is declared that section 166 does not apply to-
>
> (a) a person publishing, or causing the publication of, a report about the proceeding or the order if the publication does not identify the locality of a court or particulars likely to identify a venue of a court, or particulars of a person; or
>
> (b) the publication under section 198 by the Attorney-General of a copy of any order made under section 193 or 197.

This ensures that a person may publish reports on proceedings that do not identify the venue or location of the court or particulars of a person. Similarly, the prohibition does not prevent the Attorney-General performing his or her function under the Act of reporting on vexatious litigants.

The FVPA contains an inclusive list of particulars that are likely to lead to the identification of a person, including:

> (a) the person's name, title, pseudonym or alias;
>
> (b) the address of any premises at which the person lives or works, or the locality in which the premises are situated;
>
> (c) the address of a school attended by the person or the locality in which the school is situated;
>
> (d) the physical description or the style of dress of the person;
>
> (e) any employment or occupation engaged in, profession practised or calling pursued by, the person or any official or honorary position held by the person;
>
> (f) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
>
> (g) the recreational interests or the political, philosophical or religious beliefs or interests of the person;
>
> (h) any real or personal property in which the person has an interest or with which the person is associated.
>
> (FVPA s 168]

Last updated: 16 June 2014

4.1.9 Failure to comply with direction to relinquish firearm, etc

A police officer who is aware that a person has a firearm, a firearms authority, ammunition or a weapon may direct the person orally or in writing to surrender those items if:

- a family violence safety notice has been issued against that person;
- a family violence intervention order has been made against that person; or
- the police officer is satisfied on the balance of probabilities that there are grounds for issuing a notice or making an order against that person.

(FVPA s 158(1), (2)]

Section 158(1A) separately addresses when a police officer can exercise this power in relation to a recognised DVO or an interstate DVO:

> (1A) This section applies in relation to a recognised DVO or an interstate DVO if—
>
> (a) one of the following applies—
>
> (i) a person is a respondent to a recognised DVO; or
>
> (ii) a police officer intends to serve or has served on a person an application for a recognised DVO made against the person; or
>
> (iii) a police officer intends to serve or has served on a person an interstate DVO made against the person or an application for an interstate DVO made against the person; and
>
> (b) the police officer is aware the person has a firearm, a firearms authority, ammunition or a weapon in the person's possession.

The direction must include the prescribed particulars and may require the person to surrender the items immediately, or at a specified place and time.

(FVPA s 158(2), (3)]

If a person fails to comply with a direction given in accordance with FVPA s 158(2), the police officer:

- must seize any firearm or firearms authority the officer is aware is in the person's possession; and
- may seize ammunition or a weapon the officer is aware is in the person's possession.

(FVPA s 163]

A person commits an offence when:

- the accused receives a direction from a police officer to surrender a firearm, firearms authority, ammunition or weapon; and
- the accused fails to comply with the direction; and
- the accused has no lawful excuse for failing to comply with the direction.

The maximum penalty for the offence is, in the case of a failure to comply with a direction to surrender a firearm, 60 penalty units, and in the case of a failure to comply with a direction to surrender a firearms authority, ammunition or a weapon, 30 penalty units.

(FVPA s 158(4)]

Additional requirements for directions relating to DVOs

If a police officer intends to serve or has served an application for a recognised DVO or an interstate DVO on a person, he or she must not give a direction unless:

- he or she is satisfied, on the balance of probabilities, that the person has committed family violence against a person sought to be protected by the order and is likely to continue to do so or to do so again; or
- he or she believes on reasonable grounds that the entry and search are necessary to ensure the safety of a person sought to be protected by the order, pending final determination of the application.

Particulars required for written directions

If a police officer gives a direction in writing, he or she must include the following particulars:

(a) the name of the person who is given the direction;

(b) the address (if known) of the person who is given the direction;

(c) the date of birth (if known) of the person who is given the direction;

(d) the name, rank and station of the police officer issuing the direction;

(e) a statement that the direction is issued under section 158(2)(b) of the Family Violence Protection Act 2008;

(f) the date and time at which the direction is given;

(g) the place at which the firearm, firearms authority, ammunition or weapon is to be surrendered;

(h) a statement that the firearm, firearms authority, ammunition or weapon must be surrendered by the specified time (if any) or otherwise within 48 hours of the direction being given to the person;

(i) a description of the firearm, firearms authority, ammunition or weapon to be surrendered (if known), including identifiers such as the model and serial number;

(j) a statement that it is an offence under section 158(4) of the Act to fail to comply with the direction, punishable by 60 penalty units for failure to surrender a firearm and 30 penalty units for failure to surrender a firearms authority, ammunition or a weapon.

[Family Violence Protection Regulations r 12]

The regulations mistakenly refer to the prescribed particulars of an oral direction under s 158(3). It appears that this should refer to s 158(2)(a).

The specified particulars are:

- if the police officer issuing the direction is not in uniform, the police officer's name and rank; and
- a statement that it is an offence to fail to comply with a lawful direction.

[Family Violence Protection Regulations r 12]

Effect of surrender of firearm etc if final order made

If a person surrenders his or her firearm, firearms authority or ammunition pursuant to FVPA s 158, and a final order or a final recognised DVO or a final interstate DVO is made against the person, that firearm, firearms authority or ammunition must be returned to the person if:

- he or she is declared, pursuant to the *Firearms Act 1996*, not to be a prohibited person; and
- the firearm, firearms authority or ammunition is not needed as evidence in further proceedings under any Act, or is not subject to forfeiture after a proceeding for an offence under any Act.

(FVPA s 164(1)(a)]

If FVPA s 164(1)(a) does not apply, and the period during which the person may apply under *Firearms Act 1996* s 189 for a declaration that he or she is deemed not to be a prohibited person has ended or an application has been refused, the firearm, firearms authority or ammunition, as applicable, is forfeited to the Crown, or disposed of, either in accordance with directions in the order or, if there are no such directions, in accordance with the provisions of the *Firearms Act 1996*.

(FVPA s 164(1)(b)]

If a person's weapon is surrendered pursuant to FVPA s 158, and a final order or a final recognised DVO or a final interstate DVO is made against him or her, that weapon must be returned to the owner if:

- the person is declared, pursuant to the *Firearms Act 1996*, not to be a prohibited person; and
- the weapon is not needed as evidence in further proceedings under any Act, or is not subject to forfeiture after a proceeding for an offence under any Act.

(FVPA s 164(2)(a)]

If FVPA s 164(2)(a) does not apply and the person has not applied under *Firearms Act 1996* s 189 within three months of the final order or corresponding interstate order being made, or the person has made an application which has been refused, the weapon must be forfeited to the Crown or disposed of in accordance with directions in the order.

(FVPA s 164(2)(b)]

If a firearm, weapon or other article is sold pursuant to FVPA s 164, in accordance with directions in an order, the owner of the item must be paid the proceeds of the sale.

(FVPA s 164(4)]

Effect of surrender of firearm etc if no final order made

If a person surrenders his or her firearm, weapon or other article pursuant to FVPA s 158, and one of the following occurs:

- a final order, final recognised DVO or a final interstate DVO is not made; or
- an application for a family violence intervention order or a family violence safety notice against the person is not made within a reasonable time; or
- in the case of an interstate DVO or a recognised DVO made by a police officer, that DVO expires or is revoked and no application for an interstate DVO or recognised DVO has been made against the person; and

the firearm, weapon or other article is not otherwise required as evidence in further proceedings under any Act and it is not subject to forfeiture after a proceeding for an offence under any Act, the firearm, weapon or other article must:

- if the firearm, weapon or other article must be forfeited or disposed of under any Act, it must be forfeited or disposed of in accordance with that Act; or
- otherwise returned to the person.

(FVPA s 165(1), (2)]

If a firearm, weapon or other article is sold pursuant to FVPA s 165, in accordance with directions in an order, the owner of the item must be paid the proceeds of the sale.

(FVPA s 165(3)]

Last updated: 13 February 2018

4.2 Criminal offences in the context of family violence

This section considers principles when sentencing for other criminal offences which occur in the context of family violence.

Gravity of family violence offences

In the past, perpetrators of family violence were rarely prosecuted and even where they were, they were often given lenient sentences. Today, however, the courts place greater importance on the devastating effects of family violence. Courts now acknowledge that the effects of family violence:

> are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending … it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable … Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma … the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects.
>
> [*Pasinis v R* [2014] VSCA 97, [54] (footnotes omitted)]

Similarly, in the context of a man who murdered his former partner, Bell J said:

> As King J has said in several cases and specifically so in *R v Mulhall*, 'the law will do all it can to protect women from violent domestic partners'. Therefore, the court condemns family violence in the strongest possible terms and stresses that general deterrence, denunciation and just punishment are strong sentencing considerations in this case.
> …
> Over time, sentencing for crimes of family violence involving men as perpetrators and women as victims, as they usually are, has evolved and become better informed. There was a period when such crimes often went unreported, and were not taken sufficiently seriously by police and the courts when they were reported. By modern human rights standards, this represented institutional discrimination because equal respect and protection was not properly afforded to women in the system of justice and the sentencing process.
>
> [*DPP v Paulino (Sentence)* [2017] VSC 794, [6], [19]]

For those reasons, courts now emphasise the need to condemn family violence.

[See *Laa v The Queen* [2020] VSCA 136, [51]; *Pasinis v R* [2014] VSCA 97; *Robertson v R* [2005] VSCA 190; *Earl v R* [2008] VSCA 162; *Smith v R* [2010] VSCA 192; *Hester v R* [2007] VSCA 298]

In *DPP v Portelli*, Dixon J noted that:

> It is clear that the community is intolerant of violent behaviour in such circumstances and expects the courts to send a strong message that behaviour of this kind is totally unacceptable. Women in domestic situations are entitled to feel safe from the violently abusive behaviour of their ex-partners.

[*DPP v Portelli* [2013] VSC 588, [22]]

Further, offences occurring in the context of family violence will frequently involve breaches of trust and assaults on comparatively defenceless victims, thereby increasing the seriousness of such offences.

[See *DPP v Smeaton* [2007] VSCA 256; *DPP v Muliaina* [2005] VSCA 13; *Earl v R* [2008] VSCA 162; *DPP v Huynh* [2010] VSC 37]

In assessing the totality of the circumstances around any offence committed in the context of family violence, the surrounding behaviours of the offender must be considered to assess the true gravity of the offending and for 'the sentence to vindicate the dignity of the victim'.

[*Skeates v The King* [2023] VSCA 226, [62], citing *Marrah* [2014] VSCA 119, [16]]

Instances of minor harms should be considered together to demonstrate a pattern of behaviour, especially when an offender has a significant history of committing family violence and exhibits degrading behaviour and attitudes towards victims.

[*Skeates v The King* [2023] VSCA 226, [77]]

Sentencing purposes for family violence offences

General deterrence is of primary importance for offences committed in the context of family violence.

[*See Earl v R* [2008] VSCA 162; *Hester v R* [2007] VSCA 298; *DPP v Neve* [2013] VSC 488]

One of the reasons for this is the fact that:

> women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.
>
> [*Pasinis v R* [2014] VSCA 97, [53]]

In *Pasinis v R*, Neave JA and Kyrou AJA noted that:

> General deterrence is of fundamental importance in cases of domestic violence. The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm.
>
> [*Pasinis v R* [2014] VSCA 97, [57]]

Further, in *Filiz v The Queen*, Maxwell P and Redlich JA stated:

> It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners. In such circumstances, the submission that the complainant's level of fear when being attacked by her ex-partner was less than it might have been if she had been attacked by a stranger should be rejected.
>
> [*Filiz v The Queen* [2014] VSCA 212, [23]]

Most recently, in *Laa v The Queen*, Maxwell P, Kaye and Niall JJA noted that:

> … confrontational aggravated burglaries, in the setting of an underlying domestic dispute, are all too prevalent in our society. They are calculated to cause lasting and serious physical and emotional harm to the victim. By their nature, such offences have the potential to escalate into incidents that result in serious harm and, on occasion, human tragedy. For that reason, general deterrence is a sentencing purpose of particular significance in such cases. It is important that the courts, by sentences imposed in such cases, make it clear that those persons who contemplate indulging in

> such a form of conduct will, upon apprehension, lose their right to be at liberty in society for a substantial period of time.
>
> [*Laa v The Queen* [2020] VSCA 136, [50]]

Courts have also acknowledged the need for sentencers to denounce offences occurring in the context of family violence. As Chernov JA noted in *DPP v Muliaina* [2005] VSCA 13,

> It seems plain enough that the respondent's offending conduct had the aggravating features for which the Director contended. It was brutal and cowardly and was, in the relevant sense, ongoing. It involved, in the main, ferocious physical attacks by the respondent on a much weaker victim whom the respondent claimed to love. On those occasions he treated her as if she were his slave who had to do his bidding or be severely punished if she refused. Such conduct is clearly unacceptable to this community and must be denounced by the courts. That the respondent experienced the brutal upbringing for which he contended does not make his behaviour, even though it may have been a manifestation of his uncontrolled anger, any more acceptable.
>
> [*DPP v Muliaina* [2005] VSCA 13, [21] per Chernov JA (Winneke P and Charles JA agreeing)]

Relevance of attitude of victim to offender to sentence

It has been suggested that any evidence to suggest that a victim has forgiven the offender in a case involving offences committed in the context of family violence should be treated extremely carefully. This is because:

> It is a common pattern of behaviour for perpetrators of domestic violence to express penitence and persuade their victims to reconcile … many victims are assaulted on several occasions before they summon the courage to leave an abusive relationship. Often they require considerable support in order to do so. In my view, these are matters which should be given considerable weight by a judge who is considering the weight that should be given to a victim impact statement made by a person who has been the victim of domestic violence … evidence of forgiveness of the victim of domestic violence should be treated with extreme caution.
>
> [*Hester v R* [2007] VSCA 298, [27] per Neave JA (footnotes omitted); see also *Smith v R* [2010] VSCA 192]

Despite this, in an exceptional case, the supportive attitude of the complainant, who appears to be fully independent, gives credible evidence that the offending is isolated, and wants to move ahead with her life with the offender, can be relevant as a powerful mitigating factor.

[See, e.g., *Ivanov v The Queen* [2019] VSCA 219]

Family violence as a mitigating factor

Offending by a victim of family violence, against her previous abuser, raises significant issues for sentencing, and in some cases, culpability. In *Hill v The Queen*, the Court of Appeal noted that:

> The profound and long-lasting psychological effects of domestic violence are well-established and, where a proper evidentiary basis is established, can have a very significant impact on the court's view of the culpability of an offender and may even preclude criminal responsibility.
>
> [*Hill v The Queen* [2020] VSCA 220 ('Hill'), citing *Sawyer-Thompson v The Queen* [2018] VSCA 161, [11]–[14]; *R v Bracken (Ruling No 12)* [2014] VSC 351. See also *DPP v Williams* [2014] VSC 304]

This mitigating factor must, however, be properly established on the evidence. In DPP v Williams, Hollingworth J observed:

> There is no evidence that you or the children had ever complained to anybody about family violence, before Mr Kally "disappeared". But the lack of complaint is not uncommon in cases of family violence. Family violence, by its very nature, often occurs behind closed doors. Outsiders, even close friends and family, may not be aware what

> is going on within a relationship. Family violence is not limited to physical abuse; it also includes sexual abuse and various forms of psychological abuse, including intimidation, harassment, damage to property, and threats of abuse. A number of acts that form a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.
>
> [*DPP v Williams* [2014] VSC 304, [20]]

Ultimately, Hollingworth J was satisfied that the deceased's behaviour was "abusive, belittling and controlling, and involved both physical and psychological abuse".

Conversely, in *Hill*, the sentencing judge was not prepared to accept the offender's claim that there was a history of family violence, where the only evidence of that claim was in a psychological report which recorded the offender's account of her history with the victim. In the absence of other evidence, such as hospital admissions, the judge considered that this material was self-serving and insufficient to establish a history of family violence.

Where there is a paucity of evidence, the court may be left in a position where it cannot say whether or not there was a history of family violence, but would need to sentence on the basis that a history of family violence had not been proved, consistent with the rules relating to proof of mitigating factors in sentencing.

[See *Hill v The Queen* [2020] VSCA 220, [28]–[32], [42]–[43]]

Last updated: 30 November 2020

5 Social context

5.1 Terminology

This chapter includes references to victim of family violence, perpetrator of family violence, affected family member, protected person and respondent. In some sections, content provided by different family violence agencies refers to women victims of family violence and male perpetrators of family violence. This reflects the nature of their research and the reality of family violence as a gendered crime. Inclusion of gendered references in this chapter should not preclude recognition of the fact that there are male victims of family violence and female perpetrators.

Last updated: 3 March 2011

5.2 Nature of family violence

This section looks at the nature and dynamics of family violence, what it is, the factors and features of family violence, its prevalence, its impact on victims, children and the community, and some of the more common myths about family violence.

Information about the nature and dynamics of family violence is also available from the AVERT Family Violence resource, an Australian Government produced multi-disciplinary family violence training package.

5.2.1 What is family violence?

Under the *Family Violence Protection Act 2008*, family violence is behaviour that controls or dominates a family member in any way, and causes them to feel fear for their own, or another family member's, safety or well-being. It can include physical, sexual, psychological, emotional or economic abuse, as well as any behaviour that causes a child to hear, witness or otherwise be exposed to the effects of that behaviour.

(FVPA s 5(1)]

This definition is significantly broader than that adopted in the predecessor to the FVPA, the *Crimes (Family Violence) Act 1987*, which relied on a narrower formulation of family violence, namely:

> (a) the person has assaulted a family member or caused damage to property of a family member and is likely to again assault the family member or cause damage to property of the family member; or
>
> (b) the person has threatened to assault a family member or cause damage to property of a family member and is likely to assault the family member or cause damage to property of the family member; or
>
> (c) the person has harassed or molested a family member or has behaved in an offensive manner towards a family member and is likely to do so again.

[*Crimes (Family Violence) Act 1987* s 4(1)]

The term 'family violence', rather than 'domestic violence', was preferred in the FVPA as it is the term that best encompasses the various forms of violence that may take place between family members.

[Second Reading Speech to the Family Violence Protection Bill 2008, 26 June 2008, Hansard, Legislative Assembly, p2645]

Family violence is also the term generally preferred by indigenous communities, as it is seen to more accurately describe the broader range of family members who may perpetrate violence. It also allows for a wider concept of violence. See 5.7 Indigenous people for further discussion.

For more information on the Victorian statutory definition of family violence, see 1.1 Family violence.

Physical abuse

Physical abuse can include:

- direct assault on the body, such as strangulation or choking, shaking, eye injuries, slapping, pushing, spitting, punching or kicking;
- using weapons, including objects;
- assaulting children;
- locking the victim out of the house; and
- sleep and food deprivation.

[National Council to Reduce Violence against Women and their Children (2009), Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021, Canberra, p2]

Perpetrators of family violence often choose to inflict physical injuries on body parts that are hidden by clothing. Female victims of family violence often suffer injuries and bruising to their breasts, abdomen and genital regions, reinforcing the nature of family violence as a form of deliberate and controlled violence.

The Victorian Law Reform Commission observed that physical forms of family violence may also include actions which affect certain people particularly, for example, taking away the wheelchair of a person with a disability. See 5.5 Specific considerations for diverse groups
[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report,* Melbourne, at 2.5]

Sexual abuse

Sexual abuse can include:

- any form of pressured/unwanted sex or sexual degradation by an intimate partner or ex-partner, such as non-consensual sexual activity;
- causing pain during sex;
- assaulting genitals;
- coercive sex without protection against pregnancy or sexually transmitted disease;
- forcing the victim to perform sexual acts unwillingly (including taking explicit photos without their consent);
- criticising, or using sexually degrading insults.

[National Council to Reduce Violence against Women and their Children (2009), Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021, Canberra, p2]

Sexual abuse is an underreported form of violence generally, and the nature of family violence can make it particularly difficult for victims to disclose this type of abuse.

For example:

- victims from culturally and linguistically diverse (CALD) communities may not always view or understand sexual abuse as family violence;

- victims with cognitive impairments may not understand that their sexual abuse is family violence;
- older victims of family violence or people in same sex relationships might be too embarrassed to disclose this form of abuse.

Some of the barriers to reporting family violence for diverse groups are discussed further in:

5.6 - Culturally and Linguistically Diverse people

5.7 - Indigenous people

5.8 - People with disabilities (cognitive, physical or mental health)

5.9 - People in same-sex relationships

5.10 - Abuse of older people

Emotional or psychological abuse

Emotional or psychological abuse means behaviour towards another person that torments, intimidates, harasses or is offensive to the other person (FVPA s 7).

In addition to the examples listed in s 7 of the FVPA, psychological abuse can include:

- emotional abuse:
- blaming the victim for all relationship problems;
- constantly comparing the victim with others, in order to undermine self-esteem and self-worth;
- sporadic sulking;
- withdrawing all interest and engagement (for example, weeks of silence); and
- emotional blackmail;
- verbal abuse:
- swearing and continual humiliation, either privately or publicly, with attacks following clear themes that focus on intelligence, sexuality, body image and capacity as a parent and spouse;
- social abuse:
- systematic isolation from family and friends through techniques such as ongoing rudeness to family and friends to alienate them;
- instigating and controlling the move to a location where the victim has no established social circle or employment opportunities; and
- forbidding or physically preventing the victim from going out and meeting people;
- psychological abuse:
- driving dangerously;
- destroying property;
- abusing pets in front of family members;
- making threats regarding custody of children; and
- asserting that the police and justice system will not assist, support or believe the victim;
- spiritual abuse:
- denying and/or misusing religious beliefs or practices to force victims into subordinate roles; or

- misusing religious or spiritual traditions to justify physical violence or other forms of abuse.

[National Council to Reduce Violence against Women and their Children (2009), Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021, Canberra, p2]

Emotional or psychological abuse is a powerful way by which perpetrators of family violence exercise power and control over their victims. Victims of family violence who have experienced emotional or psychological abuse frequently talk about how this form of violence destroys their self-esteem and makes them feel worthless and as if they deserved the violence.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne, at 2.10]

Economic abuse

Economic abuse includes denying a person financial autonomy that they would otherwise have, or withholding or threatening to withhold necessary financial support from a person (FVPA s 6). The FVPA includes a range of examples of economic abuse.

Economic abuse, like emotional or psychological abuse, is a way for perpetrators of family violence to exert control over their victims. The Victorian Law Reform Commission noted comments from victims of family violence about how they were unable to purchase essential items, such as food, clothing or sanitary products, or undertake other everyday activities.

[Victorian Law Reform Commission (2004), *Review of Family Violence Laws: Consultation Paper*, Melbourne, at 2.19]

A lack of financial independence can also impede a person's ability to leave an abusive relationship.

Financial abuse is of particular concern in CALD communities, especially coupled with the social isolation some people from CALD backgrounds experience. This can take the form of one partner controlling the other's finances, or using dowry-related claims to make coercive demands for further money or gifts from a woman and her extended family. The resulting lack of financial independence, both from a woman and her family, may act as a barrier to their leaving their abusive partners.

[Victoria, Royal Commission into Family Violence, Volume V Report and recommendations (2016), 112–113]

Technology-facilitated abuse in the context of family violence

The growth in the use of smartphones, drones and social media have opened new options for perpetrators to commit family violence. Forms of technology-facilitated abuse include:

- Verbal threats (very common due to lack of evidence left behind after communication)
- Persistent contact (such as excessively texting or emailing victim)
- Posting demeaning or humiliating content about victim on public online forums
- Posting or threatening to post intimate images or videos (taken initially with or without the consent of the subject) of victim on online forums, or sharing or threatening to share such content with acquaintances, other family members, friends, employers or colleagues
- Using GPS enabled technology to track the victim's location and monitor behaviour
- Monitoring behaviour and communication (e.g. checking bank accounts, text messages, phone records, social media accounts, and installing spyware on devices without consent)
- Watching victim (e.g. using cameras to monitor the victim)
- Intercepting calls and messages on the victim's devices

[Delanie Woodlock, *SmartSafe – Technology-Facilitated Stalking: Findings and Recommendations* (2013) Domestic Violence Research Centre Victoria, at pp 18]

Due to the pervasive influence that information technology affords perpetrators into the lives of victims, technology-facilitated abuse typically continues beyond the isolation usually associated with more 'traditional' forms of family violence. Delanie Woodlock describes this prevalence as creating a feeling of 'omnipresence' of perpetrators in their victims' lives.

[Delanie Woodlock, *ReCharge: Women's Technology Safety, Legal Resources, Research & Training* (2015), Domestic Violence Research Centre Victoria, Women's Legal Service NSW, WESNET, at pp 14–15]

Technology-assisted abuse can also occur alongside emotional, sexual, physical or financial abuse, or may be used to facilitate these forms of abuse.

[Delanie Woodlock, *SmartSafe – Technology-Facilitated Stalking: Findings and Recommendations* (2013) Domestic Violence Research Centre Victoria, at pp 34–35]

Research indicates that technology-facilitated abuse is becoming increasingly prominent and poses a significant issue in the family violence context. Almost all workers in the sector surveyed in the 2015 'ReCharge' study agreed that technology was being used to stalk, harass or threaten their clients.

[Delanie Woodlock, *ReCharge: Women's Technology Safety, Legal Resources, Research & Training* (2015) Domestic Violence Research Centre Victoria, Women's Legal Service NSW, WESNET, at pp 14–15]

Last updated: 08 April 2019

5.2.2 Forms of family violence

Family violence takes many forms and occurs within a range of family relationships, including between intimate partners, siblings and in inter-generational family situations.

It can also occur within relationships which may not traditionally be thought of as 'family relationships'. Classification of violence as 'family' violence can be contingent upon the cultural understanding of family relationships by the community in which the violence is perpetuated.

One of the most common forms of family violence is intimate partner violence.

Intimate partner violence

Intimate partner violence is defined as:

> behaviour within an intimate relationship that causes physical, sexual or psychological harm, including acts of physical aggression, sexual coercion, psychological abuse and controlling behaviours.

[World Health Organisation/London School of Hygiene and Tropical Medicine (2010), *Preventing Intimate Partner and Sexual Violence against Women: Taking Action and Generating Evidence*, Geneva, p11]

In Victoria, intimate partner violence by males is the main cause of preventable death, disability and illness for women aged 15–44, costing the state approximately two billion dollars annually.

[VicHealth (2004), *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings*, VicHealth and Victorian Department of Human Services, Melbourne]

From 1 January 2000–31 December 2010 nearly half of all homicides in Victoria were linked to family violence. A significant proportion of these deaths involved intimate partner homicides (47 per cent). Females were far more likely to be killed than males, with 68 per cent of family violence related deaths during this period involving female victims of intimate partner homicide.

[Walsh, C, McIntyre, S-J, Brodie, L, Bugeja, L & Hauge, S (2012), *Victorian Systemic Review of Family Violence Deaths – First Report*, Coroners Court of Victoria, Melbourne, Victoria]

Behaviours which may constitute intimate partner violence can be categorised into different typologies of violence.

Categories of intimate partner violence

Some researchers have categorised different types of intimate partner violence, with typologies based on the role of violence in the context of the relationship. The Kelly and Johnson Typology of Intimate Partner Violence classifies intimate partner violence into four categories. These are:

- **Coercive Controlling Violence** – refers to a pattern of emotionally abusive intimidation, coercion and control coupled with physical violence against partners. Coercive controlling violence encompasses the traditional description of intimate partner violence as a pattern of behaviour used to gain and maintain power and control
- **Violent Resistance** – this occurs where a person who is in a relationship with a violent, coercively controlling partner responds with violence. An example of such a situation may be where a partner uses violence in self-defence
- **Situational Couple Violence** – refers to where an argument between partners escalates into violence. This type of violence is not part of a wider pattern of power and control in the relationship. It usually arises where partners have poor conflict and anger management skills
- **Separation-Instigated Violence** – this violence occurs when partners separate and there is no prior history of violence in the relationship. It may occur, for example, where a partner is shocked at being left and suddenly lashes out at a partner.

[Kelly, J & Johnson, M (2008), '*Differentiation among types of intimate partner violence: Research update and implications for interventions*', 46 Family Court Review, pp476–499]

While identifying different categories of intimate partner violence may be useful in developing a more nuanced understanding of the dynamics of family violence, caution has been expressed by a number of commentators that such an approach should not:

- draw attention away from the facts in a particular case by focussing on the features of a particular category;

  [Chisholm, R. (2008), *Family Courts Violence Review*, Attorney-General's Department]
- result in cases of more subtle emotional abuse being treated less seriously; or

  [Harland, A, Cooper, D, Rathus, Z, Alexander, R, *Family Law Principles*, Thomson Reuters]
- increase the burden of proof on a party alleging they were subject to coercive controlling violence, where one party argues that the violence was situational or mutual.

[Bailey, A, ('2007), *Separating Safely From Situational Violence: Responses to 'Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study'* 77 Family Matters 26, Australian Institute of Family Studies]

Last updated: 29 March 2018

5.2.3 Features of family violence

The following sections summarise research findings concerning the features of family violence.

See also the discussion in the AVERT Family Violence resource.

Family violence is gendered violence

Family violence is overwhelmingly experienced by women at the hands of men known to them, usually current or former partners and relatives. The preamble to the FVPA acknowledges this evidence base, noting:

> that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons;

The National Council to Reduce Violence against Women and their Children acknowledged that while men and women can commit – as well as be victims of – family violence or sexual assault, research shows that the overwhelming majority of violence and abuse is perpetrated by men against women. As the Council noted, '[t]he biggest risk factor for becoming a victim of sexual assault and/or domestic violence is being a woman.'

[The National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*, Canberra, at 25–26]

Historical gender dynamics have contributed to the gendered nature of family violence. For example, the Victorian Law Reform Commission observed that:

- the distinction between public and private spheres can still cause some people to consider violence in the home a private issue, rather than one in which the state should interfere; and
- for some victims of family violence, social sanctions prevent open discussion of family violence, and the fact that much violence occurs in private compounds their isolation and vulnerability.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne, at 2.58]

Acknowledging the gendered nature of family violence should not, however, preclude recognising that men can also be victims of family violence. This is discussed further in 5.4.5 - Responding to men who claim to be victims of family violence.

Statistical information about the number of women who experience family violence from a current or former partner is discussed in 5.2.4 - Prevalence of family violence.

Family violence involves coercive power and control

Family violence is different from other forms of physical violence. It is characterised by repeated coercive and controlling behaviour which limits, directs and shapes a person's thoughts, feelings and actions. In this way it is different from other forms of violent behaviour, which are more likely to be isolated incidents (see also the preamble to the FVPA).

Perpetrators often combine subtle and overt methods to maintain their control over a victim; they want them to 'act, talk and think' in ways that please them. These tactics are assisted by the fact women are socialised to be passive in the face of aggression and are not usually as physically strong as men.

Victims of family violence often learn to identify patterns of violence, when smaller incidents will escalate into more serious attacks, and the triggers that can set a perpetrator off. In this context, intimidation and harassment can continue without others noticing the intimidation.

Perpetrators usually have control over their actions when they are violent, although they might claim that they did not know what they were doing or were 'out of control' when they were violent. Research suggests that this is rarely the case, and that such claims are a way for perpetrators to attempt to minimise their responsibility and shift the blame onto someone else. Indeed, the fact that many perpetrators are not violent towards anyone other than a particular family member or members demonstrates that perpetrators elect to be violent in some situations.

See 5.4 Men for discussion of how judicial officers can respond to allegations by a respondent that the family violence was just a 'one-off' incident, or that the affected family member was also violent.

Family violence is cyclical

Another feature of intimate partner violence, most commonly associated with battered women, is the 'cycle of abuse'. This refers to the cyclical use of violence in a violent relationship. The cycle of abuse generally progresses through three phases:

- phase 1: tension builds and the victim's perceptions of danger increase;
- phase 2: tension culminates in a violent incident;
- phase 3: period of loving and remorseful behaviour by the perpetrator that seduces the victim to remain in the relationship. The tension then begins to build again.

Over time, the tension building phase can become more common and third phase can decline. The third phase can also be characterised by a lack of tension or violence, with no observable loving and remorseful behaviour.

The cycle can take varied periods of time, but tends to speed up the longer the relationship lasts. It can also involve progressively more severe, cruel and diverse forms of abuse.

[Walker, L (2009), *The Battered Women Syndrome, 3rd ed*, Springer Publishing Company, New York]

The cyclical nature of family violence is demonstrated in the diagram below.

[Avalon: A Center for Women and Children, viewed on 29 November 2012, http://avaloncenter.org/get-informed/index.php

Power and Control wheel

While the 'cycle of abuse' may be relevant in some circumstances, it does not apply universally. Some victims of family violence criticise the model for describing the violence as cyclical, rather than as a constant factor in their relationship, and for portraying outbursts of violence as a response to intolerable stress.

In response to these criticisms, the Duluth Domestic Abuse Intervention Project in Minnesota developed the 'Power and Control Wheel'. This depicts violence and abuse as intended to control the partner's actions, and as part of a consistent pattern of behaviour, rather than isolated incidents of abuse, or the cyclical build up of tension, leading to repeated explosions.

There is also a counterpart 'Equality Wheel', showing what a non-violent relationship looks like. See both images on the Family Violence resource page.

Retaliatory violence and self-defence

Victims of family violence sometimes engage in behaviours as a response to violence by perpetrators which may appear nonsensical or which threaten the legitimacy of their 'victimhood' in the eyes of observers. Dr Linda Neilson comments that documented reactive behaviours, such as retaliating against physical or psychological violence with violent behaviour, aggressiveness or self-defensive behaviours which appear excessive, are apt to cause confusion but need to be understood as different to the primary aggressor's behaviour.

Dr Neilson calls this form of reactive behaviour 'resistance violence'. Examples of documented resistance violence can include:

- Violence as a response to perceived imminent threats
- Violence which is a response to psychological harm resulting from prior family violence (for instance, violence associated with post-traumatic stress)
- Violent behaviour undertaken in an attempt to escape the relationship
- Violence as means of standing up to the primary aggressor

The primary characteristic which distinguishes resistance violence from the primary aggression of a family violence perpetrator is the lack of coercive or controlling intent on the part of the person committing the resistance violence. Dr Neilson argues that failure to properly distinguish resistance violence from primary aggressive violence has led to a failure to adequately protect victims from primary aggressors and an overly punitive response to victims by legal systems and professionals.

[Neilson, Dr L (2017) *Responding to Domestic Violence*, Canadian Legal Information Institute at 4.4.7, 4.4.9, 5.1]

Last updated: 29 March 2018

5.2.4 Prevalence of family violence

The following sections consider the prevalence of family violence, drawing from:

- Population surveys
- Police and court statistics
- Homicide data

When contemplating the prevalence of family violence it should be remembered that most incidents of family violence go unreported. Reasons for the relatively low levels of police reporting in family violence incidents are discussed below under **Underreporting of family violence incidents**.

Population surveys

The 2004 International Violence against Women Survey included Australia. It surveyed women aged between 18 and 69 about their experiences of physical and sexual violence. Some of the findings included:

- 34 per cent of Australian women had experienced some form of violence by a current or previous partner
- of 6,677 women surveyed, 57 per cent reported experiencing at least one incident of physical or sexual violence in their lifetime
- 29 per cent of women reported they had experienced physical and/or sexual violence before the age of 16.

[Australian Institute of Criminology (2004), *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey (IVAWS)*, Canberra]

In 2005, the Australian Bureau of Statistics interviewed 11,900 women and 4,600 men across Australia about their experiences of violence and safety (Personal Safety Survey). It found that females are more likely than males to experience an act of physical or sexual violence (actual, attempted or threatened) perpetrated by a current or former partner:

- 4.7 per cent of females (363,000) were physically assaulted in the 12 months prior to the survey and 31 per cent (73,800) of these women were assaulted by their current or former partner;
- 10 per cent of men (779,800) were physically assaulted in the 12 months prior to the survey but only 4.4 per cent (21,200) of these men were assaulted by their current or former partner;
- 2.1 per cent of women (160,100) and 0.9 per cent of men (68,100) aged 15 years and over have experienced violence from a current partner;
- 15 per cent of women (1,135,500) and 4.9 per cent of men (367,300) have experienced violence from a former partner;

- 1.6 per cent of women (126,100) experienced sexual violence in the 12 months prior to the survey and 21 per cent of these women (21,500) identified a previous partner as the perpetrator.

[Australian Bureau of Statistics (2006), *Personal Safety Survey, Australia, 2005 (reissue)*, cat. no. 4906.0, Australian Bureau of Statistics, Canberra]

Rates of family violence are higher among women from Aboriginal and Torres Strait Islander (ATSI) communities and women from culturally and linguistically diverse (CALD) backgrounds. ATSI women are nearly 40 times more likely to be a victim of family violence than non-ATSI women. Accurate victimisation rates for CALD women are difficult to obtain as reporting is influenced by:

- cultural and religious barriers, including different conceptualisations of 'family violence';
- language & information barriers;
- structural barriers.

[Mouzos, J & Makkai, T (2004), *'Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)'*, Research and Public Policy Series, no. 56]

The Victorian Family Violence Database Volume 4: Nine Year Trend Analysis reported that, among women who were assaulted in the most recent 12 months:

- 31 per cent were assaulted by a current or former partner;
- 28 per cent by a male family member; and
- 12 per cent by another male person.

[Victorian Family Violence Database 1999–2008 (2009), p16]

In 2010, female victims of assault were more likely to be have been assaulted by family members than male victims. 41 per cent of female assault victims were assaulted by a family member, compared to 11 per cent for males.

[Australian Bureau of Statistics (2010), *Recorded Crime – Victims, Australia 2010*, cat. no. 4510.0, Australian Bureau of Statistics, Canberra]

Homicide data

There is a strong link between family violence and homicide. Although homicide victims in Australia are more often men, female victims of homicide are far more likely to be killed by a current or former intimate partner.

The most recent published data from the Australian Institute of Criminology's National Homicide Monitoring Program shows that throughout 2008–09 and 2009–10:

- 73 per cent of intimate partner homicides involved a female victim; while
- males were more highly represented in homicides which involved friends or acquaintances (86 per cent of acquaintance homicides) or strangers (78 per cent of stranger homicides).

[Australian Institute of Criminology, *Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program Annual Report* (2013) Canberra, p18]

Indigenous people are overrepresented, both as victims and offenders, in violent crime and homicide data. The Australian Institute of Criminology, using 11 years of National Homicide Monitoring Program data, compared indigenous homicides to non-indigenous homicides and found that indigenous homicides were more likely to:

- occur in rural locations;
- involve females as offenders and victims;
- be a result of a domestic altercation; and

- result from an alcohol-related incident.

[Australian Institute of Criminology (2009), *Domestic-related Homicide: Keynote Papers from the 2008 International Conference on Homicide*, Canberra]

Underreporting of family violence incidents

Statistics do not accurately reflect levels of family violence for a number of reasons. Barriers such as fear, isolation, lack of support and shame mean that many women experiencing family violence are more likely to deal with the issues themselves or talk to family and friends rather than seek outside support.

The Australian Bureau of Statistics' (1996) Women's Safety Australia Survey found that:

- only 4.5 per cent of women who were physically assaulted contacted a crisis organisation
- 19 per cent of women who were physically assaulted in the previous 12 months contacted the police
- for 42 per cent of women, the main reason they gave for not contacting police after the last incident was that they wished to deal with it themselves
- 58 per cent of women physically assaulted in the previous 12 months discussed their experience with a friend or neighbour.

The Australian Bureau of Statistics Personal Safety Survey found that:

- only 36 per cent of women who were physically assaulted in the previous 12 months reported it to the police
- 82.9 per cent of women who were physically assaulted by a current partner in the previous 12 months did not report it to the police.

[Australian Bureau of Statistics (2006), *Personal Safety Survey, Australia, 2005 (reissue),* cat. no. 4906.0, Australian Bureau of Statistics, Canberra]

The Australian component of the International Violence Against Women Survey (IVAWS) found that only 14 per cent of women whose partner had inflicted physical or sexual violence on them in the past 12 months had reported it to police.

[Mouzos, J & Makkai, T (2004), 'Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)', *Research and Public Policy Series*, no. 56, Canberra]

Reporting rates have increased over the past decade, but remain low. One possible explanation for the low reporting rate is that victims of physical or sexual violence committed by current partners may be less likely to perceive the incident as a crime than if it were committed by a stranger.

Other reasons include:

- a belief that the incident is too minor to report;
- shame or embarrassment;
- a desire to deal with the issue by themselves;
- fear of the perpetrator or of the consequences of reporting the incident;
- cultural barriers; and
- concern about having to relive the event by re-telling the story to multiple parties.

[Cited in Chadwick, H. and Morgan, A. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, Canberra, p2]

Some victims of family violence may be reluctant to report assaults or apply for an intervention order because:

- the police or court system may have treated them insensitively when they previously sought help;
- past intervention orders may have been ineffective;
- they may not feel comfortable in telling their traumatic story to a court;
- they may fear that an order will trigger an escalation of the violence;
- they fear the consequences for their husband/partner (such as being sent to jail); or
- they fear not being believed.

Family violence victims have different motivations and considerations when it comes to holding the perpetrator accountable. Many want to stay with the abuser, 'keep the family together', maintain the relationship and/or keep their children at the same school. Many family violence victims do not want the relationship to end; they simply want the violence to stop.

Last updated: 3 May 2013

5.2.5 Risk indicators for family violence

There is no single cause of family violence. The National Council to Reduce Violence against Women and their Children reported that violence against women and their children arises from a complex interaction of many factors which operate at the community and societal levels as well as the individual and relationship levels.

[National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children 2009–2021*, Canberra, p8]

There are, however, several risk factors which have been associated with perpetrators of family violence. Researchers have identified that, among women who had experienced family violence, the most commonly reported aspects of the male perpetrator's behaviour (and therefore risk factors for violence) were drinking habits, general aggression levels and controlling behaviour.

[Mouzos, J & Makkai, T (2004), 'Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)', *Research and Public Policy Series*, no. 56, Canberra]

The following sections discuss some of the risk factors for family violence in relation to:

- Social norms and attitudes;
- Situational factors;
- Early exposure to family violence; and
- Lack of access to support services

Family violence professionals refer to a range of evidence based risk factors for family violence as part of a comprehensive risk assessment process. See the Family Violence resource page for further guidance. See, also, the AVERT Family Violence resource, Screening, Risk Assessment and Safety Planning.

Social norms and attitudes

Family violence is a gendered social phenomenon propagated by social norms and attitudes which support the use of violence. Stereotypical conceptualisations of masculinity and gender roles sanction the use of violence against women. In this vein, violence against women is seen as an expression of masculinity that displays men's control and authority over women.

Men who hold traditional gender role attitudes and negative attitudes towards women are more likely to engage in violence against women. Thus, there is a greater risk of violence against women in communities where:

- traditional or 'macho' constructions of masculinity exist and are promoted;
- men are considered to be the primary wage earners and heads of the household, whereas a woman's place is in the home;
- excess alcohol consumption is encouraged; and
- men are pressured to conform to these notions of masculinity.

[Morgan, A. and Chadwick, H. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology p6; World Health Organisation/London School of Hygiene and Tropical Medicine (2010), *Preventing Intimate Partner and Sexual Violence against Women: Taking Action and Generating Evidence*, Geneva]

The National Council to Reduce Violence against Women and their Children observed that:

> Sexual assault and domestic and family violence affects people of all races, classes, abilities and cultures. Socially learned attitudes and beliefs that men should have authority over women, and that violence is an acceptable way to gain control, can authorise violence against women within every culture.

[National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children 2009–2021*, Canberra, p8]

Research carried out in Victoria also found that attitudes which support violence are more common among males who are less supportive of gender equality. Similarly, women with traditional gender role attitudes are less likely to report violence.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation, Melbourne, Summary of Findings]

Power imbalances between men and women can be greater when additional factors such as disability or language barr
The increased vulnerability of individual women from diverse groups to family violence is discussed in 5.5 - Specific co
diverse groups.

Morgan and Chadwick found that while negative attitudes towards women differ across cultural groups, they are:

• more commonly expressed among adolescent males than older males;

• stronger in particular masculine contexts, such as sporting subcultures, and are facilitated by group socialisation;

• influenced by exposure to pornography as well as television, music and film; and

• more likely among children who witness or are subjected to violence.

[Cited in Morgan, A. and Chadwick, H. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, p7]

Research suggests that while there have been improvements, attitudes condoning or trivialising violence against women persist. For example, the VicHealth study found that while most people do not believe that physical violence against women is justified under any circumstances, approximately 20 per cent of respondents to the survey were prepared to excuse physical and sexual violence where they believed that perpetrators had temporarily lost control or truly regretted their actions.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation, Melbourne, Summary of Findings]

Situational factors

Situational factors, while not a direct cause, may increase the risk of family violence. Situational factors include family or relationship problems, socioeconomic problems and alcohol or drug abuse.

Separation

Separation is a high-risk period for people experiencing family violence. Research suggests that women are particularly at risk within the first two months of separation from their partner.

Victims often stay with a violent perpetrator because they know that leaving will increase the risk of violence. This does not indicate that the allegations of violence should be taken less seriously; often the opposite is true.

The victim of family violence is generally better placed to assess the risk of violence escalating if they attempt to leave the relationship. See the discussion in 5.2.7 Myths about family violence and potential for unconscious prejudice.

Socioeconomic deprivation

There are higher levels of family violence among economically disadvantaged and poverty stricken women. Social stresses, due to inadequate finances or other similar problems, may increase tensions in a family situation. Violence is not always caused by stress but may be one way that some people respond to stress. Dr Michael King has observed the role that socioeconomic factors play in differing rates of family violence and their effects, noting that:

- children from lower socioeconomic backgrounds witness violence against a parent one and a half times more frequently than those from upper socioeconomic backgrounds; and
- young women from lower socioeconomic backgrounds are more likely to have been subjected to relationship violence than those from higher socioeconomic backgrounds.

[King, Dr M. (2009), *Solution-Focused Judging Bench Book*, Australasian Institute of Judicial Administration, p100]

The Family Violence Risk Assessment and Risk Management Framework includes unemployment as a risk factor for family violence, observing: Unemployment is associated with an increased risk of lethal assault, and a sudden change in employment status – such as being terminated and/or retrenched – may be associated with increased risk.

[Department of Planning and Community Development (2007), *Family Violence Risk Assessment and Risk Management Framework*, Melbourne, p54]

Substance abuse

Alcohol and/or drug abuse is a contributing risk factor to both perpetrating and experiencing family violence. Research suggests that women whose partners frequently consume excessive amounts of alcohol are more likely to experience violence. The relationship between alcohol consumption and family violence is even greater within indigenous communities. It must be remembered, however, that not all people who consume alcohol become violent. One explanation for the link between alcohol and family violence is that, because alcohol consumption lowers inhibitions and increases feelings of aggression, it may enable an incident to escalate from verbal to physical abuse.

[Morgan, A. and Chadwick, H. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, p7]

The Family Violence Risk Assessment and Risk Management Framework includes substance misuse/abuse (by perpetrator) as a risk factor for family violence, explaining that:

> Serious problems with illicit drug, alcohol or prescription drugs and inhalants lead to impairment in social functioning and create a risk of family violence. This includes temporary drug-induced psychosis.

[*Family Violence Risk Assessment and Risk Management Framework*, p54]

Low levels of educational attainment

Low levels of educational attainment are associated with an increased risk of perpetrating and/or experiencing family violence. Low educational levels may restrict women's agency and access to resources, making them more accepting of violence.

Disparities in levels of educational attainment between male and female partners may also lead to increased rates of family violence. Men may use violence to gain power in a relationship where their female partner has a higher level of education.

[World Health Organisation/London School of Hygiene and Tropical Medicine (2010), *Preventing Intimate Partner and Sexual Violence Against Women: Taking Action and Generating Evidence*, World Health Organisation, Geneva, pp21–22, 28]

Research has attempted to link seasonal changes, calendar events and major sporting events to the rate of reported incidents of family violence. Australian research suggests that while there is some variation across states and territories:

- there are more reported incidents in December and January;
- there are more reported incidents on certain calendar events and holidays, including New Year's Day, the Christmas period and other public holidays, including Melbourne Cup Day; and
- some states experience higher rates of reported incidents on dates which coincide with significant sporting events, but the findings are inconsistent and not as strong as those from international research.

Explanations for this have focussed on:

- the increased contact between victims and perpetrators during holiday periods;
- increased issues associated with child contact arrangements for estranged families; and
- increased alcohol consumption.

[Morgan, A. and Chadwick, H. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, p7]

Early exposure to family violence

Children who experience or witness family violence are more likely to perpetrate or experience family violence as adults. Men who witness family violence as children are 2–3 times more likely than other men to perpetrate violence.

[World Bank (2011), *World Development Report 2012: Gender Equality and Development*, World Bank, Washington, p 151]

Exposing a child to family violence is a form of family violence, regardless of whether the child is the target of such violence (s 5(1)(b) FVPA). Exposure to family violence as a child shapes children's understandings of gender roles and acceptable behaviour in intimate relationships. Individual attitudes which support violence are transferred across generations:

> There is evidence that suggests that attitudes and behaviours are learned as children through family life and social norms, and have serious implications for children being raised in families where violence is occurring. In one study, women experiencing violence observed strong similarities in the behaviours and attitudes of their sons to those of their ex-partners. All observed that their sons used the same or similar words as their fathers when they verbally abused them. The sons showed a similar lack of respect and contempt for their mothers. Most women felt their sons had learnt these

attitudes and behaviours from their fathers.

[National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children*, 2009–2021, Canberra, p9]

Childhood experience of abuse increases the likelihood of being assaulted or harmed as an adult. Research has shown that women who reported experiencing some form of physical or sexual abuse during childhood are one and a half times more likely to report experiencing some form of violence in adulthood.

[Mouzos, J. & Makkai, T. (2004), *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey*, Canberra]

See further 5.3 Children for a discussion of the impacts of family violence on children.

Lack of access to support services

Research suggests that more than 80 per cent of women who experience family violence do not contact a specialised support agency, but are more likely to contact family and friends.

[Mouzos, J. & Makkai, T. (2004), *Women's experiences of male violence: Findings from the Australian component of the international violence against women survey*, Canberra]

Potential barriers to a victim seeking help from support services include:

- a lack of available services;
- the cost or limited availability of transport;
- limited awareness of available services;
- a lack of culturally appropriate services;
- a perception that services will be unsympathetic or judgemental;
- shame or embarrassment;
- fear that they will not be believed;
- fear of the perpetrator and the potential for retribution; and
- a perception that services will not be able to offer assistance.

[Morgan, A. and Chadwick, H. (2009), *Key issues in domestic violence*, Australian Institute of Criminology at 8]

See further 5.5 Specific considerations for diverse groups for the particular barriers to assistance faced by victims of family violence from diverse groups (e.g. Indigenous people, CALD people, people with disabilities, people in same-sex relationships and the elderly).

Victims of family violence living in rural and remote communities often face additional factors that can inhibit their access to support services and keep them trapped in violent relationships. Such factors include:

- geographic isolation, especially for those with no access to private transport;
- few, if any, family violence advice and support services;
- economic dependence (for example, women living on farms may have limited access to funds or the family finances);
- increased prevalence of firearms, especially for those living on farms;
- reduced access to legal services due to the absence of legal aid and community lawyers;
- fear about the violence becoming public knowledge among a small community (especially when the perpetrator is well-know in the local community);and
- a lack of alternative accommodation.

Family and Domestic Violence Outreach services (http://www.housing.vic.gov.au/homelessness-and-family-violence/getting-help) are located across Victoria and can provide information, support and referral to people in rural areas experiencing family violence.

Last updated: 3 May 2013

5.2.6 Impact of family violence

The effects of family violence on individuals include physical, mental, psychological and economic harms.

The following sections consider the impacts of family violence on particular groups.

See also the discussion in the AVERT Family Violence resource.

Impact on women

Research from Victoria shows that family violence is the leading cause of death, disability and illness in Victorian women aged 15 to 44 years, outranking obesity, smoking and high blood pressure.

[VicHealth (2004), *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence*, Melbourne]

Direct effects of family violence on women can include physical injuries, disability, miscarriage, sexually transmitted diseases and homicide. Less direct physical outcomes include headaches, irritable bowel syndrome and self-harming behaviour, such as substance abuse or unprotected sex.

The mental health effects of family violence include:

- loss of self esteem and decision making ability;
- depression;
- anxiety;
- phobias; and
- self-harm.

Family violence can also lead to post-traumatic stress disorder, with sufferers experiencing nightmares, sleep disorders, intrusive thoughts, emotional detachment and anxiety. The impacts of family violence on mental health, particularly post-traumatic stress disorder, can interfere with an affected family member's ability to give evidence in family violence proceedings. See the Family Violence resource page and the AVERT Family Violence resource for further discussion.

Mothers who are victims of family violence may be affected in ways that interfere with their ability to provide for their own or their children's needs. Family violence can undermine the emotional attachments between mother and child or, more directly, prevent the mother from caring for her child.

Impact on children

The Australian Institute of Criminology found that, for 2003–04, children were recorded as being present at 44 per cent of family violence incidents.

[Australian Institute of Criminology (2006), *Children Present in Family Violence Incidents*, Crime Facts Info no.137, Canberra]

The impact of family violence on children is discussed in detail in 5.3 - Children, but in summary:

- witnessing family violence can cause social and psychological health problems;
- children who witness family violence fear for their own safety and that of their abused parent;

- children may be direct victims of family violence, resulting in injuries or death;
- many children (estimated at between 30 and 60 per cent) who witness family violence also experience some other form of child abuse;
- there is some evidence that children (mainly males) who witness family violence as a child perpetrate family violence as adults (this theory has, however, been criticised, see 5.3.5 Impacts of family violence on children.

Impact on the community

In a 2009 study, KPMG estimated that violence against women and their children cost the Australian economy approximately $13.6 billion in 2007–08. The study went on to conclude that without appropriate action to address violence against women and their children, approximately 750,000 Australian women will experience and report violence in 2021–22, costing the economy an estimated $15.6 billion.

[KPMG (2009), *The Cost of Violence against Women and their Children, The National Council to Reduce Violence against Women and their Children*, Canberra]

Community costs of family violence include expenditure on counselling, medical treatment, police services, housing, child protection and social services.

Victims of family violence may suffer severe economic and social impacts such as:

- job loss due to the abuse and loss of future employability as a result of the long-term impacts of the abuse;
- homelessness due to being forced to leave their residence to escape the abuse.

In 2003–04, approximately one third of clients accessing services for homelessness were women escaping family violence.

[Australian Institute of Health and Welfare (2005), *Australia's Welfare 2005*, Canberra]

Last updated: 3 May 2013

5.2.7 Myths about family violence and potential for unconscious prejudice

There are many myths about family violence. Acceptance of these myths can distort understanding about the true nature of family violence and lead to a failure to hold the perpetrator of the violence responsible and acknowledge violent behaviour as a choice.

In 2006, following the publication of its Review of Family Violence Laws: Report, the Victorian Law Reform Commission produced a fact sheet of Family Violence Myths (http://www.lawreform.vic.gov.au/fact-sheets/family-violence-fact-sheets) outlining some of the most commonly held myths and the evidence to refute them.

The following sections reproduce the Commission's Family Violence Myths. The sections also refer to research supporting the Commission's findings and provide facts about the nature of family violence in Australia.

The myths listed in the following sections are not exhaustive. Further information about other family violence myths is available from a wide range of websites and sources, including the AVERT Family Violence resource Fact Sheets, the Domestic Violence Resource Centre (Queensland) (http://www.bdvs.org.au/?action=view&view=33163&pid=16308), Women's Refuge (New Zealand) (www.womensrefuge.org.nz/) and the National Domestic and Family Violence Bench Book.

Myth: family violence is just physical assault

> Family violence is much more than hitting or punching. It includes sexual assault and other sexually coercive behaviour; emotional, psychological and verbal abuse; restricting people's social interactions; and restricting people's access to money and property.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

Research into community attitudes towards family violence has found that while most people consider family violence to comprise physical and sexual assaults, fewer people regard social, psychological and final abuse as constituting family violence.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation Melbourne at 28]

These views contradict research that has identified that many victims of family violence perceive the emotional impacts of both physical and non-physical abuse – such as their degree of fear, their partner's intent to harm and their own self-blame – as being more significant than any physical injuries incurred.

[Chadwick, H. and Morgan, A. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, Canberra at 4]

Some women, particularly women from CALD backgrounds, may be less likely to identify sexual abuse by an intimate partner as family violence. Perpetrators may believe that they are entitled to sexual relations with their partners, irrespective of whether it is consensual.

Myth: family violence perpetrators lose their temper and can't control themselves

> Family violence is a cycle of domination, coercion and control, rather than a loss of temper. Many family violence perpetrators are able to turn their abuse off and on at

> will because they use violence to exert control, not because they can't help themselves. Alcohol does not cause family violence but may be used as an excuse by perpetrators to behave in more extreme and thoughtless ways.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

Research consistently identifies family violence as a systematic pattern of power and control, involving physical and non-physical tactics of abuse and coercion. Recognising such patterns has led some researchers to argue that family violence is best understood as chronic behaviour characterised by emotional and psychological abuse that the perpetrator uses to maintain control over their partner, rather than by episodes of physical violence.

[Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf) (PDF), A White Ribbon Foundation Report at 7]

No to Violence, the Victorian Male Family Violence Prevention Association, advise that men's use of family violence is best understood as a choice. Men make decisions about many things when they are being violent, for example, the kind of violence they use, where to hit or apply force, how hard, how long for, and when to stop.

[No to Violence (2011), content provided for inclusion in this Bench Book]

See further 5.4.1 Men's use of violence towards family members.

Myth: victims provoke the violence

> Our attitudes towards family relationships have moved on from archaic laws which gave men the right to beat their wives and children and rape their wives. Victoria recently decided provocation was not an acceptable defence to a murder charge and most people think it should not be used to excuse family violence.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

Historically, theories about family violence tended to place responsibility and blame for family violence with the victim, who was considered to have provoked or deserved the violence. However, the Victorian Law Reform Commission (2006) argued that this theory does not accord with the experience of most victims of family violence, who generally try to do everything they can to please the perpetrator and avoid further violence.

In response to this myth, the New Zealand Women's Refuge noted that:

> No one 'deserves' or 'asks' to be beaten or emotionally tortured, least of all by someone who says they love you. Abusers often blame women and children for provoking them, but no behaviour justifies a violent response. Children can be disciplined in other ways; family problems can be resolved without violence. There is no excuse for violence. The responsibility for violence lies firmly with the abuser. They make the choice to abuse.

[New Zealand Women's Refuge: Common myths about violence (http://www.womensrefuge.org.nz/index.cfm?objectid=0cfaf34b-1321-ae99-69b4c6630342dff5), accessed 25 February 2011]

The National Council to Reduce Violence against Women and their Children stress that violence is never caused or invited by the victim/survivor. The choice to use violence always rests with the perpetrator.

[The National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*, Canberra, at 2.5]

There also exists an erroneous belief that family violence is a relationship issue and that both parties in the relationship are to blame for the violence. By viewing family violence as a product of a dysfunctional relationship, one fails to consider the central aspects of control and dominance which are key characteristic behaviours of family violence perpetrators.

[Australasian Institute of Judicial Administration (2017) National Domestic and Family Violence Bench Book at 4.1]

Myth: family violence victims can leave the relationship or family

> It can be extremely difficult for victims to escape a perpetrator's control. It may also feel safer to stay – many victims are threatened with violence or death if they leave. Most victims take several attempts to leave a violent relationship before they are successful. Victims may also stay because of a combination of other factors: they can't afford to leave, there is nowhere for them to go, they don't know what their legal options are, there is nobody to care for children if they get a job, and police and courts are not helpful.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

The Victorian Law Reform Commission observed that the question 'why don't they just leave?' reveals a fundamental misunderstanding of the position of many family violence victims and the dynamics of family violence (2006 at 2.60). It can be extremely difficult to leave a violent relationship, and there are a number of factors that can influence a woman's decision to stay with a violent partner. For example:

- the victim may not want to leave the relationship; victims of family violence often love their partner and want to maintain the relationship, but they want them to stop being violent or abusive towards them;
- the victim may fear that violence will escalate if she leaves the perpetrator; evidence suggests that this is a legitimate concern, as the first two months post-separation are a high risk period for further violence;
- the victim feels powerless to leave the relationship; this state can be induced by the psychological manipulation and control exerted by the perpetrator, leaving the victim feeling worthless and dependent on the perpetrator;
- the victim may depend on her partner financially; victims who leave the home may not have access to affordable alternative housing and leaving may be the difference between being well off and being poor;
- there may be a lack of appropriate support services for victims who wish to leave violent partners, or the victim may not know that support services are available; this can particularly be the case in some regional areas or where victims are in same sex relationships;
- the victim may not wish to leave friends and family who support her and she may be concerned about the effects of leaving on her children, particularly if the children have special needs.

[King, Dr M. (2009), *Solution-Focused Judging Bench Book*, Australasian Institute of Judicial Administration at 107]

Leaving a violent relationship is often a non-linear process; it is common for victims to attempt to end a violent relationship several times before they finally succeed. Perpetrators can use various measures to make leaving as difficult as possible, including threatening to take the children, threatening legal action and depriving victims of money.

The fact that a victim may have returned to a violent partner does not necessarily, or even usually, diminish the seriousness of the alleged violence.

In addition to the barriers discussed by Dr King above, perpetrators of family violence may also employ a number of coercive and manipulative strategies in order to prevent victims from leaving the relationship or abusive environment.

Even if a victim of family violence does manage to leave the abusive environment, the violence may continue. It has been noted by multiple researchers that the period following separation is incredibly dangerous for victims of family violence, as the perpetrator may seek to use violence to regain control of the victim or to persuade them to re-enter the relationship.

[Australasian Institute of Judicial Administration (2017) National Domestic and Family Violence Bench Book at 4.1]

Myth: family violence only occurs when people are living together

> Some of the worst family violence can occur after a couple separates because the perpetrator tries to force the victim to return. The Australian Institute of Criminology has estimated that close to 30 per cent of women who were murdered by intimate partners were separated from them at the time.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

In its Final Report (2006), the Victorian Law Reform Commission noted that the most extreme form of family violence, homicide, occurs more often when a victim has already left the abusive relationship:

> Approximately 58 women in Australia each year are murdered by their male partner or ex-partner. Women are more likely to be killed by current or former partners than by anyone else. In a comprehensive study of all family homicides in Australia from 1989 to 2002, Mouzos and Rushforth found that the major precipitating events in homicides where men took the lives of spouses were domestic altercations, separation and jealousy. Homicide in these cases is often the ultimate attempt of males to exert power and control over their partners/wives.
>
> [Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Report*, Melbourne at 2.61]

The risk of post-separation violence can increase when children are involved. Researchers have observed that perpetrators may threaten children's health or well-being as a form of emotional abuse of their mother, or hold children hostage in an attempt to control their former partner. Child contact arrangements provide opportunities for former spouses to commit further acts of violence.

[Cited in Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf) (PDF), A White Ribbon Foundation Report at 9]

The Family Violence Risk Assessment and Risk Management Framework lists separation as a risk factor in its table of risk factors, noting that:

> For women who are experiencing family violence, the high risk periods include immediately prior to taking action, and during the initial stages of or immediately after separation. Victims who stay with the perpetrator because they are afraid to leave often accurately anticipate that leaving would increase the risk of lethal assault. The

> data on 'time-since-separation' suggests that women are particularly at risk within the first two months.

[Department of Planning and Community Development (2007), Family Violence Risk Assessment and Risk Management Framework (http://www.dpcd.vic.gov.au/women/family-violence), Melbourne at 55]

Myth: all family violence victims fall into the "battered woman syndrome" category

> Many family violence victims don't just take it, they fight back. This can be by physically defending themselves, or using other defensive strategies such as calling on friends, family, social services and police for help.
>
> [Victorian Law Reform Commission Fact Sheet, 2006]

In its Final Report (2006), the Victorian Law Reform Commission observed that despite the power and control, which perpetrators exercise through various forms of violence, victims are not completely unable to act for themselves and protect their children.

The Commission gave an example of one victim of family violence who would wear her running shoes and carry her keys to bed as a way of quickly escaping. Other examples talked about how victims would try to defend themselves during violent incidents (Victorian Law Reform Commission 2006 at 2.68).

The Commission did stress, however, that recognising that family violence victims are not completely powerless and are capable of protecting themselves does not mean that they are in any way responsible for the violence they experience.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Report*, Melbourne at 2.71]

Myth: men are just as likely as women to be family violence victims

While all individuals in society are vulnerable to family violence, regardless of their gender, age, race and cultural background, sexual identity, socio-economic status, location, or religion, there are certain demographics of individuals who are more vulnerable to family violence.

One in six Australian women experience violence perpetrated by their (co-habiting) intimate opposite-sex partner, while one in twenty Australian men report being the victims of (co-habiting) opposite-sex partner family violence.

[Australasian Institute of Judicial Administration (2017) National Domestic and Family Violence Bench Book at 4.1]

> Men are far more likely to be harmed by a stranger than by a family member and women's violence towards men is more likely to occur in self-defence. Women's violence has been found to be a response to frustration and stress, whereas men's violence is most often an attempt to dominate and control. Less than 10 per cent of male homicides are carried out by an intimate partner, and where they are, there is a history of the female being a victim of domestic violence in more than 70 per cent of cases.

[Victorian Law Reform Commission Fact Sheet, 2006]

Victimisation surveys carried out in Australia consistently find that family violence is more commonly perpetrated by males against females (see 5.2.4 Prevalence of family violence). The view in some sections of the community that family violence is committed equally by males and females is not supported by research.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation Melbourne at 33]

Apart from differences in the prevalence of violence, there are differences in the nature of the violence perpetrated by males and females against their partners. Males are more likely to engage in different forms of violent behaviour against their partner (not just physical violence) and the violence is more severe and more likely to result in serious injury.

Where women are violent towards men, the violence is more likely to be driven by frustration and anger rather than by a specific objective, and their violence is more likely to be committed in self-defence or following provocation.

[Chadwick, H. and Morgan, A. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, Canberra at 3]

See 5.4.5 Responding to men who claim to be victims of family violence for further discussion of this issue.

Myth: culture is an excuse for family violence

Family violence occurs in all societies irrespective of culture, socioeconomic status or religion. The notion that family violence is 'cultural' for some communities does not have any basis in research.

Myth: women often make false or exaggerated claims of family violence to obtain tactical advantages in parenting litigation proceedings

A 2015 research project indicates that this belief persists among members of the legal professional and the general community despite having no foundation in research.

[Australasian Institute of Judicial Administration (2017) National Domestic and Family Violence Bench Book at 4.1]

Myths regarding children in family violence contexts

There exist a number of myths regarding the experiences of children in environments where family violence is being perpetrated. For example: that family violence between parents does not affect children; that all children in a family will report similar experiences of family violence; that very young children are less affected by family violence than older children.

Research conducted by the Center on the Developing Child, based at Harvard University, indicates that young children are particularly affected by exposure to family violence. The Council stated in 2004 that 'significant and prolonged emotional distress can affect the emerging architecture of a young child's brain'.

The effects may be felt over a prolonged period, or may be short-lived. At a base level, the threat imposed by family violence to a child's 'security and stability' may have a negative impact on the child. Furthermore, research indicates that experiencing or witnessing family violence can have a negative impact on neurological development of children and can cause excessive emotional stress.

Dr Linda Neilson argues that family violence may affect different children in the same family in differing ways. For instance, one child may be a target of family violence, while another is considered to be protected.

[Neilson, Dr L (2017) *Responding to Domestic Violence*, Canadian Legal Information Institute at 6.2.5.1–6.2.5.5]

[Center on the Developing Child, Harvard University (2004) *Children's Emotional Development Is Built into the Architecture of Their Brains* at p3]

Last updated: 29 March 2018

5.2.8 Further reading

- Australia Bureau of Statistics (2006), *Personal Safety Survey*, Canberra
- Australian Institute of Criminology (2009), *Domestic-related homicide: keynote papers from the 2008 international conference on homicide*, Canberra
- Australian Institute of Criminology (2008), *Homicide in Australia: 2006–07 National Homicide Monitoring Program annual report*, Canberra
- Australian Institute of Criminology (2004), *Women's Experiences of Male Violence, Findings from the Australian Component of the International Violence Against Women Survey*, Canberra
- Australian Institute of Health and Welfare (2005), *Australia's Welfare 2005*, Canberra
- Chadwick, H. and Morgan, A. (2009), *Key Issues in Domestic Violence*, Australian Institute of Criminology, Canberra
- Department of Families, Housing, Community Services and Indigenous Affairs (2009), *The cost of violence against women and their children,* Canberra
- Department of Justice (2009), *The Victorian Family Violence Database Volume 4: Nine Year Trend Analysis*, Melbourne
- Department of Planning and Community Development (2007), *Family Violence Risk Assessment and Risk Management Framework*, Melbourne
- Flood, M. and Fergus, L. (2008), *An Assault on Our Future: The impact of violence on young people and their relationships*, A White Ribbon Foundation Report
- King, Dr M.S (2009), *Solution-Focused Judging Bench Book*, Australasian Institute of Judicial Administration
- KPMG (2009), *The Cost of Violence against Women and their Children*, The National Council to Reduce Violence against Women and their Children, Canberra
- Magistrates' Court of Victoria 2009 -10 Annual Report
- The National Council to Reduce Violence against Women and their Children (2009), *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*, Canberra
- VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation Melbourne
- VicHealth (2004), *The health costs of violence: measuring the burden of disease caused by intimate partner violence*, Melbourne
- Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Report*, Melbourne
- Victorian Law Reform Commission (2004), *Review of Family Violence Laws: Consultation Paper*, Melbourne
- Walker, Leonore E. (1979) *The Battered Woman*, New York

Last updated: 3 March 2011

5.3 Children

The following sections summarise research findings concerning the impact of family violence on children. The *Family Violence Protection Act 2008* recognises that children can be direct victims of family violence and also experience family violence by directly or indirectly witnessing family violence against a parent (s 5(1) FVPA).

Full citations of material referred to in this section are set out in 5.3.10 - Further reading.

Discussion of general child abuse and child protection issues is outside the scope of this bench book. However, the interaction between child protection orders under the *Children, Youth and Families Act 2005* and intervention orders is discussed in 2.7 - Interface with Children, Youth and Families Act 2005.

See also the AVERT Family Violence resource on the impact of family violence on children.

5.3.1 Prevalence of children experiencing family violence

In a study completed in 2001, 23 percent of young people surveyed in Victoria reported witnessing an act of physical family violence against their mother or step-mother. This included throwing things at her, hitting her, or using a knife or gun against her, as well as threats and attempts to do these things.

The same survey reported that 56 per cent of those surveyed had witnessed their father/stepfather yell loudly at their mother/stepmother, 30 per cent had witnessed him put her down or humiliate her, and 10 per cent had seen their father/stepfather not let their mother/stepmother see her family or friends.

[National Crime Prevention (2001), *Young People & Domestic Violence: National research on young people's attitudes and experiences of domestic violence*, Canberra]

Research has found that there are higher rates of domestic violence in households where children are present. According to the ABS (2006) Personal Safety Survey, 49 per cent of men and women who reported experiencing violence by a current partner had children in their care at some time during the relationship. Approximately 27 per cent reported that these children had witnessed the violence. Sixty one per cent of victims of violence by a previous partner also reported having children in their care at some time during the relationship and 36 per cent said that these children had witnessed the violence.

[Australian Bureau of Statistics (2006), *Personal Safety Survey*, Canberra]

As noted in 2.5.1 - Protection from family violence, between 2004–05 and 2011–12, there was a 295.4% increase in the number of children protected under an order. Further, since 2008–09, children have represented the largest proportion (approximately 46%) of persons protected by a family violence intervention order.

[Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, Monitoring Report (2013), pp19–20]

Figures from the *Victorian Family Violence Database Report* (2009) show that in 1999–2000, police identified 4,530 children (aged 17 years or and younger) as affected family members. By 2007–08, this number had increased to 15,399. The number of children recorded as present at family violence incidents by police in 2007–08 was 21,846.

The *Victorian Family Violence Database Report* identifies several factors influencing the rise in numbers of children identified as affected family members, including:

- an increase in police reporting children as victims when present at family violence incidents;
- changes in the way in which children are recorded in the court's data collection system, which ensures children subject to intervention orders are more visible;

- changes to the law in 2004 requiring magistrates to consider including children in intervention orders if they have been subjected to / witnessed family violence by the respondent; and
- increased awareness of the impact of family violence on children, resulting in overall increased reporting of children's involvement across the system.

[Department of Justice (2009), *Victorian Family Violence Database 1999–2008*, Melbourne, p70]

Last updated: 23 October 2013

5.3.2 Children's experiences of family violence

Children experience family violence through:

- direct violence against themselves from a family member (FVPA s 5(1)(a)); and
- hearing, witnessing or otherwise being exposed to the effects of violence against a family member (FVPA s 5(1)(b)).

Although both forms of violence are defined as family violence for the purpose of obtaining an intervention order under the FVPA, it can be difficult to distinguish between children's experience of family violence against a family member and the experience of direct child abuse.

While acknowledging the overlap between family violence and child abuse, theoretical discussion of the different causal factors between family violence and child abuse is beyond the scope of this Bench Book. For further information see the National Child Protection Clearinghouse (http://www.aifs.gov.au/nch/) website or Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report.

Direct physical violence

Physical and sexual violence against children is common, and research indicates that it is more common in households where violence against another family member occurs (generally mothers or step-mothers).

- One study found that physical violence against children is 15 times as likely in families where family violence is occurring;
- A review of several studies found that child abuse and family violence co-occurred in between 30 and 60 percent of cases.

[Cited in Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report, p11]

The National Crime Prevention Survey (2001) found that:

- up to one in ten children report living in households where the male carer has hit them and/or their siblings for reasons 'other than bad behaviour'; and
- over half (55.3 percent) of these children also report family violence occurring in the same household, which is more than double the rate for the sample as a whole (23.4 percent).

[National Crime Prevention (2001), *Young People & Domestic Violence: National research on young people's attitudes and experiences of domestic violence*, Canberra]

Children may also suffer direct physical harm where the main target is another family member (generally the mother). Flood and Fergus observed that:

- young children may be in their mother's arms when she is assaulted;
- one-third of children and young people living in homes where there is family violence are hit by their father or step-father when trying to defend their mother or step-mother or trying to stop the violence;
- children may be used as hostages by perpetrators in an attempt to control their partners' behaviour or force them to return to the relationship, and are at risk of physical harm (including death) in such cases.

[Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report, p12; see also Tomison, A. (2000), *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence*, National Child Protection Clearing House, Issues Paper Volume 13 at p8]

Filicide - the killing of a child by a parent

Approximately 10 per cent of all homicides in Australia involve child victims. The majority (62%) are killed by a parent.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation,* Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p6]

Approximately 27 children are killed by their parents in Australia annually. Between July 1997 and June 2008, there were 239 incidents in which a child was killed by one or more of their parents. These incidents involved 291 child victims (39 incidents involved multiple child victims).

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p15]

The vast majority of filicides which occurred between 1997 and 2008 were committed by one parent alone (90 per cent of cases). In that period, fathers or stepfathers were responsible for killing 52 per cent of the child victims (140 children), while mothers/stepmothers accounting for the other 48 per cent (127 children).

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p16]

Younger children are at a higher risk of filicide than older children. Between 1997 and 2008, 90 per cent of victims were under 10 years old at the time they were killed, and 77 per cent were aged five and under. Children younger than 12 months old were at the greatest risk, comprising one third of filicide victims.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p17]

Why parents kill

International researchers have developed classification systems which contain various categories to describe different types of filicide. A pioneering filicide researcher, Phillip Resnick, developed one of the first comprehensive classifications of filicide, suggesting that the incidents fell into five distinct categories. These classifications, which are primarily based on apparent motive, are:

- altruistic – parent kills to protect a child from real or imagined suffering
- acutely psychotic – parent kills the child under the influence of a severe mental illness or psychotic episode
- unwanted child
- accidental – unintentional deaths usually resulting from child maltreatment
- spouse revenge – child killed to punish partner.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p 21–22]

Other researchers in the field have devised different classification systems. Bourget and Gagne created a classification system which reflects whether a filicide was committed with an intention to kill or not. Their proposed categories are:

- mentally ill – actions associated with mental illness, psychosis, postnatal disturbance or other mental disturbance (broader than Resnick's 'acutely psychotic' category)
- fatal abuse – includes neglect and child abuse (similar to Resnick's 'accidental' category)
- retaliatory – intentional killing due to anger or revenge (similar to Resnick's 'spouse revenge')
- mercy filicide – intentional killing when child has a severe and debilitating illness (narrower than Resnick's 'altruistic' category)
- other/unknown – when there is insufficient information or cases with multiple contributing factors.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p22]

The spouse revenge and retaliatory categories of filicide are those with the closest links to family violence. The following sections consider the links between filicide and family violence, particularly in the context of family separation.

Links with intimate partner violence

A feature of many fatal abuse filicides perpetrated by fathers is that the mother of the child is also a victim of violence at the hands of the father. Studies have also found that when mothers perpetrate fatal abuse on their child, they are also often the victim of violence at their partner's hand.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation,* Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p22]

The Victorian Child Death Review Committee (VCDRC) investigates and reports on deaths of children where the child was involved with the child protection system at the time of their death. In 2010/11, the VCDRC found that, of the 28 child deaths it investigated, 'family violence' was found to be a parental risk factor in 16 cases.

[Victorian Child Death Review Committee (2011), *Annual Report of Inquiries into the Deaths of Children Known to Child Protection*, Office of the Child Safety Commissioner, Melbourne; cited in Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p24]

Judicial Observation

The research highlights the importance of children being included as affected family members in intervention orders w at risk. Further, it highlights the importance of including appropriate conditions on an order. Where a parent or child jeopardised by any contact with the respondent, the court must prohibit child contact (FVPA ss 91 and 93).

[Magistrate Pauline Spencer, *Judicial Options for Better Protecting Children at Risk of Being Killed by a Parent, March 2012*]

Separation

A key feature of some filicides is that children are killed in the context of their parents' separation. Research in NSW showed separation was a trigger in 20 per cent of filicides, while in Victoria, another study found that when a father kills his children, it often occurs in the context of a separated couple or where the father believes that the couple is likely to separate.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, pp 32–33]

In some instances when fathers commit filicide, it is an act of violence against women, with separation being a key trigger in the eventual death of the child.

Many fathers feel anger towards their former partner about the separation, and express desires to exact revenge and punish their partner for leaving them, breaking up the family unit. Children are then used as tools to hurt their mothers, with fathers inflicting violence on their former partner by inflicting violence on the children.

When a father's intention is to harm the mother, filicide can be seen as a form of intimate partner violence, irrespective of whether there had been a history of violence prior to the death of the child.

[Dr Debbie Kirkwood, (2012) *'Just Say Goodbye': Parents who Kill their Children in the Context of Separation*, Domestic Violence Resource Centre Victoria, Discussion Paper No.8 2012, p68]

Judicial Observation

Past and current violence and/or threats towards a mother may indicate that her child is at risk of being intentionally father, even where the child has not previously been the victim of physical violence.

Controlling behaviour by one partner towards their former partner, extreme anger about the separation, threats to har or children and threats of, or attempts to, suicide should alert all who have contact with either party, including judic court staff, to the risk to children.

In several instances, fathers have killed their children during access or child contact visits which had been negotiat parties. Often these negotiations have occurred without the parties obtaining legal advice, in circumstances where the had no choice or were too scared to object. If risk factors exist and the couple has recently separated, judicial officers consider prohibiting child contact. This is critical at the interim stage but may also be relevant into the future, with pro contact to occur through lawyers so that more comprehensive assessment can be carried out, advice given and safegua (for example supervised access).

[Magistrate Pauline Spencer, *Judicial Options for Better Protecting Children at Risk of Being Killed by a Parent*, March 2012]

Exposure to family violence

The FVPA specifically states that any behaviour which causes a child to hear, witness, or otherwise be exposed to the effects of violent behaviour is a form of family violence (FVPA s 5(1)(b)). The Act gives the following examples of this type of behaviour:

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property; and
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(FVPA s 5(1)(b)]

The inclusion of witnessing family violence in the FVPA reflects research that has made clear that even when children are not direct victims of violence, being exposed to violence against a family member (generally mothers or stepmothers) can have profound psychological effects which are comparable to those which result from experiencing violence directly. Research indicates that:

- negative developmental and behavioural outcomes for children witnessing family violence were similar to those of children who had experienced direct physical violence; and
- in addition to the heightened risk of direct physical violence against them, children exposed to family violence suffer the psychological, emotional and behavioural consequences of living with the threat of terrorising behaviours.

[Cited in Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report, p8]

See further discussion in 5.3.5 Impacts of family violence on children.

Last updated: 3 May 2013

5.3.3 Children as perpetrators of violence

Children and young people can perpetrate family violence. Children abusing parents, sibling abuse and family violence between adolescents are all emerging areas of law and social science. There is currently little research on the prevalence of this behaviour and the particular challenges it poses.

See 2.5.2 Respondent children for particular provisions of the FVPA that may be relevant to child respondents. See 5.3.5 Impacts of family violence on children for a discussion of the theory of intergenerational abuse.

ast updated: 3 May 2013

5.3.4 Indigenous children

In a 2005 report, the Secretariat National Aboriginal and Islander Child Care (SNAICC) found that Aboriginal and Torres Strait Islander young people were significantly more likely to have witnessed physical family violence against their mother or step-mother than the average (42 percent compared to 23 percent for all respondents).

[Secretariat National Aboriginal and Islander Child Care (2005), *Footprints to Where We Are: A resource manual for Aboriginal and Torres Strait Islander Children's Services*, Melbourne]

The *Strong Culture, Strong Peoples, Strong Families* Report found that family violence is the single biggest risk factor for child abuse notifications to be substantiated in Victoria and is present in 64 percent of cases affecting indigenous children. Indigenous children are around 10 times more likely to be victims of abuse with the highest proportion relating to emotional abuse.

[Department of Planning and Community Development (2008), *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities,* Melbourne at 12]

In considering the reasons for the high rates of family violence in indigenous communities, SNAICC (2005) pointed to the profound and ongoing impact of dispossession and colonisation of family and gender relations in indigenous communities, as well as the intergenerational effects of previous separation from families, potentially undermining parenting and relationship skills.

See 5.7 Indigenous people for further information on the impact of family violence on indigenous people.

Last updated: 21 March 2011

5.3.5 Impacts of family violence on children

Research shows that children experience the impacts of family violence both in the short term and in the longer term, with different impacts depending on the different developmental stages of a child's life.

See also the AVERT Family Violence resource on the impact of family violence on children.

Impact on behavioural, cognitive and emotional functioning

Children and young people experiencing domestic violence are more likely to experience behavioural and emotional problems compared with other children. Flood and Fergus stress that while it is important not to pathologise children and young people who have experienced family violence, the research highlights a clear correlation. For instance:

- children and young people who experience family violence are at heightened risk of drug abuse and delinquency in later life;
- there is some evidence indicating a connection between experience of family violence and youth suicide, especially in young men;
- children living with family violence have much higher rates of depression, anxiety and behavioural problems than children and young people not living with these issues;
- some studies show that children living with family violence have higher rates of cognitive problems than children and young people not living with these issues.

They go on to observe that the age and developmental stage of the child or young person can affect how these problems may manifest:

- infants and young children exposed to family violence are more likely to have high levels of ill health, poor sleeping habits, excessive crying and screaming, disrupted attachment patterns, severe shyness and diminished self-esteem, aggressive behaviour, emotional distress, anxiety and depression;
- children of pre-school age are particularly vulnerable to blaming themselves for adult anger, and tend to show the most behavioural disturbance;
- young people living with, or who have experienced, family violence may show fear and trauma symptoms akin to post-traumatic stress disorder. Higher levels of depression (especially in girls), and adjustment difficulties such as cognitive problems and aggression are also evident;
- young people are more likely to show the effects of such disruption in their school and social environments.

[Cited in Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report at 13]

See also the discussion of children and family violence in Dr Michael King's *Solution Focussed Judging Bench Book* (2009, at 114) and the Victorian Law Reform Commission's *Review of Family Violence Laws: Consultation Paper* (2004 at 2.29).

Judicial Consideration

Professor Nielson observes that:

- some children exhibit symptoms of harm outwardly (for example, violence and aggression);
- others exhibit symptoms of harm by turning inward (for example, withdrawal or depression).

She advises that while all children are emotionally hurt when a person they care about is abused, not every child ex violence will suffer lasting harm. Factors such as the frequency and duration of the family violence, the child's resilienc with caring non-abusive adults, and access to resources and services can prevent or reduce harm.

[Neilson, Dr L. (2009), *Domestic Violence and Family Law in Canada: A Handbook for Judges*, Ontario, National Judicial Ins

Longer term impacts

Research also shows that a child's experience of, or exposure to, family violence can have serious long-term consequences. There is a growing body of research focussing on the neurological impact that trauma (such as living with chronic or severe stress) has on brain development. Laing, for example, has noted how exposure to extreme trauma, particularly for infants, is thought to change the organisation of the brain, resulting in emotional, behavioural and mental health problems in childhood and later life.

[Laing, L. (2000), *Children, young people and domestic violence*, Australian Domestic and Family Violence Clearinghouse, Issues Paper No. 2 at 4]

Other researchers have suggested that enduring stress in the early years may adversely impact on brain development and organisation, arguing that more research is required to determine the effects of stress on the developing nervous system, how these effects are manifested through observable symptoms and what factors in the child's environment may either enhance of modify these effects.

[Cited in Bartels, B. (2010), *Emerging issues in domestic / family violence* research, Australian Institute of Criminology at 7]

International research has shown that early 'psychosocial risk experiences' (such as violence) affect the ability of children and young people to function effectively, including at school and later in employment, increasing the likelihood of problems in adolescence, such as:

- educational difficulties;
- teenage pregnancy;
- unemployment;
- limited social support; and
- relationship breakdown.

[Frederick, J. and Goddard, C. (2007), *Exploring the Relationship between Poverty, Childhood Adversity and Child Abuse from the Perspective of Adulthood*, Child Abuse Review Vol 16]

Similar findings were made in Australian research, which found that young people who have experienced family violence are at risk of:

- not completing secondary school;
- unemployment; and
- performing inadequately in the work force.

[Northern Territory Government Domestic Violence Strategy 1998]

Intergenerational abuse

There is evidence to suggest that witnessing family violence against their mothers may shape young people's attitudes to violence in their own intimate relationships. Much has been written about 'intergenerational transmission' of violence, and there is data to support a higher risk of violence perpetration (and to a lesser extent, victimisation) among those adults who witnessed or experienced violence as children.

Research findings cited by Flood and Fergus (2008) include:

- the National Crime Prevention's Survey (2001), which found that the best predictor of young men's perpetration of violence in their own relationships was 'witnessing' domestic violence in the home;
- research by Flood and Pease (2006), which found that children, and especially boys, who either live with domestic violence against their mothers/step-mothers, or are subjected to violence themselves, are more likely as adults to have violence-supportive attitudes and to perpetrate violence; and
- findings from Schumacher et al (2001), which confirm the influence of witnessing parental violence in the family of origin and note some studies suggesting that witnessing any adult violence against any victim is associated with later perpetration of domestic violence.

[Cited in Flood, M. and Fergus, L. (2008), An Assault on Our Future: The impact of violence on young people and their relationships (http://www.whiteribbon.org.au/uploads/media/AssaultonourFutureFinal.pdf), A White Ribbon Foundation Report at 16]

However, Flood and Fergus (2008, at 16) stress that while there is a clear association between the experience of domestic violence in children and later perpetration, there is no evidence of a *causal* relationship. They point out that:

- prior exposure to domestic violence is neither a necessary nor sufficient condition for the future perpetration of violence;
- significant proportions of men who use violence against their wives or partners have neither witnessed nor experienced physical aggression as children;
- some studies find no link between childhood victimisation and adult perpetration of violence;
- the association between witnessing and perpetrating is complex and mediated by a number of social and situational factors;
- domestic violence among adults is in part learnt through children's (and especially boys') experience of family violence, but also their experience of wider contexts and communities.

[See also Laing, Dr L. (2000) *Children, young people and domestic violence, Australian Domestic and Family Violence Clearinghouse*, Issues Paper Volume 2 and Tomison, A. (2000), *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence*, National Child Protection Clearing House, Issues Paper Volume 13]

Last updated: 3 May 2013

5.3.6 Family violence and Family Law

The Victorian Law Reform Commission acknowledged that when family violence occurs in a marriage or other intimate partnership, and the couple has had children together, children can become part of the dynamic of power and control in the violent relationship. Threatened or actual violence towards children is used as a way of controlling a child's parent.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws Report*, Melbourne at 2.25]

The Commission also noted that children affect the decisions people make about staying in or leaving a violent relationship. For example:

- some victims of family violence report that the impact of the family violence on their children was the reason they decided to leave; and
- other victims of family violence report that their children are one of the reasons they do not want to leave the relationship.

Laing argues that separation frequently does not end the violence. Rather, 'the site of the struggle shifts and the experience of abuse changes.' She states that:

> The months following separation present the period of greatest risk to women of death or serious injury, yet at this time of heightened danger, the victimised woman is expected to negotiate arrangements of contact and residence. This is a context in which abusive spouses can use issues of contact and residence to continue to exercise coercive control over their partners. It is also a context in which it is frequently assumed that separating couples can put aside their differences 'for the sake of the children', an assumption which does not reflect understanding of the nature and dynamics of domestic violence, and which can result in an abused woman being labelled as 'implacably hostile' within the legal system because of her attempts to protect her children and herself from violence.

[Laing, L. (2000), *Children, young people and domestic violence*, Australian Domestic and Family Violence Clearinghouse, Issues Paper No. 2 at 19]

As noted in 5.3.2 - Children's experiences of family violence, abusive parents may use a child as a means of further abusing the other parent. This can involve both direct violence against the child and indirect abuse against the other parent, such as by bringing unnecessary court cases, or failing to comply with child contact orders.

See 2.6 Interaction with family law for a discussion of judicial officer's power to revive, vary, suspend or discharge family law contact orders. See also 5.14.4 Parenting orders and family violence.

Last updated: 21 March 2011

5.3.7 Family violence and parenting

Mothers who are victims of family violence may be affected in ways that interfere with their parenting ability, such as physical injuries and mental health and substance abuse issues. For example, there has been considerable research on the impact of family violence on mother and infant attachment: see Buchanan, F. (2008), Mother and Infant Attachment Theory and Domestic Violence: Crossing the Divide (http://www.austdvclearinghouse.unsw.edu.au/pdf files/stakeholder paper_5.pdf).

However, several studies indicate that children and young people do not see their abused mothers as limited in their parenting capacity.

Professor Nielson noted that judicial officers should be aware that poor parenting practices can be raised by a respondent in contested family violence proceedings to support an argument that an intervention order should not be made, or that ongoing contact between the respondent and the children should be allowed. She argues that caution is required when respondents lead evidence about poor parenting, such as:

- regression in toilet training;
- bed wetting; or
- aggression towards other children.

[Neilson, Dr L. (2009), *Domestic Violence and Family Law in Canada: A Handbook for Judges*, Ontario, National Judicial Institute at 5.3]

In such cases, she argues that the onus should be on the respondent to prove (on the balance of probabilities) that such child reactions were in fact caused by poor parenting and not by the family violence.

The aftermath of violent incidents may cause further traumatisation of children, including:

- as a function of having to deal with an injured mother who may require assistance;
- dealing with a father who alternates from violence and to adopting a caring role;
- the involvement of police and the possible removal of their father from the home; and
- having to leave the family home and possiblly moving to a women's refuge or shelter.

[Tomison, A. (2000), *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence*, National Child Protection Clearing House, Issues Paper Volume 13, p8]

Indirect exposure to family violence can include:

- living in surroundings of high stress without stability;
- assuming adult responsibilities for the care of family members; or
- experiencing social isolation or economic deprivation due to frequent moves.

Tomison notes that child neglect may result from the non-violent parent giving less attention to her children's needs as a result of her need to focus attention on her violent partner in an attempt to appease him and hopefully control the level of violence. In addition, the need to attend to her own needs, including treating physical injuries, and at times personal survival, will reduce the resources available to her to care for her children.

[Tomison, A. (2000), *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence, National Child Protection Clearing House*, Issues Paper Volume 13, p7]

Dr Nielson argues that children exposed to family violence are more likely than other children to experience further adversities, such as low socio-economic family status, caregiver depression, stress and or mental illness, alcohol and drug abuse in the family, or parental neglect. These conditions will often have a greater effect on children than the family violence alone.

[Neilson, Dr L. (2009), *Domestic Violence and Family Law in Canada: A Handbook for Judges*, Ontario, National Judicial Institute at 5.2.5.7]

See also the AVERT Family Violence resource for a discussion of the situation in which one parent is alleged to have manipulated the child's emotions and allegiances to the extent that they unjustifiably reject the other parent.

Last updated: 3 May 2013

5.3.8 Children as affected family members or respondents

The FVPA contains a number of provisions regarding the treatment of children in the family violence system, whether as primary victims, secondary victims or respondents. These are discussed in 2.5 - Children.

Judicial officers can also refer to the *Bench Book for Children Giving Evidence in Australian Courts* (Australasian Institute of Judicial Administration, Updated March 2020) and the Judicial College of Victoria's Victims and Witnesses resource page.

Last updated: 21 March 2011

5.3.9 Services

Specific services for child victims of family violence include:

- Kids Helpline: Telephone 1800 551 800;
- Child Protection Crisis Line: Telephone 131 278
- National Association for Prevention of Child Abuse and Neglect (NAPCAN) (http://www.napcan.org.au/): NAPCAN works for the prevention of all forms of child abuse and neglect and towards greater community awareness of child abuse and neglect.

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Last updated: 21 March 2011

5.3.10 Further reading

- Australian Bureau of Statistics (2006), *Personal Safety Survey*, Canberra
- Bartels, B. (2010), *Emerging issues in domestic / family violence* research, Australian Institute of Criminology
- Department of Justice (2009), *Victorian Family Violence Database 1999–2008*, Melbourne

- Department of Planning and Community Development (2008), *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities,* Melbourne
- Flood, M. and Fergus, L. (2008), *An Assault on Our Future: The impact of violence on young people and their relationships*, A White Ribbon Foundation Report
- Frederick, J. and Goddard, C. (2007), *Exploring the Relationship between Poverty, Childhood Adversity and Child Abuse from the Perspective of Adulthood*, Child Abuse Review Vol 16
- King, Dr M. (2009) *Solution Focussed Judging Bench Book*, Australasian Institute of Judicial Administration
- Neilson, Dr L. (2009) *Domestic Violence and Family Law in Canada: A Handbook for Judges*, National Judicial Institute, Ontario
- Laing, Dr L. (2000) *Children, young people and domestic violence, Australian Domestic and Family Violence Clearinghouse*, Issues Paper Volume 2
- National Crime Prevention (2001), *Young People & Domestic Violence: National research on young people's attitudes and experiences of domestic violence*, Canberra
- Secretariat National Aboriginal and Islander Child Care (2005), *Footprints to Where We Are: A resource manual for Aboriginal and Torres Strait Islander Children's Services*, Melbourne
- Tomison, A. (2000), *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence*, National Child Protection Clearing House, Issues Paper Volume 13
- Victorian Law Reform Commission (2006), *Review of Family Violence Laws Report*, Melbourne

Last updated: 21 March 2011

5.4 Men

Content contained in this section was prepared by the Male Family Violence Prevention Association, known as No To Violence (NTV), specifically for inclusion in this Bench Book (February 2011).

NTV is the peak Victorian body of organisations and individuals working with men to end their violence and abuse against family members. For further information, see www.ntv.org.au (http://www.ntv.org.au/)

Useful information about responding to perpetrators of family violence is also contained in the AVERT Family Violence resource.

5.4.1 Men's use of violence towards family members

Family violence is gendered power. Numerous empirical studies have demonstrated that the most common form of family violence is perpetrated by men against their partner, ex-partner and/or other family members.

Family violence is a choice that men make. It cannot be excused by their partner's actions or factors such as upbringing, alcohol or stress. There are men who experience relationship difficulties, significant life problems or addictions, or who experienced violence as a child, who do not perpetrate family violence.

Why men use family violence

Male family violence is primarily used by men to control women and children. It is rarely a one-off event; it is generally a pattern of abuse and control. It is acceptable to the men who use it because they have internalised the idea that, as men, their own needs are paramount.

Men using family violence do so:

- to impose their will;
- because it 'works' as a way to feel powerful and to control their partners and families;
- to express, or to attempt to justify or to feel better about an intense emotion, such as anger, perceived powerlessness, jealousy or resentment; and
- despite the great costs to themselves and their families.

Which men use family violence

All types of men use family violence, including those with strong and positive professional and social reputations in the community.

Men who present well and behave respectfully in court can use family violence, including particularly severe forms, as much as others.

Violence as a choice

Men's use of family violence is best understood as a choice. Men make decisions about many things when they are being violent, for example, the kind of violence they use, where to hit or apply force, how hard, how long for, and when to stop.

Judicial officers are often exposed to men's narratives about their use of violence. It is critical to recognise these for what they usually are, namely attempts to minimise or to deny responsibility.

Men commonly try to shift responsibility to their partner. Signs of this include:

- wanting to talk about her behaviour rather than what he did;
- saying such things as, 'If only she would/would not do…, then I wouldn't be abusive'; and
- saying that she needs to change in order for him to stop his violence.

Men also often seek to shift the blame to other factors, such as stress, work problems, money worries, their children's behaviour, their own childhood experiences, or the influence of alcohol or drugs. None of these factors causes a man to be violent. Many people experience these things without using violence.

Men often claim they 'just lost it' or 'just exploded'. However, few of these men 'just explode' towards people other than family members and/or in settings other than their homes. Men who use family violence make a range of conscious or unconscious choices, for example, about where to hit their partner or how hard to hit (to prevent visible bruising or other injuries). They often cease their use of violence when they hear a knock at the door.

Almost all men who appear in court for their use of family violence have demonstrated capacity to manage their feelings in other settings without resorting to violence.

See also family violence myths in 5.2.7 Myths about family violence and potential for unconscious prejudice.

Last updated: 21 March 2011

5.4.2 Men's behaviour change programs the preferred approach

Men's behaviour change programs are the preferred approach to addressing individual men's use of family violence. These programs are accessible to all men who are willing to take steps towards ending their use of violent or controlling behaviour.

Participation in a men's behaviour change program is not a predictor of change. While men are unlikely to change their behaviour without attending such a program, there is no guarantee a woman will be safer if her partner (current or former) attends one.

The following sections look at the common features of men's behaviour change programs, accessibility to particular groups of men, and potential outcomes of men's behaviour change programs.

Judicial Consideration

Judicial officers sitting in the Specialist Family Violence Court Division or at certain other prescribed courts can make orders in respect of certain eligible respondents requiring them to attend counselling for the purpose of increasing the respondent's accountability for the violence the respondent has used against a family member and encouraging the respondent to change the respondent's behaviour (see 3.6 Counselling orders).

Judicial officers sitting at other courts can encourage a respondent to contact the Men's Referral Service and participate in a men's behaviour change program. If the respondent consents, this can be included in the terms of the intervention order, although its breach will not be subject to enforcement.

Role of men's behaviour change programs

Men's behaviour change programs have been available in Victoria since the mid-1980's. No To Violence provides training, professional development, policy input and standards to enhance the effectiveness of men's behaviour change programs. There are currently over 35 programs across the state.

Men's behaviour change programs aim to assist people using violence to take responsibility for their violence and to develop skills to stop using violence. The programs are informed by an awareness of the power dynamics based on gender, and on culture, race and class that underpin family violence.

Except for counselling orders made in the Specialist Family Violence Court Division (see 3.6 Counselling orders), or when attendance is specified in a community-based order, men's attendance at these programs is voluntary (men can also be mandated to attend by DHS child protection services).

Men's behaviour change programs are a preferred approach because they:

- recognise family violence as an expression of gendered power;
- educate men about the types of family violence and controlling behaviour, the excuses men use to justify their behaviour, the difference between anger or other intense emotions and behaviour, and how men can choose to behave differently;
- encourage men to identify their own reasons and motivations towards change;
- assist men to:
- listen to and understand their partner's perspectives, and the effects of family violence and control on them and their children;
- reflect on and change their attitudes towards women, and their sense of male entitlement and privilege;
- learn strategies to monitor their emotions, physiology, thoughts and behaviours, so that they can make different (non-violent) choices;
- view contact with men's (former) partners as a critical component of the behaviour change process.

This last point is particularly important. Men's behaviour change program staff attempt to contact every man's current partner or recent ex-partner to offer her support, links to women's services and information about the program. Where a woman desires it, program staff have ongoing contact with her through the duration of her (former) partner's participation in the program – and in some cases beyond.

Judicial Consideration

In order for men to become and remain non-violent, they need to change on a number of levels: in their thinking, feelin behaviour. They also need to learn new skills, and to practise and integrate these in their lives. The change process is gr time, especially to consolidate and maintain changes.

Common features of men's behaviour change programs

Men's behaviour change programs usually:

- include at least one 'one-to-one' assessment session;
- are group based;
- involve at least 12 sessions, and often 20 or more spread over several months (and in some programs, over multiple groups);
- are co-facilitated by one male and one female family violence professional;
- have ongoing contact with participants' (ex)partners who agree to such contact;
- are guided by State Government-endorsed minimum standards regarding staff training and qualifications, facilitation, administration, management and other matters. These are set down by the profession's peak body, No To Violence (see https://www.ntv.org.au)

Accessibility to particular groups of men

Men's behaviour change programs receive referrals for men from a wide variety of cultural backgrounds and situations. They will:

- use interpreters and possibly other options to enhance accessibility for men from culturally and linguistically diverse backgrounds, or with hearing or speech impediments;
- work with indigenous health and community services, and with emerging indigenous family violence programs;

- assess whether men with significant mental health, drug and alcohol or intellectual disability issues are suitable for the program.

During the initial assessment session(s), program staff will decide how best to proceed, and whether other specialised services should be involved.

Outcomes of men's behaviour change programs

Men's behaviour change programs can have positive outcomes for the men who use violence. While change does involve giving up the use of power and control and the privileges of domination, men can ultimately gain from learning to have equal, open and non-violent relationships.

However, it is important to have realistic expectations about men's behaviour change programs. Some men change significantly through this work, some only moderately, and some not at all. Some drop out before completing the program, or during the early stages. Many men continue to use at least some forms of family violence while they participate in a program.

Generally, the only reliable way of judging the progress of a man through a program is via feedback from his partner. Men's self-reports of their behaviour generally under-estimate their use of violence, sometimes significantly so.

Last updated: 08 April 2019

5.4.3 Unhelpful and unsafe approaches to men's use of family violence

Men's behaviour change programs are the preferred approach to addressing men's use of family violence. Other approaches have the potential to reinforce the family violence and/or to make women and children less safe.

According to the family violence professional sector, unsafe approaches include:

- anger management programs;
- generalist counselling;
- referral as a diversionary strategy or as an alternative to an Order; and
- referral to mediation or couple counselling.

These approaches are discussed briefly in the following sections.

Anger management programs

Men's behaviour change is not the same as anger management. There are many feelings that men who use family violence experience in addition to anger, including anxiety, impatience, agitation, frustration and jealousy.

Proposing anger management programs for men who use family violence promotes the myth that men's violent and controlling behaviours are a consequence of their inability to manage anger, or that men are less able to do so compared to women. Men can be violent and controlling when they are not angry, or non-violent when angry. Like all of us, men have choices about how to behave when they experience anger or any other intense emotion.

Anger management approaches fail to address broader issues of power and control. Men who use violent and controlling behaviour towards their partner don't generally use it towards others. They can control their anger, but in certain settings, with certain people, they choose not to do so.

Family violence professionals neither refer to nor recommend anger management programs for men who perpetrate family violence.

Referral to generalist counselling

Family violence is a specific field, and working with male users of family violence is a specialisation within a specialisation. Without specialist training and experience in this work, counsellors can easily (and unknowingly) collude with, minimise, or excuse men's use of violence. This can make matters worse and might compromise the safety of affected family members.

A man who uses family violence might also present with issues such as addiction or depression. Referral to a men's behavioural change program is an appropriate first step for these men, as the program would undertake a comprehensive assessment of their needs and refer them to other services as required.

Referral to mediation or couple counselling

Men who use violence against their partners need to acknowledge that no matter how difficult, conflicted or challenging they might find their relationship or their partner, violence is never an acceptable response.

Mediation and relationship counselling are generally suited to situations in which both parties share responsibility for their relationship difficulties, and where they both need to make changes and compromises. It is appropriate when there is a relatively equal balance of power, and women feel safe to talk about their needs and wants without fear of retribution.

These conditions do not exist when a man is using family violence. The use of mediation or relationship counselling when family violence is present is counterproductive at best, and potentially dangerous.

Sentencing considerations

Participation in a men's behaviour change program is by no means a guarantee that the man will decrease his use of violence and that affected family members will be safer.

Men's behaviour change programs were not designed to be used as sanctions and there can be difficulties monitoring compliance and progress of those ordered to attend. Men who use violence need a strong message that family violence is unacceptable and men's behaviour change programs should be considered an add-on, not a replacement for appropriate criminal justice responses. A sufficiently strong criminal justice response to family violence can support the work of men's behaviour change programs in encouraging respondents to take responsibility for their behaviour.

The issue of how to balance rehabilitative measures with respondents with ensuring the safety of affected family members is discussed further in 4.1 - Contravention of an intervention order and the Sentencing Advisory Council's Reports:

- Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report (http://www.sentencingcouncil.vic.gov.au/content/publications/sentencing-practices-breach-family-violence-intervention-orders-final-report); and
- Guiding Principles for Sentencing Contraventions for Family Violence Intervention Orders (http://www.sentencingcouncil.vic.gov.au/content/publications/guiding-principles-sentencing-contraventions-family-violence-intervention-order).

See also the Magistrates' Court of Victoria Guide to Court Support and Diversion Services (http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/resources/8/e/8e6120004o4a31a6bb22fbf5f2791d4a/guide+to+court+support+services-june10.pdf) (PDF) for information on diversion principles.

Last updated: 21 March 2011

5.4.4 Judicial responses

A court appearance can provide judicial officers with an opportunity to make a strong statement about the unacceptability of family violence, to challenge a respondent about their behaviour, and to encourage them to take responsibility.

The following sections look at judicial responses to men who perpetrate family violence.

- How men experience a judicial officer's intervention;
- How far to challenge men's behaviour;
- A judicial officer's use of language; and
- Referral

How men experience a judicial officer's intervention

It is unlikely that anything a judicial officer says or does in court will result in immediate significant changes to a man's attitudes and behaviours. However, a court appearance is a significant life event and can provide an opportunity for some men to reflect upon their behaviour and make a decision to change.

For these men, a clear statement from a judicial officer on the value of participating in a men's behaviour change program might make the difference in helping them take steps to work towards change.

Of course, for other men, the views of the court – aside from conviction and sentencing – might be of little significance. Some might be further aggrieved by a judicial officer's suggestions about their responsibility.

See the Judicial College of Victoria's Family Violence resource page for examples of comments judicial officers can consider making to respondents in court.

How far to challenge men's behaviour

Family violence workers have learnt that attempting to cajole or coerce a man too quickly into accepting responsibility for his actions can be counterproductive, leaving him more defensive and possibly less open to change.

Most men referred to men's behaviour change programs – including those who refer themselves – begin this work because they feel 'pushed' or pressured to do so. Very few men come close to understanding the scope of their use of violence when they commence this work, or its impact on others. As they progress through this work, some come to a greater understanding of how changing their behaviour can benefit them and their relationships.

Judicial officers should use their professional judgement concerning how far to push a conversation with a respondent concerning his responsibility for his behaviour in the course of an intervention order hearing.

Some men in court will admit that they have used violence and promise that they will not do so again. The experience of family violence workers is that such promises (even if made in all sincerity) generally do not automatically translate to a cessation of violence. For most men, where violence-supportive attitudes and behaviours are entrenched, determination and will are not enough to change. Men who are serious about changing need to commit to a men's behaviour change program.

Judicial officer's use of language

Men who use family violence develop entrenched ways of thinking that minimise their responsibility for their behaviour and blame their partner and/or others.

For example, they might say:

- "We had a disagreement that got out of hand";
- "She kept going on and on about the same old stuff"; or
- "I know I lost it, but it was only because I was drunk."

At court, these men will rarely say 'I wasn't happy with what she said so I shoved her to the floor and screamed at her inches away from her face so that she would never raise this issue again.'

Unfortunately, many people in men's social networks are likely to be sympathetic to their minimisations and justifications. These narratives can be strengthened if others – especially influential people – do not confront them.

Judicial officers can respond by:

- always using language that conveys men's complete responsibility for their use of family violence;
- not accepting men's minimisations and justifications for their use of family violence;
- being mindful there is often much more to men's behaviour than they are willing to admit;
- conveying their serious concerns for the safety and wellbeing of men's partners (and children). This can often be the first time men have heard anyone raise such concerns and can potentially start men thinking differently about their role in their partner's (and children's) fear and hurt.
- See the Family Violence resource page for further guidance on using non-collusive language.

Referral

Judicial officers sitting in the Specialist Family Violence Court Division and at other prescribed courts have the power to make a counselling order directing a respondent to attend a men's behaviour change program (see 3.6 Counselling orders).

Judicial officers sitting at other courts may encourage men to consider participating in a men's behaviour change program by contacting the Men's Referral Service (www.mrs.org.au (http://www.mrs.org.au/) or telephone (03) 9428 2899 or 1800 065 973).

Judicial officers may seek assistance from men's behaviour change programs to decide on a course of action for a particular man. However, men's behaviour change programs cannot provide judicial officers with feedback about a man's behaviour; to do so would be unsafe and unethical as only the woman who is the partner of the man knows what he does at home.

See NTV's standards in respect to confidentiality of group proceedings and non-disclosure obligations; Men's Behaviour Change Group Work: A Manual for Quality Practice (http://www.ntv.org.au/pages/publications.php).

Judicial Observation

When speaking to the respondent, I will say to him:

"I don't have someone who can help you today, but this service [the Men's Referral Service] can help and it is free and co
is the telephone number; they can provide you with support and services. I would like you to telephone them;
telephoned them you will have done everything I have asked. Will you do that? 99 percent will say yes."

[Magistrate Anne Goldsbrough, S

Last updated: 08 April 2019

5.4.5 Responding to men who claim to be victims of family violence

While men can be victims of family violence, men are more likely to be harmed by a stranger than by a family member. Quantitative research clearly indicates that the majority of incidents are perpetrated by men against women and their children.

The following sections look at things judicial officers should bear in mind, and some of the questions they can ask, when assessing a situation in which a man claims to be a victim of family violence.

Incidence of abuse towards men

The research evidence and experience of family violence professionals unambiguously demonstrates that relatively few men in heterosexual relationships are solely victims of intimate partner violence. The majority of women who use some form of violence towards their partner have been subjected to (worse) violence by that man before, or on the same occasion.

Often, men who are genuinely victims of family violence experience the violence from a same sex partner, carer or a male relative.

Men who are the principle users of family violence often try to present as a victim or the victim of violence. Sometimes they succeed in convincing themselves, police and others. This is because:

- many men try to avoid responsibility by seeking to justify the violence (directly or indirectly) or to blame their partner - perhaps for 'provoking' an attack or for 'giving him no way out';

- many men try to make their account of the situation seem more believable or credible by portraying their partner as being 'hysterical', 'irrational', and 'a danger to themselves' or even 'mentally ill' – while they present as calm, charming, eloquent and 'in control';
- many men claim injuries (such as scratch or bite marks) inflicted on them by their partner in self-defence as evidence of their victimisation – self-defence actions can also be presented as 'tit-for-tat fighting', perhaps by saying that 'she gives as good as she gets'.

It is important to remember that people experiencing fear or terror will sometimes make bad decisions, which might add to their portrayal as being 'hysterical' or 'out of control'. Women, if they feel safe enough, may undertake small acts of retaliation, which can be construed as 'evidence' of a pattern of violence on their part.

Establishing whether a man is a victim

There are a number of questions a judicial officer can consider asking when a man presents as an affected family member (even in a police application), including:

- Have you ever been violent towards your partner?
- Were you at fault, in any way in causing her violence? This question serves two purposes. First, to assess whether he did anything that caused her to act in self-defence, or to retaliate. Second, people who are genuinely the victims often excuse the perpetrator to some degree and blame themselves for the violence.
- Are you afraid of her? What are you afraid that she might do? If a man does not feel significant levels of fear, then this raises questions about his victim status.
- Describe exactly what she did to you.
- Describe the frequency and any patterns of the violence.
- What has held you back from seeking help earlier or trying to escape the situation? People who are truly victims might have felt too frightened to seek help earlier. They might have lacked access to money, resources, information and support to leave. They might have felt trapped. Note that they might also feel ashamed for not having sought help earlier.

In addition to responses to the questions above, judicial officers might also wish to consider the following questions and issues:

- Has the man had any history of criminal behaviour or allegations of such behaviour, particularly involving violence?
- Has the man had any intervention orders taken out against him in the past?
- Is there evidence of the man using controlling attitudes, beliefs and behaviours, or having rigid attitudes towards gender roles?
- If the accused woman has attended court, has she ever felt the need to apply for an intervention order?
- Does the woman say that she was defending herself, or is there any other evidence to suggest this was the case?

If in any doubt about whether the man is the victim (or the sole victim), judicial officers can refer the man to the Men's Referral Service who can assess the situation further and make appropriate referrals (note that the Men's Referral Service will not provide reports to the Court).

Men who are victims

Men who are genuinely victims of violence from female partners or other family members (e.g. adolescent or adult children) might be assisted by:

- the Men's Referral Service (which has a database of services for both users and victims of family violence);
- the Victims of Crime Helpline;
- the Victim's Assistance and Counselling Program (see also VOCAT assistance); and
- their local community health service.

Last updated: 21 March 2011

5.4.6 Responding to men in same sex relationships

There are many similarities and some differences in men's use of violence against same sex partners. See 5.9 People in same-sex relationships for further information.

Last updated: 21 March 2011

5.5 Specific considerations for diverse groups

Although all people may be exposed to and experience family violence, additional considerations apply to members of some groups when they are exposed to family violence. These groups include indigenous communities, people with disabilities, culturally and linguistically diverse (CALD) communities, the elderly and people in same sex relationships.

Understanding the factors that can influence how people from diverse backgrounds experience family violence, either in their reasons to seek assistance or the conditions they require for their protection, can assist judicial officers to respond in ways that promote their safety.

The following sections discuss particular family violence considerations that apply to:

5.6 - Culturally and Linguistically Diverse people

5.7 - Indigenous people

5.8 - People with disabilities (cognitive, physical or mental health)

5.9 - People in same-sex relationships

5.10 - Abuse of older people

5.6 Culturally and Linguistically Diverse people

This section looks at how people from culturally and linguistically diverse (CALD) backgrounds may experience family violence and issues that may affect their experience of applying for an intervention order.

Because CALD involves a combination of factors, there is no one definition of CALD. However, the following description is often used and may be a useful guide:

> In the Australian context, individuals from a CALD background are those who identify as having a specific cultural or linguistic affiliation by virtue of their place of birth, ancestry, ethnic origin, religion, preferred language, language(s) spoke at home, or because of their parents' identification on a similar basis.

[Department of Human Services (Vic), Multicultural Strategy Unit, 2002]

While the term 'CALD' can have a homogenising effect that undermines the aim of describing the diversity of refugee and migrant communities, it is used in this Bench Book as it is the term currently used by policy makers, service providers and researchers.

[See Dimopoulos, M (2010), *'Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities'*, Australian Domestic and Family Violence Clearinghouse Issues Paper, no. 20, p2]

The content contained in this section has been prepared in consultation with InTouch Multicultural Centre Against Family Violence (formerly known as Immigrant Women's Domestic Violence Service).

Useful information about family violence and CALD communities is also contained in the AVERT Family Violence resources.

References for source material mentioned in this section can be found in 5.6.6 - Further reading.

5.6.1 Prevalence of family violence amongst CALD communities

It is difficult to determine the exact prevalence of family violence amongst people from CALD backgrounds. As with family violence generally, there are high levels of underreporting.

InTouch Multicultural Centre Against Family Violence (formerly known as Immigrant Women's Domestic Violence Service) found that family violence is not a culturally specific phenomenon. Instead, particular experiences common to newly settled refugees and migrant families, such as lack of English language skills, unemployment, and pre-immigration trauma increase the risk of family violence.

[Immigrant Women's Domestic Violence Service (2006), *Refugee Settlement Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities*, Melbourne, p1]

In Victoria, information about cultural background and primary language is not routinely collected in Courtlink, although some indication of prevalence can be gleaned through the number of family violence clients requesting services from an interpreter. Studies indicate that less than five per cent of affected family members and respondents received interpreter services at court for family violence matters.

[*Victorian Family Violence Database Volume 5: Eleven Year Trend Analysis (2009–2010) (2012),* p 158)]

Anecdotal evidence from judicial officers is that the number of people from CALD backgrounds making applications for intervention orders is much higher than these interpreter statistics suggest. The small number of cases recorded as accessing interpreter services may be affected by:

- limited availability of interpreters in particular languages;
- the number of CALD affected family members who understand spoken English sufficiently enough to not request the services of an interpreter;
- lack of awareness of interpreter services;
- the sharing of interpreters between affected family members and respondents; and
- an unknown proportion of informal translation through family and friends.

Across the population more broadly, a significant proportion of the Victorian community was either born overseas or speaks a language other than English, with 31.4 per cent of the Victorian population born overseas and 27.6 per cent of people speaking a language other than English at home.

[Australian Bureau of Statistics, *2011 Census Quickstats: Victoria*, Australian Commonwealth Government, accessed at http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/2 on 4 April 2013]

Last updated: 3 May 2013

5.6.2 Particular experiences of family violence

Introduction

In many ways, the nature of family violence experienced by people from a CALD community is similar to that experienced by people from mainstream communities. However, there are also some significant differences.

People from CALD backgrounds:

- may experience emotional and social abuse through actions that isolate them from other members of their cultural group, or people who speak their own language;
- may suffer financial abuse due to relying on their partner for money, or not knowing about their rights to Family Allowance or Social Security payments;
- may experience sexual abuse as a result of not equating a non-consensual sexual act perpetrated by their partner as violence, or by being too embarrassed to report this form of violence.

Risk factors for family violence for newly-arrived or immigrant people can include unemployment, isolation from mainstream society, trauma experienced in their home country and transition of cultural and gender roles.

InTouch's study into refugee settlement, safety and wellbeing found that social isolation is a common risk factor for family violence for refugee and migrant women. The report noted that women who stayed at home caring for children, or who could not gain entry to the workforce, felt restricted from learning about Australian society and how it functions. These women were alienated from their new society, its values, laws and expectations, and as a result became more socially reliant on their male partners.

[Immigrant Womens' Domestic Violence Service (2006), *Refugee settlement safety and wellbeing: Exploring domestic and family violence in refugee communities,* Melbourne]

Forced marriage

Forced marriage occurs when a person marries without free and full consent. It can happen both in Australia (including when a person is brought into the country in order to be married) and when a person is taken to an overseas country for the purpose of a forced marriage.

Forced marriage is to be distinguished from arranged marriage, in which a marriage is organised by the families, but the individuals concerned have the right to accept or reject the arrangement.

This has been described as a 'unique and important' form of family violence for young CALD women, reportedly that 'young women are extremely fearful of refusing [to marry] for fear of losing their family's love and support'. Women involved in forced marriages are reportedly at high risk of mental health problems and suicide, as well as family violence perpetrated by fathers, brothers and mothers to force the woman to cooperate with the marriage. Ultimately. these forms of abuse may not be readily recognised as family violence by some within these communities.

42 cases of forced marriage were referred to the Australian Federal Police between March 2013 and May 2015.

Forced marriages can represent an 'intersection between family violence, sexual exploitation and child protection'. A recent report by the Australian Institute of Criminology confirmed that 'marriage and partner migration have been used to facilitate the trafficking of people into Australia', and the InTouch submission to the Royal Commission has reported:

> '…an increase in human trafficking for sexual and domestic servitude in recent years, especially in regional areas. Typically, a foreign woman enters into what she believes is an arranged marriage with an Australian citizen, but upon arrival is treated as a slave by her husband, and repeatedly subjected to physical, sexual and other forms of abuse.'

In Australia, human trafficking, slavery and slavery-like offences (including a specific forced marriage offence) are prohibited under Divisions 270 and 271 of the *Criminal Code* (Cth).

In Victoria, the *Family Violence Protection Act 2008* indicates that using coercion, threats, physical abuse or emotional or psychological abuse to cause or attempt to cause a person to enter into a marriage may constitute family violence under section 5(1)(a).

[Victoria, Royal Commission into Family Violence, Volume V Report and recommendations (2016), 111–112]

Female genital mutilation

Female genital mutilation (FGM) refers to 'all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons'. It is sometimes called 'female cutting' or 'female circumcision', and is known to be harmful and to have both immediate and long-term health impacts. The practice has been documented in 28 countries in Africa and a few countries in Asia and the Middle East.

Migration has led to an increase in the number of women and girls living outside their country of origin who have undergone FGM or are at risk of being subjected to it. There is no data on its prevalence in Victoria, although it has been reported that between 600 and 700 women each year seek the assistance of the Royal Women's Hospital de-infibulation clinic because they have been subjected to some form of FGM. Some research suggests a decline in support for, and the relevance of, FGM in migrant and refugee communities who have resettled in Victoria.

No FGM Australia told the Royal Commission that the practice is a form of family violence that is culturally motivated and used as a means of controlling women and girls. However, a recent paper published by ANROWS noted that 'while some women who have experienced genital cutting would describe it as a form of family violence many others would not.'

Evidence before the Royal Commission suggests that parents are sometimes pressured to subject their daughters to FGM for a variety of reasons, among them to curb a girl's sexual feelings, a belief that a girl will not be able to marry without undergoing FGM, the notion that a girl subjected to the practice will be 'pure' and not bring shame on her family, and a belief that the procedure constitutes an 'initiation' into the community.

The need to raise awareness in CALD communities about the negative health and legal consequence of FGM was raised with the Royal Commission.

Female genital mutilation has been illegal in Victoria since 1996 under the *Crimes Act 1958* s 32.

[Victoria, Royal Commission into Family Violence, Volume V Report and recommendations (2016), 112]

For more information about the extent and impact of FGM, see the following articles:

- 'Towards estimating the prevalence of female genital mutilation/cutting in Australia' (Australian Institute of Health and Welfare, February 2019).
- 'Discussion of female genital mutilation/cutting data in Australia' (Australian Institute of Health and Welfare, August 2019).

Dowry-related violence

'Dowry' refers to money, property or gifts transferred by a woman's family to her husband upon marriage. Sometimes, dowry demands can be for substantial amounts of money which are multiple times the annual income of a bride or the groom's family, and the parties' socio-economic status affects the amount of dowry to be paid.

Misuse of dowry is a 'substantial problem' and a particular concern in Indian, Pakistani, Sri Lankan and, increasingly, Middle Eastern communities, despite demand for dowry being unlawful in some of these overseas jurisdictions.

Dowry-related violence commonly involves claims that dowry was not paid and coercive demands for further money or gifts from a woman and her extended family. Other claims involved can include visas, such as a prospective entitlement to permanent residency being used to attract a higher dowry price from a spouse and their family or the victim's uncertain visa status used as a threat or limitation for the victim. For some women the money their families have spent on dowry also acts as a barrier to their leaving their abusive partners.

Women who sought assistance have reportedly had difficulty because there was a lack of understanding about dowry and its misuse.

The Australasian Centre for Human Rights and Health submitted to the Royal Commission that dowry plays a 'significant adverse role' in leading to emotional and physical abuse and has harmful impacts on mental health, and highlighted the need for greater awareness and education around the issue as a form of physical, mental and economic abuse.

In Victoria, the *Family Violence Protection Act 2008* indicates that using coercion, threats, physical abuse or emotional or psychological abuse to demand or receive dowry, either before or after a marriage may constitute family violence under section 5(1)(a).

[Victoria, Royal Commission into Family Violence, Volume V Report and recommendations (2016), 113]

For more information about the extent and impact of dowry-related family violence, see the following articles:

- Manjula O'Connor, 'Dowry-related domestic violence and complex -post-traumatic stress disorder: a case report' (2017) 25(4) *Australasian Psychiatry* 1.
- Supriya Singh and Jasvinder Sidhu, 'Coercive control of money, dowry and remittances among Indian migrant women in Australia' (2018) *South Asian Diaspora* 1.

Last updated: 30 August 2019

5.6.3 Myth: violence against women is an accepted part of some cultures

CALD communities are not heterogeneous and different communities have a range of views about the nature and seriousness of family violence. For example, the findings of the *National Community Attitudes to Violence against Women Survey 2009* found that the following factors affect views on family violence:

- *length of settlement*: those who arrived in Australia after 1980 were less likely to define some behaviour as 'always' family violence;
- *place of birth*: those born outside of Australia were less likely to define some behaviours as family violence;
- *cultural heritage*: Vietnamese and Chinese participants did not rank behaviours as seriously as Greek, Italian and Indian participants; and
- *language spoken at home*: respondents who spoke English at home were less likely at accept excuses for violence.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women 2009*, Victorian Health Promotion Foundation Melbourne at 57]

In her research into effective legal strategies to prevent family violence in new and emerging communities, Dimopoulos observed that:

> Although (program workers) agreed that culture and faith were important considerations in service design and delivery, they were also keen to ensure that culture was not promoted as justification or excuse for violence. To illustrate, staff at the Island Women's Welfare Council (IWWCV) were keen to highlight that the utilisation of the 'cultural defence' serves to deny that in every society there is a longstanding history of resistance against recognising and responding effectively to violence against women.

The following comment from a IWWCV program worker illustrates this point:

> Do not mistake the absence of an institutional prohibition against violence in a society for absence of cultural prohibition, or at the very least a history of resistance against it.

[Dimopoulos, M. (2010), *Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities*, Australian Domestic and Family Violence Clearinghouse Issues Paper 20 at 15]

The Queensland Immigrant Women's Support Service (IWSS) has produced a helpful brochure of Myths and Facts http://www.iwss.org.au/public/mythsandfacts.pdf (PDF) setting out some of the commonly held myths relevant to CALD victims of family violence and the responses to those myths.

Last updated: 3 May 2013

5.6.4 Barriers to reporting family violence

A range of barriers inhibit the ability of people from CALD backgrounds to access the family violence system. Such barriers include:

- a misunderstanding of the concept of family violence
- lack of knowledge of Australian law and available services
- language and literacy issues
- cultural and religious issues
- fear and/or mistrust of government and law enforcement agencies
- social isolation
- visa dependency
- lack of cultural competency
- poor interpreting services

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne]

InTouch's report noted that the primary motivation for some CALD women who seek help is support rather than legal intervention. A tendency to underreport, probably due to barriers to using the justice system, means that CALD women may wait until a crisis point before they seek help. The report warned that:

> Safety must always be the priority, but services should be sensitive to all the women's concerns about the consequences of taking legal action.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne, p25]

The above barriers, as well as ways in which judicial officers can respond to them, are discussed in the following sections.

A misunderstanding of the concept of family violence

InTouch reported that:

> A reluctance to report family violence may reflect a failure on the part of the victim to recognise that what she is experiencing is a crime in Australia. In some CALD communities, their understanding of crime is synonymous with grave physical assault or murder…
> Our research highlights that the women interviewed did not have a broader understanding of what constitutes family violence in Victoria. Even though women could identify physical violence as a form of family violence, other forms of abuse such as verbal, emotional, financial, sexual and controlling behaviours were not understood as family violence.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne, p15]

This indicates that women from CALD communities may be unaware of the broad definition of family violence in the FVPA; see 1.1 Family violence.

The InTouch finding is similar to those contained in a VicHealth report, which found that the selected CALD survey respondents were less likely than the wider community to view a range of behaviours such as yelling, criticising or forcing the partner to have sex, as 'always' constituting domestic violence.

[VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women*, Melbourne]

This point was also noted by the Victorian Law Reform Commission, which observed that migrants may come from countries where family violence is seen as acceptable by authorities or is not penalised by the criminal law.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne, at 2.82]

Judicial Observation

When talking with people from culturally and linguistically diverse backgrounds – where women's autonomy might no it can be useful to talk about family violence in terms of human rights. For example:

"It is a fundamental human right for all women and children to live safely in their homes. It does not matter what cul they are from, it is a fundamental human right to live free from family violence."

[Magistrate Pauline Spence

Lack of knowledge of Australian law and available services

People from CALD communities, particularly new and emerging communities, often lack knowledge of their legal rights and how to access legal services in Australia. The Australian Human Rights Commission's study of African Australians found that lack of legal literacy is a critical barrier preventing engagement with the legal system.

This conclusion is supported by the experiences of participants in a 2005 study on migrant and refugee women's experiences of accessing legal services in Australia conducted by Women's Legal Services NSW. Those participants noted:

> I have no idea what the legal system is in Australia and what kind of legal services they have.
>
> We don't know where to start, that is the problem

[Women's Legal Services NSW (2007), *A Long Way to Equal: An Update of "Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women"*, Lidcombe, p19]

This lack of knowledge means that some women are not aware that exclusion orders under the FVPA mean that a protected person can remain in their home (see s 82 FVPA). Without this knowledge, women fear that addressing family violence carries with it a risk of housing instability and homelessness.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne, p16]

Women's lack of knowledge about their rights and the way the legal system works is compounded by:

- illiteracy;
- low socio-economic status; and

- a lack of accessible information, especially in their own language.

While information about legal rights is available through community organisations, police stations and courts, women in violent relationships find it extremely difficult to visit these locations without their violent partner knowing.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne, p16]

Language and literacy issues

Low levels of English proficiency among people from CALD backgrounds, and issues regarding the availability, quality, confidentiality and cost of interpreting services are further barriers to CALD communities accessing the justice system.

Limited translated legal material means that legal information is not readily accessible to members of CALD communities. Accordingly, CALD community members with limited English-language skills frequently rely on their children (who often speak better English) or other community members to provide them with legal information. However, this information may be misinformed, or victims of family violence may be unwilling to disclose the abuse to their children or other community members.

Some CALD victims of family violence are also reluctant to disclose abuse to an independent interpreter for fear that the interpreter will not maintain confidentiality (particularly in some of the newer communities).

[Women's Legal Service NSW (2007), *A Long Way to Equal: An Update of "Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women"*, Lidcombe; Australian Human Rights Commission (2010), *In Our Own Words – African Australians: A Review of Human Rights and Social Inclusion Issues*, Sydney]

Cultural and religious issues

Social and cultural changes associated with resettlement can negatively affect women and increase their vulnerability to violence. Migrants and refugees often experience changes in gender roles and power dynamics within families following settlement in Australia.

Poljski has noted that men from CALD backgrounds may perceive these changes as a challenge to their traditional role as head of the family and attempt to assert their authority through controlling behaviour and violence.

[Poljski, C (2011), *On Her Way: Primary Prevention of Violence against Immigrant and Refugee Women in Australia*, Multicultural Centre for Women's Health, Melbourne, p20]

Cultural norms may discourage victims from seeking help from outside the community, thus preventing them from seeking assistance from police or the legal profession. CALD communities may view family violence as a private matter that should be resolved with assistance from extended family and community or religious leaders.

Fear and/or mistrust of government and law enforcement agencies

Another documented barrier to reporting family violence or seeking assistance is fear and distrust of government and law enforcement agencies. This fear is based on CALD community members' past negative experiences of such bodies in their country of origin. For example, a participant in the Australian Human Rights Commission's consultations with African Australians commented that:

> [T]rust is probably not there for a number of reasons, including the fact that a lot of Africans have come from countries where the legal systems and police were corrupt.

[Australian Human Rights Commission (2010), *In Our Own Words – African Australians: A Review of Human Rights and Social Inclusion Issues*, Sydney, p30]

Social isolation

Social isolation and fear of being ostracised from their families and communities can be a powerful barrier to reporting family violence or taking legal action.

Many newly arrived members of CALD communities find resettlement a lonely experience and do not have established social networks to provide support in their new country of residence. These factors contribute to a sense of social isolation, which is compounded by:

- language barriers
- legal illiteracy
- geographical isolation from other members of the same community
- limited access to transport

[Pittaway, E. & Muli, C. (2009), *The Settlement Experiences of Refugees and Migrants from the Horn of Africa*, Centre for Refugee Research, UNSW, Sydney; Reiner, A (2010), *Background Paper for African Australians: A Review of Human rights and Social Inclusion Issues – Literature Review*, Australian Human Rights Commission, Sydney; Australian Human Rights Commission (2010), *In Our Own Words – African Australians: A Review of Human Rights and Social Inclusion Issues*, Sydney]

In their research, InTouch found that CALD women who report family violence may face ostracism from their families and communities. Among comments from CALD women surveyed:

- one woman commented that reporting to police is like 'opening up your house' and there is shame in divulging 'family secrets';
- another said 'if I leave my husband where will I go, what will I do, what will my family back home say?';
- another woman was burdened by guilt and feared the consequences of breaking up her family;
- one woman said that people from her community knew about the violence but failed to help her; and
- another felt intimidated by threats made by her own family back home if she left her husband.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne, p16]

This fear of social isolation and ostracism is compounded in rural communities.

InTouch also found that some communities believe that conflict resolution is best achieved outside the law through mediation. This usually includes the man's family, disempowering the woman in the process. Religious leaders would also often discourage women from separating or 'breaking up' the home.

Judicial consideration

The pressures on women in CALD communities to settle matters without using the courts can continue to operate w system. Especially in smaller and emerging communities, it is important to ensure that any interpreter is a profe independent of the parties. The interpreter's role must be to directly translate for the court. They must not seek to ne influence an affected family member.

See further the Judicial College of Victoria's Victims and Witnesses resource page.

Like many victims of family violence, CALD women primarily want the violence to stop and do not necessarily want the partner removed from the home

Visa dependency

Visa dependency is a critical barrier in accessing the justice system in family violence situations. Many refugees and migrants arrived in Australia on temporary visas. Studies have shown that concerns about immigration status and fear of deportation prevent women on temporary visas from reporting family violence. For example:

- CALD women conflate lawyers, police, and government departments as representatives from the one authority that can demand their deportation if their relationship breaks down; and
- women who depend on a violent partner for their visa status are often unaware of the right to apply for a change of visa status on the basis of family violence and so will stay in violent situations.

This barrier is particular inhibiting for secondary visa holders who are listed as dependents on primary visas. Many secondary visa holders are unaware that they do not have to accept an abusive relationship in order to remain in Australia.

The Migration Regulations 1994 (Cth) enable persons on relationship-based visas to obtain new visas when they are victims of family violence committed by their sponsors. Obtaining an intervention order is way to prove the existence of family violence.

[*Migration Regulations 1994* (Cth) reg 1.23(4), and Schedule 2]

While an intervention order is proof of family violence, for the purposes of the *Migration Regulations*, the Victorian Law Reform Commission observed in its consultation paper that respondents often contest applications for intervention orders by temporary visa holders and argue that the woman has brought the application to support her visa application following the breakdown of the relationship.

The Commission noted that the *Migration Regulations* allow a person to prove the existence of family violence through other means, such as statutory declarations and it is therefore unlikely that a person will seek an intervention order solely to support a visa application.

[Victorian Law Reform Commission (2004), *Review of Family Violence Laws; Consultation Paper*, Melbourne, at 4.58–4.60]

Judicial Consideration

Where visa concerns are an issue, Judicial Officers may consider including additional conditions on the intervention ord
the respondent from:

- prohibit the respondent from engaging in any action that would undermine the other party's application
residence; or
- prohibit the respondent from hiding or destroying documents required to process the affected family
children's) immigration claims.

Given the vulnerable situation of CALD victims of family violence who do not have permanent residency status, exclu
may be particularly appropriate.

Lack of cultural competency

Concerns about culturally inappropriate responses and a lack of culturally competent services and personnel is a significant barrier to CALD communities engaging with the justice system. Studies have shown that people from CALD backgrounds are reluctant to access mainstream services due to a lack of cultural competency.

Cultural competency in this context includes an understanding of the migration experience, the settlement process, the impact of traumatic pre-arrival experiences and knowledge of CALD communities and their values. For example, the Australian Human Rights Commission study found that:

> A woman may not tell a police officer who is a male that she is experiencing domestic violence because it might be culturally inappropriate for her to share that kind of information with a man.

[Australian Human Rights Commission (2010), *In Our Own Words – African Australians: A Review of Human Rights and Social Inclusion Issues*, Sydney, p31]

Barriers to court processes and legal representation

Inappropriate responses from the justice system can prevent a CALD victim of family violence from seeking an intervention order or continuing with an application. InTouch found that despite reforms introduced by the FVPA, such as the prohibition on personal cross-examination, women's discontent with the legal system was highly influenced by the negative experiences they had in the courtroom. There was evidence that affected family members from CALD communities:

- often lacked proper knowledge of court proceedings;
- had insufficient emotional support to protect them from the intimidating aspects of court;
- were unprepared for lengthy delays in court; and
- were often confused, as the legal processes had never been explained to them in detail.

They identified the use and availability of interpreters was identified as significant issue in intervention order proceedings. InTouch reported that:

- a lack of interpreters when police are called can result in apparent variations between a woman's statements. Inability to give proper evidence was cited as a cause of great anxiety among CALD women;
- interpreters are generally not available to assist affected family members complete an application for an intervention order;
- difficulties can arise when interpreters are not well trained in family violence or legal terms and are unable to interpret accurately;
- in some cases, women were forced to share the services of an interpreter with the respondent, undermining her ability to trust the interpreter;
- finally, interpreters were not always booked for enough time, leaving the women without interpreting services in court for some of the time.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne at 21]

The InTouch research stressed the need for judicial officers or court staff to take the time to clearly explain the effects of the intervention order, as many CALD women did not fully understand the conditions or the consequences of a contravention.

The Footscray Community Legal Centre (2009) reported similar findings in a research study with its African clients about their understanding of family violence intervention orders. Issues identified included:

- a belief that domestic arguments are a private matter that could and should be resolved by family members and community elders, and a corresponding reluctance to seek intervention orders;
- a consequent lack of understanding of police powers to seek an intervention order on a person's behalf;
- lack of understanding about intervention orders as a distinct and separate process from criminal proceedings;
- lack of understanding of intervention orders as a serious legal procedure; and
- lack of understanding of the consequences of an intervention order and the consequences of contravening it.

The study suggested that this confusion may result in people:

- not complying with intervention orders, because of a lack of understanding of the consequences of a contravention;
- becoming reluctant to report family violence to police, because they do not want police to obtain an intervention order on their behalf;
- seeking to resolve family violence through family and community networks, rather than by seeking intervention orders; and
- not reporting contraventions of intervention orders to police.

[Fraser, K. (2009), *Out of Africa and into court: the legal problems of African refugees,* Footscray Community Legal Centre, Melbourne]

Judicial Consideration

Judicial officers can assist CALD affected family members and respondents to understand the court process by:

- taking time to explain the court process and minimising the use of complex language;
- ensuring parties understand the effect of the order (registrars, interpreters, support workers and InTouch may be able to assist with explanations); and
- ensuring parties have access or referrals to appropriate legal representation (e.g. the Women's Legal Service

See, further, the Judicial College of Victoria's Victims and Witnesses resource page.

Lack of appropriate services

It was widely recognised by participants in the InTouch research that support services assisted CALD women dealing with the legal system, especially if the workers spoke their language and understood their culture.

However, it was acknowledged by the services themselves that the following shortcomings significantly impact a woman's willingness to engage with the services:

- **Lack of cultural awareness:** Issues surrounding cultural sensitivity, cultural stereotypes (including service provider assumptions around CALD community tolerance of family violence) and use of interpreters influence the behaviour of workers and a user's perceptions of the service.
- **Limited resources**: Limited resources inhibit services from helping CALD women access the legal system. Service workers also expressed concerns about their capacity to support women with no income, no residency status and no entitlement to other services such as language classes, public housing and employment. These problems seem especially acute in non-metropolitan regions.
- **Lack of integration**: Some service providers operate as isolated agencies that do not have well-developed referral processes.
- **Interpreters**: Workers were frustrated by interpreters who were not well trained in family violence or the use of legal terms. The report noted the challenges in finding an appropriately skilled interpreter quickly in the midst of a crisis, particularly in the evening or on the weekend, or one who can travel to a rural area.
- **Unrealistic expectations**: support workers expressed concern that some CALD women lack basic life skills and attempt to transfer their dependence from a violent partner to the

worker. When the worker is unable to meet those needs, the woman is confused and disappointed and may return to the violent relationship.

[InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne at 22]

Judicial Consideration

Applicant support workers at courts with Specialist Family Violence Services and applicant and respondent support w in the Specialist Family Violence Court Division, can provide assistance and referrals for members of CALD comm manager from InTouch Multicultural Centre Against Family Violence is present at Melbourne and Sunshine Magistra Monday and at Heidelberg and Dandenong Magistrates' Court every Thursday.

Last updated: 3 May 2013

5.6.5 Services

Specific services for CALD victims of family violence include:

- Translating and Interpreting Service: Telephone 131 450
- InTouch Multicultural Centre Against Family Violence (formerly IWDVS): Telephone 1800 755 988 or (03) 8413 00, website www.intouch.asn.au (http://www.intouch.asn.au/) – InTouch case managers support CALD clients at Heidelberg Magistrates' Court (every Thursday), Sunshine Magistrates' Court (every Monday), Melbourne Magistrates' Court (every Thursday) and Dandenong Magistrates' Courts (every Monday).

The Victims of Crime Assistance Tribunal may be able to provide financial assistance to CALD people to help them recover from the effects of family violence. See the VOCAT Resource Page for further information about the availability of VOCAT assistance in family violence matters.

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Last updated: 21 March 2011

5.6.6 Further reading

- Australian Bureau of Statistics (2008), *2006 Census Quickstats: Victoria*, Australian Commonwealth Government
- Dimopoulos, M. (2010), *Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities*, Australian Domestic and Family Violence Clearinghouse Issues Paper 20
- Eastel, P (1996), *Double jeopardy: violence against immigrant women in the home*, Australian Institute of Family Studies
- Immigrant Women's Domestic Violence Service (2006), *The Right to be Safe from Domestic Violence: Immigrant and Refugee Women in Rural Victoria*, Melbourne
- Immigrant Women's Domestic Violence Service (in conjunction with VicHealth) (2006), *Refugee Settlement, Safety and Wellbeing: Exploring domestic and family violence in refugee communities*, Melbourne
- InTouch Multicultural Centre Against Family Violence (2010), *Barriers to the Justice System Faced by CALD Women Experiencing Family Violence*, Melbourne

- Fraser, K (2009), *Out of Africa and into court: the legal problems of African refugees*, Footscray Community Legal Centre, Melbourne
- Neilson, Dr L (2009), *Domestic Violence and Family Law in Canada: A Handbook for Judges*, National Judicial Institute Ontario
- Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne
- Victorian Law Reform Commission (2002), *Review of Family Violence Laws: Consultation Paper*, Melbourne
- VicHealth (2009), *National Survey on Community Attitudes to Violence Against Women*, Melbourne

Last updated: 21 March 2011

5.7 First Nations people

This section discusses indigenous people's experiences of family violence, the prevalence of family violence within indigenous communities, and some of the barriers to indigenous people reporting family violence and accessing support services. To maintain consistency with terminology used in the key research reports, the term indigenous is used to encompass both Aboriginal and Torres Strait Islanders.

The content contained in this section was prepared in consultation with the Koori Family Violence Unit within the Courts and Tribunals Unit.

Useful information about family violence and Indigenous communities is also contained in the AVERT Family Violence resources.

References for source material contained in this section are set out in 5.7.8 - Further reading.

5.7.1 Legislative context

There are several key parts of the FVPA that relate specifically to indigenous people.

Firstly, the definition of family violence is broad enough to encompass indigenous people's experiences of family violence (s 5 FVPA). It aligns closely with the Victorian Indigenous Family Violence Task Force's (2003) definition of family violence as:

> An issue focussed around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self-harm, injury and suicide.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 123]

The term family violence has always been preferred to the term 'domestic violence' when describing indigenous situations because it recognises the complex interaction of kinship structures and extended family relationships.

The definition of family member in s 8 of the FVPA recognises the diverse range of familial structures that exist within different cultures in the Victorian community, including indigenous family relationships. Further, s 10 defines relative to include 'a person who, under Aboriginal or Torres Strait Islander tradition or contemporary social practice, is the person's relative.'

(FVPA s 8 and s 10]

The FVPA defines 'Aboriginal and Torres Strait Islander tradition' as:

(a) the body of traditions, observances, customs and beliefs of Aboriginal and Torres Strait Islander people generally or of a particular community or group of Aboriginal or Torres Strait Islander people; and

(b) any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

(FVPA s 4]

Finally, when a court is considering making an exclusion order against a child respondent, the court must have regard to the need for an indigenous child to live with their indigenous extended family or relatives or, if that is not possible, other extended family or relatives. The court must also have regard to the need for the child to keep their culture and identity through contact with their community (see 2.2.3.2 Exclusion of the respondent from a residence).

(FVPA s 83]

The Department of Planning and Community Development (http://www.dpcd.vic.gov.au/indigenous/indigenous-family-violence) website contains information about the development of the Victorian Indigenous Family Violence Strategy.

Last updated: 3 May 2013

5.7.2 Prevalence of family violence in Indigenous communities

Research indicates that family violence amongst indigenous communities is significantly higher than in the general population. The Australian Institute of Health and Welfare's report, *Family violence among Aboriginal and Torres Strait Islander peoples* (2006) found that:

- indigenous people are twice as likely to be victims of actual or threatened violence as non-Indigenous people;
- indigenous women are 35 times more likely to be hospitalised for family violence-related injuries than their non-Indigenous counterparts;
- indigenous women are 11 times more likely to be killed due to assault and indigenous men are 9 times more likely, compared to their non-indigenous counterparts.

[Australian Institute of Health and Welfare (2006), *Family violence among Aboriginal and Torres Strait Islander peoples*, Canberra, at 41]

The Victorian Indigenous Family Violence Task Force found that indigenous Victorians are eight times more likely to experience family violence than non-indigenous Victorians.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 4]

In considering the prevalence of indigenous family violence, it is worth noting that family violence within indigenous communities often involves extended families and kinship networks. The Victorian Indigenous Family Violence Task Force (2003, at 99) observed that where wider family networks become involved in a family violence situation, the victim may feel threatened by the perpetrator, as well as members of his family.

Judicial Consideration

Making associated intervention orders can be a way of protecting indigenous people who have experienced family violence at the hands of more than one perpetrator. See 2.2.2.1 Power to make final intervention orders for a discussion of when and on what grounds the court may make an associated final intervention order.

Last updated: 21 March 2011

5.7.3 Factors contributing to family violence in Indigenous communities

The factors contributing to family violence in indigenous communities cannot be separated from the broader context of violence and dispossession experienced by indigenous people.

Research and government reports acknowledge that for indigenous people, the causes of family violence are located the history and impacts of white settlement and the structural violence of race relations since that time. This includes:

- dispossession of land and traditional culture;
- breakdown of community kinship systems and indigenous law;
- racism and vilification;
- economic exclusion and entrenched poverty;
- alcohol and other drug abuse;
- the effects of institutionalisation and child removal policies;
- inherited grief and trauma; and
- loss of traditional roles and status.

[Department of Planning and Community Development (2008), *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities,* Melbourne]

These factors can also affect reporting rates and the willingness of both affected family members and respondents to engage with service providers. For example, previous negative encounters with the police may affect the willingness of an indigenous victim of family violence to report violence to the police.

Last updated: 21 March 2011

5.7.4 Impact of family violence on Indigenous people

Family violence has a devastating impact on indigenous communities. The Victorian Indigenous Family Violence Task Force's Final Report discusses:

- the intergenerational transmission of family violence – this can lead to young indigenous people growing up surrounded by violence and developing a belief that it is part of traditional culture;
- breakdown in family structures and lack of positive parental role models – this can result in young indigenous people growing up with low self-esteem, low retention rates in school and unhealthy lifestyle choices, such as drugs and alcohol;
- the relationship between family violence and drug and alcohol abuse – drug and alcohol abuse can contribute to family violence and victims of family violence may use substances as an escape from the violence. Substance abuse can also prevent victims and perpetrators of family violence from addressing and dealing with the cause of the problem;
- the impact of family violence and child abuse on indigenous children - family violence is the single biggest risk factor for child abuse notifications to be substantiated in Victoria and is present in 64 percent of cases affecting indigenous children.

The recognition of indigenous family violence as a community based issue led the Victorian Indigenous Family Violence Task Force to conclude that the solutions to family violence issues must be based on a family healing approach which reunifies families and community and focuses on the prevention of factors that cause violence within families and communities (see 5.7.7 Services).

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 113]

Last updated: 21 March 2011

5.7.5 Barriers to reporting family violence and accessing assistance

Although the Indigenous Family Violence Strategy has improved the service response to indigenous victims of family violence, there are still a number of barriers that impact on the willingness of indigenous people to report incidents of family violence and seek assistance.

Some of these barriers include:

- limited access to support services and limited awareness of rights;
- fear of family and community isolation;
- previous negative experiences with the criminal justice system; and
- scepticism toward the practical effects of an intervention order.

These barriers are discussed in the following sections.

Limited access to support services and limited awareness of rights

The Victorian Indigenous Family Violence Task Force identified the lack of culturally appropriate support services as a major barrier to seeking assistance for family violence. Key points included:

- indigenous victims of family violence need access to culturally appropriate supports and refuges, particularly in regional areas;
- there needs to be greater availability of culturally appropriate resource materials, including advice about legal rights and options for referral;
- holistic responses are needed to address the underlying causes of the violence, such as 'Healing Places' and Time Out' places; and
- indigenous people can encounter practical difficulties (such as the need to travel) when accessing legal advice, attending court, or seeking assistance.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 115]

The Government's response to the Task Force's report included initiatives designed to encourage a community led approach to tackling the issue of indigenous family violence. A number of projects have since received funding to strengthen the capacity of indigenous organisations and communities to address family violence at a local level.

[Department of Planning and Community Development (2008), *Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities,* Melbourne]

Judicial officers and court staff can obtain information about which community groups provide support and assistance to indigenous victims of family violence by contacting a Regional Indigenous Family Violence Support Officer, telephone (03) 9616 8028.

Fear of family and community isolation

Fear of family and community isolation is a major barrier preventing indigenous victims of family violence from reporting the abuse and seeking assistance. For example:

- some indigenous victims of family violence fear that reporting family violence will result in the incarceration of a family member or the involvement of child protection authorities;
- there is a lack of alternative or suitable accommodation if a victim of family violence does decide to leave the relationship and their residence;
- fear that reporting family violence will isolate the victim from their family and community, or that they will be blamed for causing trouble; and
- some victims of family violence prioritise keeping the family unit together and dealing with the causes of the violence, rather than having the perpetrator removed.

For many indigenous people, the intervention of child protection services is a common experience that often goes back several generations. Recently it has been reported that child protection workers in Australia have begun removing the fifth generation of indigenous children from their parents, meaning that some indigenous families have an eighty year history of child protection intervention.

[Douglas, H. and Walsh, T. (2010), *Mothers, Domestic Violence and Child Protection*, Violence Against Women Vol 16 (289)]

In relation to alternative accommodation, the Victorian Indigenous Family Violence Task Force reported that many indigenous individuals trying to escape family violence have limited options other than to leave their community and travel to a refuge elsewhere in the state. This results in community members being removed from their cultural base with minimal access to family support.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 98]

Judicial Considerations

Exclusion orders can help indigenous victims of family violence who might otherwise be faced with limited choi culturally appropriate accommodation and emergency refuges. If the court is considering making an exclusion ord indigenous child respondent from the protected person's residence, it must consider the importance of the child livi indigenous extended family or relatives and the need for the child to keep their culture and identity through co community (s 83(4) FVPA). See 2.2.3.2 Exclusion of the respondent from a residence.

Previous negative experiences with the criminal justice system

Due to historical and cultural experiences, many indigenous people are reluctant to seek assistance from the police and the courts in relation to family violence. The Victorian Indigenous Task Force found that reasons for this reluctance include:

- a belief that the police will not take their allegations seriously, or will blame the victim for the abuse, or charge the victim on other unrelated matters (e.g., outstanding warrants);
- a belief that the police respond poorly to reports of family violence in indigenous communities, or that the police will seek mutual intervention orders against the parties involved in the family violence incident;
- perception that the court environment is not culturally supportive, is alienating, and that it does not protect the indigenous affected family member's privacy.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 120]

The police response to First Nations victims of family violence has altered considerably since the introduction of the Code of Practice for the Investigation of Family Violence (http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=132058) (*1st and 2nd edition*).

In relation to intervention order proceedings, indigenous victims of family violence have reported concerns about:

- being in the same courtroom as the perpetrator during the hearing;
- the absence of protection or physical barriers between themselves and the perpetrator or the perpetrator's friends and family after the hearing;
- the lack of suitable quiet spaces where they could sit with their family, legal representative or other support persons before the hearing;
- not having somewhere for their children to go while they were in court.

Some of these concerns have been identified in the development of the Koori Family Violence Court Support Program, a pilot program at the Melbourne Magistrates' Court. The program is ongoing, with a support worker available to assist both applicants and respondents.

Aims of the Koori Family Violence Court Support Program include:

- enhancing the court's knowledge and understanding around issues associated with family violence within the indigenous community;
- providing culturally appropriate support and information within the court environment for indigenous victims of family violence around their options within the justice system;
- improving the court's capacity to engage with respondents in indigenous family violence matters through the provision of linkages and referrals to support services to address the underlying causes of their behaviour;
- increasing indigenous community confidence in the courts and the justice system more broadly.

If an application for an intervention order involving an indigenous person is lodged at a court other than the Melbourne Magistrates' Court, judicial officers may consider adjourning the hearing of the application to the Melbourne Magistrates' Court in order for the indigenous affected family member or respondent to access the Koori Family Violence Court Support Program. Availability of support services is one factor a court may consider when determining the 'proper venue' for the purpose of a proceeding.

[See r12.02 of the *Magistrates' Court (Family Violence Protection) Rules 2018* and the definition of proper venue in s 3(da) of the *Magistrates' Court Act 1989*]

Judicial Consideration

Judicial officers can take steps to increase their cultural awareness by seeking out training activities related to indigenous cultural awareness and by attending community events. The Judicial College of Victoria runs indigenous cultural awareness programs on a regular basis.

Scepticism about efficacy of intervention order system

The Victorian Indigenous Family Violence Task Force reported that indigenous people are sceptical about the degree of protection an intervention order provides. Issues included:

- confusion around the process of applying for an intervention order;
- a lack of understanding that, if an interim order is made, the affected family member will have to return to court to obtain a final order;
- frustration about having to continually tell their story and experience of the violence to the police, solicitors, workers and the court;
- feeling intimidated and unsupported at the interim or mention hearing and, as a result, not returning to court to obtain a final order;
- not understanding how the intervention order worked - this leads to indigenous protected persons agreeing to conditions that are not practicable;
- feeling that breaches of intervention orders are not taken seriously by the police and that the indigenous protected persons are somehow to blame for any breach.

[*Victorian Indigenous Family Violence Task Force Final Report* (2003), at 150]

Nancarrow in her research on indigenous and non-indigenous women's perspectives on family violence, found that many indigenous women saw the separation of families as a perpetuation of historic governments' policies to separate indigenous families. indigenous women believed that separation did not enable a resolution of factors that contribute to the violence, such as substance abuse and racism. Separation also reduces the opportunity for involving family members in resolving the issue.

The indigenous women's focus was largely on rehabilitation of the offender and restoration of the relationship between the offender and the victim, and between the offender and the broader community. Their commitment was to justice strategies that did not collude with processes of domination and enforced separation, but which unified and empowered indigenous communities to seek their own solutions.

[Nancarrow, H (2006), *In search of justice for domestic and family violence: Indigenous and non-Indigenous Australian women's perspectives*, Theoretical Criminology Journal 10(1)]

Last updated: 3 May 2013

5.7.6 VOCAT Assistance

Indigenous victims of family violence may be entitled to assistance from the Victims of Crime Assistance Tribunal to help them recover from the effects of the violence and to access counselling services.

The Koori VOCAT List operates at the Melbourne Magistrates' Court and the Koori VOCAT List Registrar can provide specialist information and referrals for indigenous victims of crime.

See the VOCAT Resource Page for further information about the availability of VOCAT assistance in family violence proceedings.

Last updated: 21 March 2011

5.7.7 Services

Specific services for indigenous victims of family violence include:

- Aboriginal Family Violence Prevention and Legal Service Victoria: Telephone 1800 105 303 or (03) 9654 3111;
- Victorian Aboriginal Legal Service: Telephone 1800 064 865 or (03) 9419 3888;
- Elizabeth Hoffman House: Telephone 1800 796 112 or (03) 9482 5744;
- Koori Family Violence Court Support Program: managed by the Family Violence Programs and Initiatives Unit, Magistrates' Court of Victoria;
- Koori VOCAT List (within the Victims of Crime Assistance Tribunal): Telephone (03) 8615 3879.

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Judicial Consideration

When engaging with indigenous affected family members and respondents, judicial officers should consider the type of assistance and referrals they need. For example, indigenous perpetrators and victims of family violence may need support for drug and alcohol abuse, or access to cultural healing in order for them to be in a position to address the family violence in their lives.

The Victorian Aboriginal Legal Service and the Aboriginal Family Violence Prevention and Legal Service Victoria can provide legal representation to respondents and affected family members respectively. The Men's Referral Service and the Courts Integrated Service Program (CISP) can provide indigenous respondents with links to culturally appropriate forms of counselling.

Last updated: 21 March 2011

5.7.8 Further reading

- Australian Institute of Health and Welfare (2006), *Family violence among Aboriginal and Torres Strait Islander peoples*, Canberra
- Department of Planning and Community Development (2008), *Strong Culture, Strong People, Strong Families: Towards a safer future for Indigenous families and communities 10 year plan*, Melbourne
- Department of Planning and Community Development (2008), 'Development of a Benchmark evidence base for the family violence service system'
- Douglas, H. and Walsh, T. (2010), *Mothers, Domestic Violence and Child Protection*, Violence Against Women Vol 16 (289)
- Nancarrow, H (2006), *In search of justice for domestic and family violence: Indigenous and non-Indigenous Australian women's perspectives*, Theoretical Criminology Journal Volume 10(1)
- Victorian Indigenous Family Violence Task Force (2003), *Final Report*, Melbourne

Last updated: 21 March 2011

5.8 People with disabilities (cognitive, physical or mental health)

People with disabilities experience higher rates of violence than non-disabled people. Women with disabilities are particularly over-represented as victims of family violence and may have different needs from other victims.

The content contained in this section has been prepared in consultation with Women with Disabilities Victoria (previously known as Victorian Women with Disabilities Network). Further information about supporting women with disabilities is available from the Women with Disabilities Victoria's website at www.wdv.org.au (http://www.wdv.org.au).

Useful information about family violence and people with disabilities is also contained in the AVERT Family Violence resource.

Reference in this section is made to people with disabilities. However, it should be observed that most of the research into family violence against people with disabilities focuses on women with disabilities. In some cases, the issues discussed in this section are specific to women victims.

References for source material contained in this section are set out in 5.8.8 - Further reading.

5.8.1 Definition of disability

The Office for Disability (within the Department of Planning and Community Development) states that:

> One-in-five Australians have a disability. The ageing of the Australian population and longevity are leading to increasing numbers of people with a disability with a severe or profound limitation (The National Disability Strategy 2008).
> Disability is an evolving concept and disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others (UN Convention of the Rights of Persons with Disabilities).
> The term 'disability' also indicates an impairment which may limit a person's ability to carry out day-to-day tasks. A disability can be caused by an accident, illness, trauma, genetic condition, ageing or can occur from birth. A disability can affect a person's mobility, one or more of the five senses, moods and perceptions, or the way the brain functions.
> Some people may have more than one type of disability. For example, a person who has a vision impairment may also have an intellectual disability.

[Office for Disability, http://www.officefordisability.vic.gov.au/ (http://www.officefordisability.vic.gov.au/)]

The definition of family member in the FVPA is sufficiently broad to potentially include people who live together in a residential facility, paid and unpaid carers, and other persons who provide support or sustenance to a person with a disability.

(FVPA s 8(3)]

Last updated: 21 March 2011

5.8.2 Prevalence of family violence against people with disabilities

Reliable statistics on prevalence of violence against people with disabilities is not available, as most services (including the Magistrates' Court) do not routinely record whether a victim suffers from a disability. While presence of a disability can be measured among clients seeking support from SAAP agencies, this data only captures people who are eligible for a disability pension and accordingly is not a reliable indicator. Despite this lack of precision, commonly cited figures suggest that women with disabilities are assaulted, raped and abused between twice and twelve times the rate of other women.

[Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne, at 39]

Last updated: 21 March 2011

5.8.3 Disability as a risk factor

Women with Disabilities Victoria found that people with disabilities can be more vulnerable to family violence because of:

- restricted mobility, making it difficult for them to protect themselves from violent or dangerous situations;
- relying on assistance with personal tasks from the perpetrator; and
- being identified as 'easy targets' for abuse.

They also noted that some people with disabilities may have limited education and limited economic independence, which can increase the risk of family violence.

In considering why people with disabilities are more vulnerable to violence, the research stresses that it is not so much the effects of disability that increases vulnerability, rather it is society's response to people with disabilities. As Women with Disabilities Victoria put it:

> Disability is a risk factor in cultures that devalue people with disabilities, but not in cultures that place a higher value on them.

[Victorian Women with Disabilities Network (2008), *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria*, Melbourne, at 36]

Women with Disabilities Victoria (2008, at 113–114) reported that compared to non-disabled people, people with disabilities:

- experience violence at higher rates and more frequently;
- are exposed to a significantly higher risk of violence;
- have considerably fewer pathways to safety;
- tend to be subjected to violence for significantly longer periods of time;
- experience violence that is more diverse in nature; and
- experience violence at the hands of a greater number of perpetrators.

Last updated: 21 March 2011

5.8.4 Forms of family violence experienced by people with disabilities

People with disabilities can experience family violence from a number of different perpetrators, including intimate partners, relatives, paid or unpaid carers, or co-residents at aged care facilities.

The violence that people with disabilities experience may be similar to that of non-disabled people; however people with disabilities also experience unique forms of violence. The Victorian Women with Disabilities Network discussed the specific forms of violence that people with disabilities can experience, including:

- administration of poisonous substances or inappropriate drugs;
- withholding of food, water or heat;
- withholding of equipment, medications or transportation;
- inappropriate handling, including the use of restraints or confinement;
- taking advantage of physical weakness and isolation to force sexual activity;
- being rough with intimate body parts or being left naked or exposed;
- denial of sexuality, forced or involuntary sterilisation or termination of pregnancy;
- threats to withdraw care or services;
- threats to institutionalise or remove children; and
- restricting access to others (including services).

[Victorian Women with Disabilities Network (2008), *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria*, Melbourne, at 114]

Judicial Consideration

The draft Courtlink intervention order conditions can be added to or modified as judicial officers consider appropriate (see s 81 FVPA and 2.2.3.1 Sample conditions). When considering the safety of affected family members with disabilities, judicial officers may consider:

- prohibiting the respondent from denying the affected family member access to medication or mobility aids; or
- prohibiting the respondent from making demeaning comments about the affected family member's disability.

Last updated: 21 March 2011

5.8.5 Barriers to reporting family violence

People with disabilities face additional barriers to reporting abuse and seeking assistance. These barriers exacerbate the general problems around the underreporting of family violence.

Barriers include:

- The behaviour may not be recognised as family violence
- Limited access to services or alternative accommodation
- Limited access to the justice system

In considering the barriers that people with disabilities encounter when seeking assistance for family violence, it is important to remember that disability:

- may increase the affected family member's dependence on the perpetrator of the violence;
- may cause the affected family member to fear that they will not be regarded as a credible or reliable witness; and

- can affect the ability of the affected family member to leave their residence, particularly if their premises have been modified or if they receive assistance and care services from the local council.

These barriers, as well as some ways judicial officers may respond to them, are discussed in the following sections.

The behaviour may not be recognised as family violence

It is not always easy for any person to recognise and define family violence. People with disabilities face special difficulties defining what is abusive treatment and what is not.

As the Victorian Law Reform Commission observed:

> People with disabilities experience forms of violence which are not only often condoned, but to a certain extent institutionalised in our society. This includes being forced into dependent living situations and the denial of sexual relationships and participation in family planning decisions.
>
> [Victorian Law Reform Commission (2006), *Review of Family Violence Laws Report*, Melbourne at 2.85]

Women with Disabilities Victoria noted that not all women with disabilities understand that what they are experiencing is violence and that they should not have to endure it. They also noted that women with disabilities sometimes simply do not know about the existence of services that might be helpful to them in dealing with violence.

> [Victorian Women with Disabilities Network (2008), *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria*, Melbourne, at 38]

People with disabilities also often encounter reluctance on the part of others to believe that violence has taken place. Violent actions by a carer are often viewed as 'carer fatigue', or a response to challenging behaviour by the person with disabilities, rather than as family violence.

As noted by one victim of family violence:

> I believe the big difference for a woman with a disability experiencing domestic violence is that people just don't believe you. They still have this underlying assumption that the able bodied partner is wonderful taking on a person with a disability. In my case it fed his ego. I was astounded by people who didn't believe my fear when I eventually told them. They believed I was overreacting. I remember the disbelief of some of my neighbours and one saying he wouldn't do that, he has done so much for you for so many years. All the lifestyle improvements I advocated for myself, but the perception was he had done it all.

[Victorian Law Reform Commission (2006), at 2.86]

Carer fatigue, or the stressed care-giver theory, can be used to explain abuse again people with disabilities (it is also used when explaining abuse against older people). The care-giver stress theory describes abusers as well-meaning individuals who want to be caring but commit an isolated act of abusive behaviour when they lose control under significant pressure.

However, researchers argue then when professionals start focussing on the characteristics of the victim, for example their age or their disability, it implicitly blames the victim for being too needy and takes responsibility away from the abuser. This issue is discussed in detail in 5.10.3 - Perpetrators of family violence against older people.

[Brandl, B. (2000), *Power and Control: Understanding Domestic Abuse in Later Life*, Abuse and Neglect of Older People, Summer 2000]

Limited access to services or alternative accommodation

Access to appropriate services and the limited availability of affordable, accessible housing is a considerable barrier to people with disabilities escaping violence. For example, a person with disabilities can encounter:

- difficulties in seeking assistance where the victim is reliant on the perpetrator of the violence for their day-to-day living needs;
- difficulties in accessing refuges or finding alternative accommodation that are suitable for the person's needs;
- difficulties in obtaining help with personal care if the perpetrator of the violence is also the person's carer;
- problems reconnecting with funded care services, support workers, support networks or special schools (if the person has a child with disabilities) if the person is forced to move from region to region.

Women with Disabilities Victoria noted that many women with disabilities do not have access to adequate independent income, information, housing, employment, services (such as general practitioners, lawyers, counsellors), and transport. This means that the majority of them do not have access to the resources they need to protect themselves from violence.

[Victorian Women with Disabilities Network (2008), *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria*, Melbourne, at 37]

Women with disabilities often face a range of additional problems if they are forced to leave their homes. If the home has been modified to meet their needs, leaving can cause a significant loss of independence. Concern about loss of independence and mobility can prevent victims from leaving a violent relationship. Women with Disabilities Victoria advised that having to leave their home can be an issue for people with disabilities who are connected to a disability support worker or who receive financial assistance through their local council. Frequent moves can result in these people losing access to important services and networks.

[Comments provided by Jen Hargrave, Policy Officer, Women with Disabilities Victoria, 28 October 2010]

Judicial Consideration

When making an intervention order in favour of an affected family member, judicial officers must consider whethe exclusion condition (s 82 FVPA).

Women with Disabilities Victoria advocate in favour of exclusion conditions and have observed that women with disabi alternative accommodation options than other women, particularly in situations where they require particular modifi residence.

Limited access to the justice system

People with disabilities can find it particularly difficult to access legal services and make intervention order applications. Some barriers identified include:

- difficulty in gaining access to legal aid (due to physical and cognitive disabilities);
- lack of integrated support systems, including police, family violence support services, legal assistance and in-court support;
- court facilities that are ill-equipped to the needs of people with disabilities;
- inadequate or inappropriately used interpreting facilities;
- absence of flexible court procedures and practices to accommodate the needs of people with disabilities, including the use of alternative technology;
- fear amongst people with disabilities that they will not be believed if they report the abuse or will not be considered a credible witness.

See 5.8.6 Court craft responses to people with disabilities for a discussion of how judicial officers can respond to some of these issues.

Last updated: 21 March 2011

5.8.6 Court craft responses to people with disabilities

Judicial officers and court staff should consider modifying their usual approach to effective communication with parties and assessing credibility and competence of witnesses when dealing with affected family members or respondents with disabilities.

Communication

When liaising with affected family members with disabilities, court staff and judicial officers (where appropriate) should:

- ask the affected family member whether they would like the services of a support person or independent third person and, if so, engage that person as soon as possible;
- allow the affected family member to communicate in their preferred way using, for example:
- Auslan;
- Braille;
- picotgrams;
- a communication assistant; or
- support from a Guardian Advocate from the Office of Public Advocate (http://www.publicadvocate.vic.gov.au/).
- take time to explain the court process and what is going to happen (particularly if the affected family member has cognitive difficulties or mental health issues).

If the affected family member's carer is the respondent, court staff will need to arrange another person who can assist the affected family member and translate effectively in court. Communication Rights Australia (http://www.caus.com.au/) can assist in organising communication assistance.

Applicant support workers (Specialist Family Violence Court Division and Specialist Family Violence Courts) and Court Network may also be able to provide assistance to an affected family member with disabilities.

See also the Judicial College of Victoria's Family Violence resource page for tips on how to effectively communicate with parties to intervention order proceedings.

Credibility and competence

- One of the biggest fears held by people with disabilities, particularly cognitive disabilities, is that courts will not believe them or take them seriously.
- Affected family members with cognitive impairments may seem to have difficulty knowing or remembering what has happened to them and may seem untruthful. Like all affected family members, a person with a disability may be vulnerable to intimidation in the courtroom by the respondent.
- Judicial officers can assist affected family members with disabilities by:
- giving them time to communicate what happened to them;
- providing clear and simple explanations of the proceedings, repeating things where required;
- treating them with respect; and

- allowing them to give evidence by way of affidavit or sworn statement (s 66 FVPA).

Magistrates may also be assisted by the Mental Health Court Liaison Service (MHCLS), which is a court-based assessment and advice service provided by Forensicare. The aim of the MHCLS is to provide court assessment and advice services to magistrates in relation to people who may have a mental illness appearing before the Magistrates' Court. Further information about the service is available from the Magistrates' Court of Victoria website or by contacting the MHCLS on (03) 9628 7909.

Last updated: 21 March 2011

5.8.7 Services

Useful services in relation to people with disabilities include:

- Women with Disabilities Victoria: Telephone (03) 9664 9317
- Women with Disabilities Australia: Telephone (03) 6224 8288
- Disability Services, within the Department of Human Services: Website http://www.dhs.vic.gov.au/disability.

The Victims of Crime Assistance Tribunal may be able to provide financial assistance to people with disabilities to help them recover from the effects of family violence. See the VOCAT Practice Page (https://access.justice.vic.gov.au/webapps/ca256ebe0003a664/page/practice+pages-vocat?opendocument&1=65-practice+pages~&2=70-vocat~&3=~) for further information about the availability of VOCAT assistance in family violence proceedings.

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Last updated: 21 March 2011

5.8.8 Further reading

- Brandl, B. (2000), *Power and Control: Understanding Domestic Abuse in Later Life*, Abuse and Neglect of Older People, Summer 2000
- Victorian Women with Disabilities Network (2008), *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria*, Melbourne
- Victorian Law Reform Commission (2006), *Review of Family Violence Laws: Final Report*, Melbourne.

Last updated: 21 March 2011

5.9 People in same-sex relationships

This section looks the nature and prevalence of family violence within same-sex relationships, as well as some of the barriers gay, lesbian, bisexual transsexual, transgender and inter-sex (GLBTI) people experience when reporting same-sex partner abuse.

Content contained in this section was prepared in consultation with Gay and Lesbian Health Victoria and the Rainbow Network Victoria.

Useful information about family violence and people in same sex relationships is also contained in the AVERT Family Violence resource.

References for source material contained in this section are set out in 5.9.6 - Further reading.

5.9.1 Prevalence of family violence in same sex relationships

To date, there is little accurate Australian research that records the level of family violence in same sex relationships. However, there are a number of overseas studies that suggest that the general patterns and levels of family violence in same sex relationships are about the same as in heterosexual relationships.

A Victorian study reported on the responses of 390 gay, lesbian, bisexual transgender or intersex (GLBTI) Victorians to an online survey asking them about their experiences of same-sex partner abuse. The research found that:

- just under one third of GLBTI respondents have been in a same-sex relationships where they were subject to abuse by their partner;
- of respondents subject to abuse, 78 per cent reported that they had been subject to psychological abuse and 58 per cent reported being subject to physical abuse (respondents could provide multiple responses);
- lesbian women were more likely than gay men to report having been in an abusive same sex relationship (41 per cent and 28 per cent respectively).

[Leonard, W., Mitchell, A., Patel, S., and Fox, C. (2008) *Coming Forward: The underreporting of heterosexist violence and same sex partner abuse in Victoria*, The Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne]

American studies indicate that between 22 and 46 per cent of lesbian women reported they had been in a physically violent intimate partner relationship. Other studies estimate that 15 to 20 per cent of gay men and lesbian women had been affected by family violence. While most of this research was based on self-selected samples, it suggests that family violence in same-sex relationships is a major issue.

[Cited in Chan, C (2005), *Domestic Violence in Gay and Lesbian Relationships*, Australian Domestic and Family Violence Clearinghouse, p2]

In Victoria, there are no comprehensive figures on the prevalence of family violence in same-sex relationships. Sexual orientation is not recorded in the Courtlink database or the Victorian Family Violence Database.

Last updated: 3 May 2013

5.9.2 Forms of family violence experienced by people in same sex relationships

Family violence in same-sex relationships follows many of the power and control dynamics of abuse present in heterosexual relationships. It can include physical or sexual violence, as well as psychological, emotional or economic abuse.

However, some forms of abuse are unique to same-sex relationships. Chan observed that there are some forms of abuse specific to same-sex relationships, such as:

- 'outing' or threatening to 'out' a person to friends, family, employer, police, church or others in the wider community;
- telling a partner that no-one will help them because the police and justice system are homophobic;
- telling a partner that they will not be believed because of a perception that homosexuals do not rape or abuse their lovers;
- telling a partner that they deserve it because they are homosexual - this type of abuse is indicative of internalised homophobia or self hatred by an abuser;
- telling a partner that they are not a 'real' homosexual because they used to relate to men or women, have male or female friends, or prefer certain sexual practices or behaviour;
- relying on sexist stereotypes to hide the abuse by portraying the violence as mutual or consensual combat;
- telling a male partner that the behaviour is not family violence but an expression of masculinity.

[Chan, C (2005), *Domestic Violence in Gay and Lesbian Relationships*, Australian Domestic and Family Violence Clearinghouse, at 3]

The Aids Council of New South Wales reported that HIV status has been shown to influence gay men's decision-making about staying in abusive relationships. For example:

- victims of same-sex family violence who are HIV-positive may feel that they have no other support apart from their abusive partner;
- if the abusive partner if HIV-positive, the victim may feel guilty about reporting the abusive partner to the police.

[Aids Council of New South Wales (2004), *Homelessness and Same Sex Domestic Violence in the Supported Accommodation Assistance Program*, Sydney]

Judicial Consideration

If making an intervention order to protect a GLBTI affected family member, judicial officers may consider including additional conditions prohibiting the respondent from revealing information about the affected family member's sexual orientation or health status. See further 5.9.4 Barriers to reporting family violence.

Last updated: 21 March 2011

5.9.3 Myths about same-sex family violence

As with family violence in heterosexual relationships, there are a number of myths surrounding family violence in same sex relationships. These myths can affect how the police, service agencies and the courts respond to victims of same-sex partner abuse.

Some family violence myths that are specific to same-sex relationships include:

- lesbian women do not engage in violent abuse against their partners because women are not violent;
- women in relationships together have equal power;
- lesbian battering only occurs in sado masochistic or butch/femme relationships;
- same-sex family violence is 'sexual behaviour', a form of sado masochism that both parties enjoy;
- a batterer must be physically bigger than the party abused;
- men are never victims of family violence – it isn't violence when gay men fight, its a case of 'boys being boys';
- same-sex family violence is about 'mutual combat' not power and control by one partner over the other – the violence is an 'equal fight'; and
- violence is a normal part of how some same-sex relationships work.

[Vickers, L. (1996), *The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective*, Murdoch University Electronic Journal of Law]

The police and justice system's tendency to minimise these issues or to treat incidents of family violence in same-sex relationships as 'mutual battering' are discussed in 5.9.4 - Barriers to reporting family violence.

Last updated: 21 March 2011

5.9.4 Barriers to reporting family violence

People in same-sex relationships face a number of barriers to reporting family violence in addition to the barriers to reporting family violence generally. Barriers include:

- Fear that the abuse will not be taken seriously
- Fear that the victim will be 'outed' or discriminated against
- Fear of discrimination by service providers, police and the court

GLBTI people from indigenous and ethnic communities may have additional reasons for not disclosing abuse, including the fear that they will be ostracised from a particular ethnic or racial community.

The above barriers, as well as some ways judicial officers can respond to them, are discussed in the following sections.

Fear that the abuse will not be taken seriously

The *Coming Forward* report found that the major single barrier preventing people in same-sex relationships from reporting or seeking assistance for family violence was fear that their allegations would not be taken seriously.

For example, people in same-sex relationships often fear that:

- the violence would not be taken seriously because a man was not involved (for women in lesbian relationships);
- the violence would be treated as mutual battering or 'boys being boys' (for men in gay relationships); or
- the victim would be blamed or held responsible for the violence because he or she was in a same-sex relationship.

[Leonard, W., Mitchell, A., Patel, S., and Fox, C. (2008) *Coming Forward: The underreporting of heterosexist violence and same sex partner abuse in Victoria*, The Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne]

GLBTI community workers have reported that people in same-sex relationships sometimes believe that the community and justice system affords more status to heterosexual relationships than same-sex relationships. This can lead victims of same-sex partner violence to fear that the court might refuse to acknowledge the existence of their relationship, or give greater protection to a victim of family violence who is married or who has children. This fear can persist despite the fact that the victim of same-sex family violence may have been in a committed relationship for many years.

[Comments provide by Roz Ward, Co-ordinator of the Rainbow Network Victoria, November 2010]

Victims of same-sex family violence can be reluctant to call the police or seek legal help due to fears that the violence will be dealt with as mutual battering and that they may both get arrested. While mischaracterisation of defensive violence as mutual battering is an issue for all relationships, it is especially problematic in same-sex relationships.

Vickers argued that the misconception that same-sex violence must be mutual or equal is exemplified by the fact that frequently, when abused same-sex people seek intervention orders against their abuser, the court makes mutual orders. This approach is contrary to research on the nature of family violence in same-sex relationships, which suggests that it involves the same power and control dynamics present in heterosexual intimate partner abuse.

[Vickers, L. (1996), *The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective*, Murdoch University Electronic Journal of Law]

Judicial Consideration

Evidence of physical violence in same-sex relationships, particularly in gay relationships, is not necessarily indica violence. Mutual family violence intervention orders will only be appropriate if there is clear evidence that both parties l family violence against the other and are likely to do so again.

Fear that the victim will be 'outed' or discriminated against

Some people in same-sex relationships are not open about their sexuality. Fear of being outed can be a powerful reason for not disclosing family violence. For example, the *Coming Forward* report found that:

- accessing public assistance may require a person to reveal their sexuality, even if not openly in a same-sex relationship;
- victims can be fearful of being outed to parents, work colleagues or other family members;
- victims can fear that if their sexual identity is revealed they might be subject to further violence (fear of homophobic abuse);
- fear of homophobic treatment, particularly from the courts and other service providers is a powerful disincentive for not revealing abuse; and
- victims who have positive HIV status or other health concerns may be fearful that this will be revealed.

[Leonard, W., Mitchell, A., Patel, S., and Fox, C. (2008) *Coming Forward: The underreporting of heterosexist violence and same sex partner abuse in Victoria*, The Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne]

Fear of discrimination can extend to fear of how the GLBTI victim will be treated by the GLBTI community. For example, Vickers (1996) argues that some victims may be reluctant to disclose same-sex partner abuse for fear that acknowledging it may contribute to prejudice about same-sex relationships and the GLBTI community will blame the victim for showing same-sex relationships in a negative light.

Vickers has also argued that lesbians, in response to homophobic oppression, have placed great importance on building an identity characterised by egalitarian relationships. Many lesbians can be reluctant to concede that lesbian relationships are not always equal, that lesbians can be, and sometimes are, violent towards their partner – just like men.

Likewise, Vickers suggests that gay men similarly rely on the view that they are 'more evolved' than their heterosexual counterparts to deny the existence of intimate violence. Her alternate view is that gay men have internalised traditional ideals of masculinity, making it difficult for them to acknowledge that a man can be a victim of violence.

[Vickers, L. (1996), *The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective*, Murdoch University Electronic Journal of Law]

People in same-sex relationships who are isolated from their friends and family can encounter difficulties accessing resources such as family, friends, social services, police and the legal system.

Judicial Consideration

Applying for a family violence intervention order can be difficult for someone in a same-sex relationship who does not wish to disclose this fact. In these situations, judicial officers may consider:

- closing or clearing the courtroom to protect the privacy of the affected family member;
- including additional conditions in the intervention order, such as:
    - prohibiting the respondent from disclosing the affected family member's sexual orientation; or
    - prohibiting the respondent from disclosing the affected family member's health status or HIV status.

Fear of discrimination by service providers, police and the court

Previous experience of homophobia and discrimination by people in same-sex relationships can make them wary of accessing services and seeking assistance for family violence.

Chan noted that:

> Homophobia is defined as 'the irrational fear and hatred of homosexuals' and heterosexism as 'the use of heterosexuality as the dominant and institutionalised form of sexual identity' for dominance and privilege (citations omitted).

[Chan, C (2005), *Domestic Violence in Gay and Lesbian Relationships*, Australian Domestic and Family Violence Clearinghouse, at 3]

Support services or programs specifically addressing same-sex family violence are limited. Although lesbians can access most general family violence services, like refuges, court assistance schemes, and counselling services, these services may have little experience working with same-sex family violence and may not offer the most appropriate service. For gay men, there are currently few specific services that offer assistance and support.

GLBTI community workers have observed that people in same-sex relationships often encounter unintended heterosexist comments from court staff and judicial officers (Roz Ward, 2010). For example:

- a lesbian victim of family violence attends at court to make an application for an intervention order against her partner and is asked 'what is his name?' or
- a judicial officer, when considering child contact issues in relation to a lesbian couple with children, may make assumptions that the birth mother is the primary care-giver of the children.

Judicial consideration

Community workers note that victims of same-sex family violence are very concerned that the nature of their relation taken seriously or understood by the court. They suggest that the court take care to use gender neutral language and involved, avoid asking questions like 'who is the child's real mother?' or 'where is the father?' and focus on the questio primary care-giver for the child and what is the nature of the child's relationship with the affected family member's part 2010).

Last updated: 21 March 2011

5.9.5 Services for people in same sex relationships

Useful services in relation to same sex victims of family violence include:

- w|respect (With Respect): Telephone 1800 542 847, Website https://www.withrespect.org.au/ (https://www.withrespect.org.au/)
- Switchboard: Telephone 1800 184 527 or (03) 9663 2474, Website http://www.switchboard.org.au/ (http://www.switchboard.org.au/);
- LGBTIQ Legal Service: Website https://lgbtiqlegal.org.au/ (https://lgbtiqlegal.org.au/)
- Kara House Domestic Violence Outreach Service: Telephone 1800 900 520, Website https://karahouse.org.au/ (https://karahouse.org.au/);
- Men's Referral Service: Telephone 1300 766 491 – can provide assistance and referrals to men in same-sex relationships who are experiencing family violence.

Victoria Police employ Gay and Lesbian Liaison Officers (GLLO) to address specific issues affecting the GLBTI community and to provide assistance and referrals to GLBTI victims of violence. A list of GLLOs is available here: https://www.police.vic.gov.au/lesbian-gay-bisexual-transgender-and-intersex-liaison-officers (https://www.police.vic.gov.au/lesbian-gay-bisexual-transgender-and-intersex-liaison-officers)

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Last updated: 28 January 2020

5.9.6 Further reading

- Aids Council of New South Wales (2008), *Another Closet: Domestic Violence in Gay and Lesbian Relationships*, Sydney
- Aids Council of New South Wales (2004), *Homelessness and Same Sex Domestic Violence in the Supported Accommodation Assistance Program*, Sydney
- Chan, C. (2005), *Domestic Violence in Gay and Lesbian Relationships*, Australian Domestic and Family Violence Clearinghouse
- Leonard, W., Mitchell, A., Patel, S., and Fox, C. (2008) *Coming Forward: The underreporting of heterosexist violence and same sex partner abuse in Victoria*, The Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne
- Vickers, L. (996), *The Second Closet; Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective*, Murdoch University Electronic Journal of Law
- Interview with Roz Ward, Co-ordinator Rainbow Network Alliance and Gay and Lesbian Health researcher, 3 November 2010

Last updated: 21 March 2011

5.10 Abuse of older people

This section looks at older people's experiences of family violence. It also considers some of the barriers older people face when reporting abuse. Older people may have experienced family violence throughout their lives, but never reported it, or they may experience violence for the first time when they are older.

In Australia, the term 'older people' is applied to people in a range of age groups, some as young as 45, depending on the researcher, organisation or service involved. For the purposes of this section, however, the focus is people who are vulnerable to family violence because of their age, and does not attempt to define 'older people' based on a specific numerical age.

Useful information about family violence and older people is also contained in the AVERT Family Violence resource.

References for source material contained in this section are set out in 5.10.7 - Further reading.

5.10.1 Definition of elder abuse

Abuse of older people, or elder abuse as it is commonly known, has emerged as an issue in Australia over the last fifteen to twenty years. The Australian Network for the Prevention of Elder Abuse (ANPEA) defines elder abuse as:

> Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.

The World Health Organisation defines elder abuse as:

> A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

Elder abuse includes physical, sexual, financial, psychological/emotional, social abuse, as well as intentional and unintentional neglect.

[Australian Network for the Prevention of Elder Abuse (1999), *Australian Network for the Prevention of Elder Abuse Working Definition*, Queensland; World Health Organisation (2008), *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report*, World Health Organisation, Geneva]

The two primary elements of elder abuse are:

1. That the abuse occurs within a relationship of trust between the perpetrator and the victim; and

2. That the abuse results in harm to the older person.

Dependency is another defining characteristic of elder abuse. Elder abuse generally occurs when an older person is in relationship of dependence with the perpetrator, such as when an older person is dependent on another person for care, accommodation or financial assistance.

[World Health Organisation (2008), *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report*, World Health Organisation, Geneva]

[See also the *Australian Network for the Prevention of Elder Abuse* (1999), and the *Victorian Elder Abuse Prevention Project* (2005)]

The broad definition of family member in s 8 of the FVPA that includes any person who the abused person regards as being like a family member encompasses the range of potentially abusive relationships that apply to older people, including partners, children, other relatives and carers. The preamble of the Act also recognises that family violence occurs in all areas of society, regardless of age.

Support for older people who have experienced abuse, or are at risk of experiencing abuse, has generally been provided by the aged care sector. However, as many researchers have argued, the aged care sector has a very different history and focus from the family violence sector, which focuses on power and control dynamics and the gendered nature of family violence. As one researcher has argued:

> The lack of collaboration between the aged care sector and the family violence sector has resulted in women falling through the cracks and not receiving adequate support.

[McFerran, L. (2009), *The disappearing age: a discussion paper on a strategy to address violence against older women*, The Australian Domestic and Family Violence Clearinghouse, Topic Paper 18, at 5]

Researchers have also observed that aged care professionals, who have had limited training and exposure to family violence, may not recognise abuse of older people as family violence, often viewing it as caregiver stress. See 5.10.3 Perpetrators of family violence against older people for further discussion of this issue.

[Brandl, B. (2000), *Power and Control: Understanding Domestic Abuse in Later Life*, Abuse and Neglect of Older People, Summer 2000]

See the Department of Health (http://www.health.vic.gov.au/agedcare/policy/elder_abuse.htm) website for informa Abuse Strategy.

Last updated: 3 May 2013

5.10.2 Prevalence of family violence against older people

The exact rate of elder abuse is unknown. In Australia, research suggests that between one and five per cent of the ageing population experience elder abuse.

[Victorian Government Elder Abuse Prevention Project (2005), *Strengthening Victoria's Response to Elder Abuse: Report of the Elder Abuse Prevention Project*, Victorian Government Department for Victorian Communities, Melbourne]

Recent growth in the proportion of older people both nationally and internationally is likely to lead to increased rates of elder abuse. The Australian Bureau of Statistics conducted a survey into personal safety which showed the proportion of older women aged 45 years and over reporting violence in the twelve months prior to the survey had increased to 25 per cent.

[Australian Bureau of Statistics (2006), Personal Safety Survey]

Figures prepared by the Department of Justice showed that from 1 July 2007 to 30 June 2010, there were 3,788 finalised intervention orders for people aged 65 or older. This represented four per cent of the 95,737 finalised intervention orders for those years. For people aged 45 and over, the percentage increases to 28 per cent of the finalised intervention orders.

The most prevalent form of elder abuse is financial abuse. Some studies estimate that financial abuse accounts for half of all abuse experienced by older people.

[Department of Health, Victoria (2012), *Elder Abuse Prevention and Response Guidelines for Action 2012–2014*, Department of Health, Victoria; Victorian Government Elder Abuse Prevention Project (2005), *Strengthening Victoria's Response to Elder Abuse: Report of the Elder Abuse Prevention Project*, Department for Victorian Communities, Victoria]

Researchers have argued that most elder abuse goes unreported because of:

- older people are unaware of their rights and available services;
- difficulties older people face in reporting abuse; e.g. an older person may be isolated by language barriers, hearing loss or dependence on an abuser;
- fear of institutionalisation by an abused older person; and
- difficulty service workers may have in distinguishing signs of abuse from what is considered to be 'normal' ageing.

[Cripps, D et al (2002), *Abuse of Older People: Issues for Lawyers*, 1 Elder Law Review 14, p19]

See further 5.10.5 Barriers to reporting elder abuse.

Last updated: 3 May 2013

5.10.3 Perpetrators of family violence against older people

Elder abuse is perpetrated by someone who is in a trusting relationship with an older person, such as family members, friends and carers. Elder abuse is perpetrated by someone who is in a trusting relationship with an older person, such as family members, friends and carers. Abuse of older people occurs within a range of relationships and environments.

Examples of perpetrators include:

- intimate partners: the violence may have been present throughout the relationship or it might have developed with age. Older people can enter new relationships later in life (for example, following divorce or death) and these relationships may be violent.
- adult children or other family members: the violence may be perpetrated by adult children or other family members providing care and support to an older person. The perpetrator of the violence may also depend on the older person for material or financial support.

Elder abuse may occur in the following relationships:

- where the older person depends on a carer, either physically or mentally;
- where the abuser depends on the older person, either financially or because of disability, drug or alcohol abuse; or
- between spouses and between generations (similar to intimate partner violence experienced by younger people).

[See also King, Dr M. (2009), *Solution-Focused Judging Bench Book*, Australasian Institute of Judicial Administration, at 117–118]

Stressed care-giver theory

There are a number of theoretical explanations for abuse of older people by their family members. The most common of these is the overwhelmed or stressed care-giver theory.

Brandl observes that care-giver stress is often described as a primary cause of elder abuse. The care-giver stress theory describes abusers as generally well-meaning individuals who want to be caring but engage in an isolated incident of abusive behaviour when they lose control in circumstances where they are under significant pressure.

Most of the research into elder abuse (see Brandl 2000, at 4) has found that elder abuse generally follows the dynamics of the traditional family violence model. However, aged care professionals too often assume that violence is due to care-giver stress, rather than a choice motivated by issues of power and control. Aged care professions therefore unwittingly:

1. blame the victims for the abuse;
2. collude with the abuser's excuses; and
3. discourage the involvement of the justice system.

Brandl argues that the implication that abuse occurs because caring for dependent older people is too difficult is embedded in the care-giver stress model. This message blames victims for being too needy and relieves perpetrators of responsibility for their abusive behaviour. Victims of elder abuse are given the clear message that if they just tried harder the abuse would end.

[Brandl, B. (2000), *Power and Control: Understanding Domestic Abuse in Later Life*, Abuse and Neglect of Older People, Summer 2000. See also Bagshaw, D., Wendt, S., Zannettino, L. (2009), *Preventing the abuse of older people by their family members*, Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper 7, at 5]

Judicial Consideration

Brandl argues that professionals who believe perpetrators of family violence are stressed care-givers are likely to be commonly offered by perpetrators of family violence, such as 'I lost control'. People working with situations of elde avoid colluding with abusers by making comments like 'we recognise how difficult it is to provide care and how some under all the pressure' as this supports the abuser's existing belief and minimises the abuser's responsibility for their be

Last updated: 3 May 2013

5.10.4 Forms of family violence experienced by older people

Despite some common elements, there are differences in the nature of violence against older people compared to violence experienced by younger people.

Forms of elder abuse include:

- physical abuse;
- psychological or emotional abuse;
- sexual abuse;
- financial abuse;
- social abuse; and
- intentional and unintentional neglect.

Physical abuse

Physical abuse involves the infliction of pain or injury on an older person or physical coercion. Examples include biting, hitting, shaking, burning and restraining or confining an older person.

Psychological or emotional abuse

Psychological or emotional abuse occurs when the perpetrator inflicts mental anguish on an older person through actions which cause fear of violence, isolation or deprivation and feelings of shame and powerlessness. Such forms of abuse include verbal intimidation, humiliation or embarrassment, bullying, threats of institutionalisation, emotional blackmail and denying access to services.

Sexual abuse

Sexual abuse refers to non-consensual sexual contact with an older person, including rape, indecent assault and sexual harassment.

Financial abuse

Financial abuse involves the illegal or improper use of an older person's finances, assets or property. This form of abuse may include forced or unauthorised changes to legal documents, misappropriation of finances and assets, denying access to personal assets, forging signatures or misusing a Power of Attorney.

Social abuse

Social abuse refers to the forced social isolation of older people through preventing them from socialising with friends and family or accessing social activities.

Neglect

Neglect takes the form of elder abuse when a person intentionally or unintentionally fails to provide the necessities of life to an older person who is in their care.

[ACT Government Office of Ageing (2012), *ACT Elder Abuse Prevention Program Policy*, ACT Government Community Services Directorate, Canberra; World Health Organisation (2002), *The World Report on Violence and Health*, Geneva]

Australian researchers have found that the most common form of reported or suspected abuse of older people is financial abuse, with the older person's adult child being the most likely abusers.

[Bagshaw, D., Wendt, S., Zannettino, L., (2009), *Preventing the Abuse of Older People by Their Family Members*, Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper 7, p3]

A full description of the types of elder abuse, as well as some of the risk factors for identifying abuse, are contained in the Department of Human Services' report With Respect to Age – 2009 (http://www.health.vic.gov.au/agedcare/policy/elder_abuse.htm).

In considering the forms of abuse experienced by older people, researchers have noted that abuse is not always intentional. Some older people are hurt in accidents; others are harmed by people who are genuinely trying to help but lack the proper skills. Sometimes harm is caused by a person with a physical or mental illness that manifests itself in violent behaviour. These cases do not generally indicate a risk of future violence (see requirement in s 74 FVPA).

Judicial Consideration

If making an intervention order to protect an older person from family violence, judicial officers may consider in conditions that prohibit the above-mentioned forms of violence. Such conditions may include:

- prohibiting the respondent from denying the older person access to medical treatment; and
- prohibiting any behaviour that unjustly or unreasonably interferes with the ability of the protected perso and manage their own financial assets.

Last updated: 3 May 2013

5.10.5 Barriers to reporting elder abuse

Older people face a number of barriers to reporting family violence. These include:

- isolation: older people who are socially and physically isolated, who have cognitive or physical disabilities, or who lack knowledge about family violence services can find it difficult to report abuse and seek assistance
- dependency: older people who depend on spouses, family members or carers can find it difficult to access support services; they may also be concerned that reporting abuse by their primary caregiver will lead to loss of the caregiver
- loyalty to family members: emotional attachment to family members and concerns about the legal consequences for an abusive family member can prevent older people from reporting abuse
- shame
- fear of further abuse
- absence of uniform reporting laws
- fear of the consequences of reporting, such as being placed in residential care.

The limited accommodation and care options available to older people compound these barriers to reporting and significantly influence older people's responses to abusive in relationships. Monro has observed that:

> despite the abusive quality of the relationship, an older person may see greater value in preserving the relationship in which abuse is occurring rather than facing the possibility of no longer living in their own home or receiving care from a family member.
>
> [Monro, R (2002), '*Elder abuse and legal remedies: practical realities?*', Reform, no. 81, p 45]

Family considerations

Victims of elder abuse commonly cite shame and embarrassment as reasons for not speaking to anyone about their situation.

For example, older victims of family violence may:

- feel they have invested too much in their families and partners to leave;
- feel they are too old to re-enter the workforce if they leave the relationship / family home;
- have more conservative attitudes about the role of women as wives and mothers;
- prioritise keeping the family together over leaving a violent relationship;
- value keeping private matters within the family, rather than discussing them with outside agencies; and

- fear that by reporting the violence or leaving their relationship they will be excluded from social, religious or community networks.

[Bagshaw, D., Wendt, S., Zannettino, L. (2009), *Preventing the abuse of older people by their family members*, Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper 7; McFerran, L. (2009), *The disappearing age: a discussion paper on a strategy to address violence against older women*, The Australian Domestic and Family Violence Clearinghouse, Topic Paper 18]

Where the abuser is a family member, particularly a dependent child, the older person may have concerns about what will happen to their child if they report the abuse and involve the law.

In carer relationships, the older person may fear that removing the carer from the home will leave the older person with no other support, companionship, or connection to their family.

These considerations can be even more pronounced for CALD or indigenous older people.

Dependency

Older people who are dependent on their abuser for care are often scared that if they report the abuse they will be placed in an aged care facility.

Where the abuser is financially or materially dependent on the older person, for example children with disabilities, mental health issues, or drug or alcohol issues, the older person may feel guilty about the possibility of reporting the abuse and having them excluded from the home. This concern is particularly acute if the older person lives in an area where there are limited support services available to assist the abuser (for example, rural communities).

These issues can have implications for judicial officers considering whether to include an exclusion condition in an intervention order. If the older person is dependent on the respondent for care (or vice versa), judicial officers should consider whether alternative and appropriate support services are available (see further 5.10.6 Services).

Leaving an abusive relationship can also be financially difficult. Far greater numbers of older women than older men live on the single Age Pension and a high proportion of older women have no superannuation.

[Association of Superannuation Funds of Australia, 2008]

Leaving a violent relationship also results in a high risk of homelessness as there are limited accommodation services that are appropriate for older people.

Limited access to services

Research into older people's experiences of family violence indicates that many older women consider that leaving the relationship, going to a refuge, or calling the police are choices for younger women.

McFerran noted that older women are more likely to seek assistance for abuse from a general practitioner. However, members of this profession were judged to be more unhelpful than helpful.

[McFerran, L. (2009), *The Disappearing Age: A Discussion Paper on a Strategy to Address Violence Against Older Women,* Australian Domestic and Family Violence Clearinghouse, Topic Paper 18, p6]

Other barriers to accessing services include:

- limited mobility;
- lack of knowledge about available services;
- literacy and language barriers (issues for CALD older people); and
- lack of suitable alternative accommodation.

Older people who are not engaged with family violence services may be more likely to seek assistance from health and community aged care services. As mentioned in 5.10.1 - Definition of elder abuse, these services might not have experience in dealing with family violence or be aware of what legal options are available.

Last updated: 3 May 2013

5.10.6 Services

Useful services in relation to older victims of family violence include:

- Senior Rights Victoria: Telephone 1300 368 821, Website www.seniorsrights.org.au (http://www.seniorsrights.org.au/);
- Office of Senior Victorians: Part of the Department of Planning and Community Development, Website www.dpcd.vic.gov.au (http://www.dpcd.vic.gov.au/)

The Victims of Crime Assistance Tribunal may be able to provide financial assistance to older people to help them recover from the effects of family violence. See the VOCAT Resource Page for further information about the availability of VOCAT assistance in family violence matters.

See 5.12 Services for further information about the location of Applicant Support Workers, Respondent Support Workers and Family Violence Outreach Workers and links to Statewide Family Violence Services.

Last updated: 21 March 2011

5.10.7 Further reading

- Bagshaw, D., Wendt, S., Zannettino, L. (2009), *Preventing the abuse of older people by their family members*, Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper 7
- Brandl, B. (2000), *Power and Control: Understanding Domestic Abuse in Later Life*, Abuse and Neglect of Older People, Summer 2000
- Cripps, D., Biven, J., Northey, J., Rigger, P. (2002), *Abuse of older people: issues for lawyers*, 1 Elder Law Review 14
- Department of Human Services (2009), *With respect to age – 2009*, Melbourne
- King, Dr M. (2009), *Solution-Focused Judging Bench Book*, Australasian Institute of Judicial Administration
- McFerran, L. (2009), *The disappearing age: a discussion paper on a strategy to address violence against older women*, The Australian Domestic and Family Violence Clearinghouse, Topic Paper 18

Last updated: 21 March 2011

5.11 – Family violence in rural, remote and regional places

While family violence is perpetrated across all areas of Australia, there are particular vulnerabilities faced by victims, unique patterns of family violence perpetrated, distinctive drivers of family violence, and unique barriers faced by victims in terms of reporting and accessing necessary services and assistance, which result from geographical location in which family violence is experienced.

There are also compounded intersectional issues faced by certain victims of family violence who live rural and remote communities, such as victims with disabilities, victims from culturally and linguistically diverse backgrounds (CALD), and Aboriginal and Torres Strait Islander victims. Such individuals already face vulnerabilities due to their demographic status, which may be compounded by geographical isolation in rural and remote communities.

[The Equality Institute, 'Family Violence Primary Prevention: Building a knowledge base and identifying gaps for all manifestations of family violence', at 63, 66–68]

Prevalence and types of family violence in rural communities

The prevalence of family violence in rural communities is significantly higher than in urban settings. Moreover, research indicates that family violence experienced in rural environments is often more severe than in urban settings, primarily due to lack of accessible services and resources.

There are also forms of family violence experienced by victims in rural and remote communities which may not be experienced by victims living in urban areas. For example, a denial of access to transportation and communication is more significant in rural environments due to a victim's geographical isolation.

There may also be a greater prevalence of under-reporting of family violence in rural and remote communities, due to lack of access to services, and also due to social stigma around disclosing violence.

[The Equality Institute, 'Family Violence Primary Prevention: Building a knowledge base and identifying gaps for all manifestations of family violence', at 63–64]

Drivers of family violence in rural communities

The greater prevalence of family violence in rural communities may be due to certain drivers of family violence that are more common in rural communities. For example:

- Socially isolated communities may have rigid gender norms. There is a documented relationship between dominant masculinity and rurality which may result in a higher occurrence of gendered violence.
- Social and geographic isolation which may exacerbate experiences of family violence by preventing access to assistance and service, and by making victims dependent upon their abusers for access to family, friends, leisure activities and employment.
- Lack of perpetrator accountability due to community attitudes towards and social stigma around family violence. This lack of accountability may also extend to unsympathetic police and community leaders, and to inadequate responses by the legal system.
- Particularly in farming communities, a family's assets and income may be tied up in assets and trust accounts associate with the running of a farm. These financial arrangement may prevent victims from accessing the necessary funds to leave the relationships or to be financially independent from the abusers.

- Higher prevalence of gun ownership compared to urban environments, which may make victims feel particularly vulnerable, and which may result in different forms of family violence, such as threats to use firearms on victims or other family members.

[The Equality Institute, 'Family Violence Primary Prevention: Building a knowledge base and identifying gaps for all manifestations of family violence', at 64–66]

Barriers to reporting and accessing assistance experienced by victims in rural communities

The drivers of family violence (discussed above) which exacerbate experiences of family violence in rural communities also function as barriers to reporting and accessing services.

For example, geographical isolation may inhibit a victim from being able to connect to prevention and assistance programs and services, which are more readily accessible in urban communities. Community attitudes around gendered violence present in rural areas may make victims more unwilling to report violence for fear of being socially stigmatised and isolated.

[The Equality Institute, 'Family Violence Primary Prevention: Building a knowledge base and identifying gaps for all manifestations of family violence', at 64–66]

Further reading

The Equality Institute, 'Family Violence Primary Prevention: Building a knowledge base and identifying gaps for all manifestations of family violence', 64–66.

Jo Little, 'Understanding domestic violence in rural spaces', Progress in Human Geography, 2017, pp 472– 488.

Laura Huey and Rose Ricciardelli, 'Policing "Domestic Disturbances" in Small Towns and Rural Communities: Implications for Officer and Victim Safety', Canadian Review of Sociology, 2017, pp 198–215.

Bridget Harris, 'Family Violence in the rural landscape', DVRCV Advocate, 2015, pp 19–23.

Last updated: 29 March 2018

5.12 Services

There are a range of family violence support services and referral agencies operating in Victoria. The following sections are not an exhaustive list and there may be local agencies that provide a similar service.

Judicial officers can obtain further information about the availability of support services from their Family Violence Court Registrar (at the Specialist Family Violence Court Division and the Specialist Family Violence Services) or through the Domestic Violence Victoria Website http://www.dvvic.org.au/.

Magistrates' Court Services

The Specialist Family Violence Court Division is available at the Ballarat and Shepparton Magistrates' Courts and is soon to commence at the Heidelberg, Moorabbin and Frankston Magistrates' Courts. They have:

- Magistrates who are trained in hearing family violence matters;
- Magistrates who can make counselling orders;

- A Registrar trained in family violence who coordinates all services and works to ensure matters are heard in a timely manner;
- Family violence Applicant and Respondent practitioners who are specially trained to provide support. They can also provide referrals to community support agencies to ensure people have the support they need outside of court; and
- Police prosecutors, outreach workers and lawyers with family violence training.

Some of the Specialist Family Violence Court Division sites have specialist Koori Men's and Women's practitioners.

The Family Violence Court Division can hear intervention order cases at the same time as other matters, including:

- Bail applications and pleas in criminal cases;
- Family law parenting order matters; and
- Victims of crime applications related to family violence.

Other Magistrates' Courts can hear family violence intervention order cases, and many have family violence Applicant and Respondent practitioners available, as well as police prosecutors, outreach workers and lawyers with family violence training.

For criminal cases, the Court Integrated Services Program (CISP) provides support and coordinates referrals to:

- Drug and alcohol treatment services
- Crisis and supported accommodation
- Disability and mental health services
- Acquired brain injury services
- Koori-specific services.

The accused person is assigned a case manager who meets regularly to help them through the program, review their progress and provide updates to the magistrate. CISP can begin anytime between the accused person being charged up until sentencing.

CISP is available at the following Magistrates' Courts:

- Ballarat Magistrates' Court
- Bendigo Magistrates' Court
- Broadmeadows Magistrates' Court
- Dandenong Magistrates' Court
- Frankston Magistrates' Court
- Geelong Magistrates' Court
- Heidelberg Magistrates' Court
- Korumburra Magistrates' Court
- La Trobe Valley Magistrates' Court
- Melbourne Magistrates' Court
- Mildura Magistrates' Court
- Moorabbin Justice Centre
- Portland Magistrates' Court
- Ringwood Magistrates' Court
- Shepparton Magistrates' Court
- Sunshine Magistrates' Court
- Warrnambool Magistrates' Court

- Wangaratta Magistrates' Court
- Wodonga Magistrates' Court
- Wonthaggi Magistrates' Court

Koori CISP officers are available at the following Magistrates' Courts:

- Heidelberg Magistrates' Court
- Latrobe Valley Magistrates' Court
- Melbourne Magistrates' Court
- Shepparton Magistrates' Court.

Statewide Services

Child Protection Crisis Line: To report concerns of child abuse and/or sexual abuse. Telephone 131 278 (24 hrs 7 days, toll free within Victoria).

Child FIRST: For family services support. Referrals can be made for vulnerable children, young people (0 to 17 years) and their families, including families with an unborn child. Contact details for services are available on the website: https://services.dhhs.vic.gov.au/family-support

InTouch Multicultural Centre Against Family Violence (InTouch) – formerly known as Immigrant Womens' Domestic Violence Service: For immigrant women who are victims of family violence. Telephone 1800 755 988 (toll free) if you are experiencing family violence and need support, or (03) 9413 6500 for administration (9am-5pm, Mon-Fri).

Men's Referral Service: Telephone counselling and referral for men who use violence towards family members. Provides initial counselling and referral for partners and advice to agencies requiring assistance. Telephone 1300 766 491 (8am - 9pm Mon-Fri; 9am - 5pm Sat-Sun) or use the national Live Chat (https://www.ntv.org.au/get-help/live-chat/) (8am - 9pm Mon-Fri; 10am - 3pm Sat-Sun & Public Holidays)

Elizabeth Morgan House Aboriginal Women's Service: Crisis accommodation and support for Aboriginal women and children experiencing family violence from crisis through to recovery programs. Telephone (03) 9403 9400 (9am - 5pm, Mon-Thu; 9am – 4pm, Fri).

Safe Steps Family Violence Response Centre (previously the Women's Domestic Violence Crisis Service of Victoria): Crisis support, information and referral to safe accommodation (refuge) for women. Telephone 1800 015 188 (24/7) or the Safe Steps office at (03) 9928 9600.

The Orange Door: Service for adults, children and young people who are experiencing or have experienced family violence and families who need extra support with the care of children. Contact and list of locations at https://orangedoor.vic.gov.au/find-a-service-near-you (https://orangedoor.vic.gov.au/find-a-service-near-you)

Domestic Violence Resource Centre Victoria (DVRCV): Publications, training, resources and referral to local and national services, and to Victorian Family Violence Networks. Information covers violence and women with disabilities, and older women and domestic violence. Telephone: (03) 8346 5200. Website: http://www.dvirc.org.au/ (http://www.dvirc.org.au/)

DVRCV maintains a list of services across Victoria. Website: http://www.dvrcv.org.au/support-services/victorian-services (http://www.dvrcv.org.au/support-services/victorian-services)

Family Violence Outreach Services

Family Violence Outreach Services offer women and children who are enduring or escaping from a violent partner practical support and information about safe accommodation options, obtaining legal advice, accessing financial entitlements, referrals to counselling and other services.

Melbourne Metropolitan Outreach Services	
Ringwood	(03) 9870 5939
Heidelberg	(03) 9458 5788
Mornington Peninsula	(03) 5971 9454
Inner South	(03) 9536 7777 or 1800 627 727

Dandenong	(03) 9791 6111 or 1800 357 397 (includes Family Violence Crisis service)
Narre Warren, Cranbourne, Pakenham	(03) 9703 0044
Frankston	(03) 9781 4658 (5pm – 10pm) or 0400 503 338
Footscray	(03) 9689 9588
Rural Outreach Services	
Barwon	(03) 5224 2903 or (03) 5278 8122
Camperdown	(03) 5593 1892 (Wed)
Colac	(03) 5232 5140
Geelong	(03) 5224 2903
Hamilton	(03) 5571 1778 (Tues and Thurs)
Portland	(03) 5521 7939 (Mon and Wed)
South West	(03) 5561 1934
Warrnambool	(03) 5561 1934 (Mon – Fri)
East Gippsland	(03) 5152 0052
Latrobe, Baw Baw and Wellington	(03) 5120 2000
Leongatha	(03) 5662 4502
Morwell	(03) 5134 1588
South Gippsland/Bass Coast	1800 221 200
Warragul	(03) 5623 4168
Ararat/Stawell	(03) 5358 7400
Ballarat	(03)5333 3666
Horsham	(03) 5362 1200
Broadford	(03) 5784 5500
Wodonga	(02) 6022 8888
Wangaratta	(03) 5722 1100
Bendigo	(03) 5430 3000 or 1800 884 038 (free call)
Mildura	(03) 5021 2130

Legal Services

Djirra (formerly the Aboriginal Family Violence Prevention and Legal Service): Support for Indigenous victims of family violence. Telephone 1800 105 303 (toll free, 9am–5pm, Mon–Fri).

Federation of Community Legal Centres: Will refer to local Community Legal Centres who can provide legal assistance on family violence, family law and support in applying for intervention orders. Telephone (03) 9652 1500 (9am-5pm, Mon-Fri).

Women's Legal Service Victoria: Legal phone advice line concerning family violence and family law for women. Telephone (03) 8622 0600 (legal advice) or 1800 133 302 (toll free).

LGBTIQ Legal Service: An LGBTIQ focussed legal service, run by the St Kilda Legal Service: https://lgbtiqlegal.org.au/ (https://lgbtiqlegal.org.au/)

Other Services

Switchboard Victoria: Telephone counselling for lesbians and gay men, referral to face to face counselling and other services. Telephone 1800 184 527 (3pm-Midnight each day).

Kids Helpline: Telephone counselling for children and young people. Telephone 1800 551 800 (24/7, toll free).

LifeLine: Telephone counselling (general). Telephone 131 114. Online Crisis Support Chat (https://www.lifeline.org.au/get-help/online-services/crisis-chat) (7pm - 12am, 7 Days).

Translating and Interpreting Service: Operator-assisted access to an immediate phone interpreter in over 160 languages. Telephone 131 450.

Victims of Crime Victoria - Victims Support Agency Helpline: Helpline that offers information, advice and support for victims and family. Telephone 1800 819 817 (8am-11pm, 7 Days), or Text 0427 767 891.

Women's Information and Referral Exchange (WIRE): Telephone information, support and referral for women. Telephone 1300 134 130 (toll free) or (03) 9921 0870 (administration) or 133 677 (hearing impaired). Online chat (https://www.wire.org.au/find-support/) available.

Centres Against Sexual Assault

Centres Against Sexual Assault (CASA) provide crisis support, counselling, information for people who have been sexually assaulted.

See their website (https://www.casa.org.au/contact-us/) for contact details.

Last updated: 14 February 2020

5.13 History of current family violence reforms

The following sections provide a brief summary of current family violence reforms within Victoria and at the federal level.

The AVERT Family Violence resource contains a useful overview of the key areas of law that comprise Australia's legal framework for dealing with family violence and family safety.

5.13.1 Victorian policy development The integrated approach

Family violence is now recognised as a public issue with significant socio-economic and health impacts. As a result, services have significantly changed how they respond to family violence.

The focus in Victoria is on developing an integrated family violence service system. The Family Violence Risk Assessment and Risk Management Framework (http://www.dpcd.vic.gov.au/women/family-violence) (2007) recognises that victims of family violence may seek assistance through three different entry points, namely:

- family violence services, including case management, practical support and counselling, social/public housing, peer support, indigenous healing services, and behaviour change programs;
- legal and statutory services, including the police, the court, correctional services, and child protection services; and
- mainstream services including education, healthcare, mental health services, family and legal services.

[Department of Planning and Community Development (2007), Family Violence Risk Assessment and Risk Management Framework (http://www.dpcd.vic.gov.au/women/family-violence), Melbourne]

An integrated approach focuses on ensuring that victims of family violence who access different services are assessed and responded to in a consistent matter, and that there is a strong relationship between all the services.

See also the AVERT Family Violence Resource.

In February 2015, the Royal Commission into Family Violence was announced by the Victorian Government. The Commission handed down its report in March 2016. The primary tasks of the Royal Commission were to seek methods to better support victim survivors of family violence, to find ways to make perpetrators accountable, and to find solutions to prevent family violence. The Commission's report included 227 recommendations regarding Victoria's response to family violence.

In response to the Commission's report, the Victorian government announced that they would implement all 227 of the Commission's recommendations, and has since released a website where it is possible to view the status of the implementation of the Commission's recommendations.

[Victorian Government, *Royal Commission into Family Violence report* (*https://www.vic.gov.au/familyviolence/royal-commission-report.html*)]
[Victorian Government, *The 227 Recommendations* (*https://www.vic.gov.au/familyviolence/recommendations.html*)]

The Victorian government has also announced a series of funding packages which assist the implementation of the Commission's recommendations and provide necessary funding for family violence services and programs around the state.

[Victorian Government, *Family Violence Rolling Action Plan 2017–2010*, at 5]

Family violence policy initiatives in Victoria

Reducing and preventing violence against women and children has become increasingly prominent in government policy directions in Australia at a state and federal level. Since 2005, the Victorian Government has invested over $100 million in addressing family violence in Victoria.

Key initiatives include:

- The Women's Safety Strategy (http://www.dpcd.vic.gov.au/women/womens-safety/womens-safety-strategy) 2002–07, a policy framework to guide the government in the area of violence against women;
- A Fairer Victoria and Changing Lives: A New Approach to Family Violence in Victoria, which was announced in November 2005 and outlined the details of a four year investment into family violence;

- The introduction of the *Family Violence Protection Act 2008*; and
- The Strategic Framework for Family Violence Reform 2010–2020, (http://www.dpcd.vic.gov.au/women/family-violence/a-right-to-safety-and-justice-strategic-framework-to-guide-continuing-family-violence-reform-in-victoria-2010-2020) which is the Victorian Government's 10 year strategy to build on reform effort to respond to family violence against women.
- Ending Family Violence: Victoria's Plan for Change (http://www.vic.gov.au/familyviolence/rolling-action-plan.html), which outlines a vision for the implementation of strategies and reforms which seek to prevent family violence in Victoria
- The Rolling Action Plan (RAP) 2017–20 (http://www.vic.gov.au/familyviolence/rolling-action-plan.html), which outlines the implementation of the Royal Commission's 227 recommendations
- The Support and Safety Hub State-wide Concept (http://www.vic.gov.au/familyviolence/support-and-safety-hubs.html), which outlines the implementation and role of Support and Safety Hubs, which were a key recommendation of the Royal Commission

Further information on all these initiatives is available from the Office of Women's Policy's website, see Preventing and Responding to Violence against Women – Milestones in Victoria (2002–2010) (http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0011/39674/Range_of_reforms_resize7.pdf) (PDF).

The justice response to family violence

Since 2004, several major initiatives have attempted to improve the justice system's response to family violence in Victoria.

Victoria Police

- The Code of Practice for the Investigation of Family Violence (http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=132058) (*3rd ed)*, which guides how Victoria police respond to and investigate incidents of family violence.

Magistrates' Court of Victoria

- The Family Violence Court Division (http://www.magistratescourt.vic.gov.au/wps/wcm/connect/magistrates+court/home/specialist+jurisdictions/family+violence+programs/), which commenced operation at the Ballarat and Heidelberg Magistrates' Courts in June 2005; and
- The Specialist Family Violence Services (http://www.magistratescourt.vic.gov.au/wps/wcm/connect/magistrates+court/home/specialist+jurisdictions/family+violence+programs/), which operate at the Melbourne, Sunshine (circuit to Werribee) and Frankston Magistrates' Courts.
- The Magistrates' Court of Victoria's Submission to the Royal Commission into Family Violence (https://www.magistratescourt.vic.gov.au/publication/family-violence-submission-royal-commission), a joint submission with the Children's Court of Victoria, which provided recommendations for the Royal Commission's consideration.

Sentencing Advisory Council Reports

- Sentencing Practices for Breach of Family Violence Intervention Orders (http://www.sentencingcouncil.vic.gov.au/content/publications/sentencing-practices-breach-family-violence-intervention-orders-final-report) and accompanying Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders (http://www.sentencingcouncil.vic.gov.au/content/publications/guiding-principles-sentencing-contraventions-family-violence-intervention-order).
- Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention (https://www.sentencingcouncil.vic.gov.au/publications/family-violence-intervention-orders-and-safety-notices) (2013)
- Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report (https://www.sentencingcouncil.vic.gov.au/projects/family-violence-contravention-offences) (2015).
- Contravention of Family Violence Intervention Orders and Safety Notice: Prior Offences and Reoffending (https://www.sentencingcouncil.vic.gov.au/projects/reoffending-following-sentencing-contravening-family-violence-order) (2016)
- Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders (https://www.sentencingcouncil.vic.gov.au/publications/swift-certain-and-fair-approaches-sentencing-family-violence-offenders) (2017)

Coroner's Court

- The State Coroner's Systemic Review of Family Violence Deaths (http://aija.org.au/Family%20Violence%2009/Papers/Coate.pdf), which was introduced in November 2008, and produced its first report in November 2012, available here: Victorian Systemic Review of Family Violence Deaths - First Report (http://www.coronerscourt.vic.gov.au/find/publications/victorian+systemic+review+of+family+violence+deaths+_+first+report).

MARAM risk assessment framework

See the Family Violence resource page for further guidance.

Last updated: 29 March 2018

5.13.2 Federal family violence reform agenda

In March 2009, the National Council to Reduce Violence against Women and their Children released its Time for Action (http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/reducing-violence/national-plan-to-reduce-violence-against-women-and-their-children/time-for-action-the-national-council-s-plan-for-australia-to-reduce-violence-against-women-and-their-children-2009-2021) report. The report focused on strategies and actions for prevention, early intervention, improved service delivery and justice. It identified 6 outcomes with 25 strategies and 117 actions to achieve them.

The Australian Government supported the National Council's zero tolerance for violence against women, and outlined its response to the Time for Action report in The National Plan to Reduce Violence Against Women: Immediate Government Actions – April 2009 (http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/reducing-violence/national-plan-to-reduce-violence-against-women-and-their-children/the-national-plan-to-reduce-violence-against-women-immediate-government-actions-april-2009). Action points include:

1. Invest $12.5 million for a new national domestic violence and sexual assault telephone and online crisis service. The new service will be run by professional staff and make active referrals to follow up services. The new service will operate 24 hours a day, 7 days a week.
2. Invest $26 million for primary prevention activities including $9 million to improve the quality and uptake of respectful relationships programs for school age young people and $17 million for social marketing focused on changing attitudes and behaviours that contribute to violence.
3. Invest $3 million to support research on perpetrator treatment and the greater harmonisation of Federal and State and Territory laws.
4. Work with the States and Territories through the Standing Committee of Attorneys-General (note that this is now the Standing Council on Law and Justice) to:
    - establish a national scheme for registering domestic and family violence orders. This scheme will allow orders to be recognised and enforced across State and Territory borders;
    - improve the uptake of relevant coronial recommendations;
    - identify the most effective methods to investigate and prosecute sexual assault cases.
5. Develop a multi-disciplinary training package for lawyers, judicial officers, counsellors and other professionals working in the family law system, to improve consistency in the handling of family violence cases.
6. Ask the Australian Law Reform Commission to work with State and Territory law reform commissions to examine the inter-relationship between Federal and State and Territory laws that relate to the safety of women and their children.
7. Establish the *Violence Against Women Advisory Group* to advise on the National Plan to Reduce Violence against Women.

Since the release of the *National Plan*, four major inquiries have been undertaken into the federal family law and family violence system.

Increased public and political attention on the issue of family violence around Australia has seen an increase in federal funding for family violence prevention and support services.

In September 2015 the Australian Government announced funding for a Women's Safety Package. The 2016/2017 Federal Budget included an additional $100 million to fund women's safety initiatives over the next three years, which is an additional figure on top of the $101.2 million originally allocated to the Women's Safety Package.

[Janet Phillips and Helen Portillo-Castro, 'Domestic and family violence: Budget Review 2016–17 Index (http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/Domesticviolence)']

ALRC Family violence inquiry

In August 2009, the Federal Attorney-General announced a review of family violence and family law to be conducted by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC).

The Terms of Reference directed the ALRC and NSWLRC to consider:

- the interaction in practice of State and Territory family violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and
- the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family violence context, including rules of evidence, on victims of such violence.

The ALRC created a specialised web page (http://www.alrc.gov.au/inquiries/family-violence) concerning family violence, which outlines the scope of the ALRC's reference and other major studies that coincided with the commission's investigation.

On 11 November 2010, the ALRC released its report Family Violence – A National Legal Response (http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114) (ALRC 114). The report makes 187 recommendations across a range of issues, including:

- common definitions of family violence;
- data gathering on the prevalence of family violence;
- bail for family violence offences;
- interaction between intervention orders and criminal proceedings;
- the effect of family violence in family law proceedings and child protection proceedings;
- reform of sexual offence laws;
- improvements to initiating applications in family violence and family law proceedings;
- development of a national family violence and sexual assault bench book; and
- specialisation of judicial officers.

Further discussion of some of the recommendations from the ALRC's report is contained in 5.14 Family violence and family law.

In June 2017, the ALRC published a report on elder abuse entitled Elder Abuse – A National Legal Response (ALRC 131) (https://www.alrc.gov.au/publications/elder-abuse-report). The report makes 43 recommendations for law reform which seek to address the issue of elder abuse in the Australian context. The recommendations generally concern mechanisms to protect elder people from abuse and to provide financial safeguards.

Evaluations of Family Law Act 1975

In addition to the ALRC inquiry, there have been three other significant studies undertaken into family violence and family law (reports released 2009–10).

First, the Attorney-General commissioned a review by Professor Richard Chisholm, former Justice of the Family Court of Australia, of the practices, procedures and laws that apply in the federal family law courts in the context of family violence (the Family Courts Violence Review (http://www.leadr.com.au/articles/Chisholm_report.pdf)).

Secondly, the Family Law Council provided advice to the Attorney-General on the impact of family violence on children and on parenting, Improving responses to family violence in the family law system (www.ag.gov.au/Documents/Family_Violence_Report.pdf).

Thirdly, the Australian Institute of Families Studies released its Evaluation of the 2006 family law reforms (http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf), which provided empirical data about the impact of the 2006 changes to the *Family Law Act 1975* (Cth).

See discussion of these reports in 5.14 Family violence and family law.

Last updated: 29 March 2018

5.13.3 International Conventions

See 1.2 Purpose and principles.

Last updated: 3 March 2011

5.13.4 Further reading

- Australian Government (2009), *The National Plan to Reduce Violence against Women – Immediate Government Actions – April 2009*, Canberra
- Australian Institute of Family Studies (2009), *Evaluation of the 2006 family law reforms*, Melbourne
- Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra
- Chisholm, Professor R (2009), *Family Courts Violence Review*, Canberra
- Department of Planning and Community Development (2010), *A Right to Safety and Justice: Strategic Framework to Guide Continuing Family Violence Reform in Victoria 2010–2020*, Melbourne
- Department of Planning and Community Development (2007), *Family Violence Risk Assessment and Risk Management*, Melbourne
- Department of Planning and Community Development (2005), *Changing lives: a new approach to family violence in Victoria*, Melbourne
- Department of Planning and Community Development (2002), *Women's Safety Strategy: A Policy Framework*, Melbourne

- Department of Human Services (2005), *Reforming the Family Violence System in Victoria*, Melbourne
- Family Law Council (2009), *Improving responses to family violence in the family law system: An advice on the intersection of family violence in family law issues*, Canberra
- The National Council to Reduce Violence against Women and their Children (2009), *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*, Canberra
- Victoria Police (2011), *Code of Practice for the investigation of family violence (2nd edition)*, Melbourne

Last updated: 3 March 2011

5.14 Family violence and family law

Issues relating to family violence and safety are relevant for a substantial proportion of separated parents. In its evaluation of the 2006 changes to the family law system, the Australian Institute of Family Studies reported that:

- around two-thirds of separated mothers and around half of the fathers reported that their child's other parent had emotionally abused them prior to or during separation;
- one in four mothers and around one in six fathers reported that the other parent had hurt them physically prior to separation; and
- around one in five parents reported safety concerns associated with ongoing contact with the child's other parent.

[Australian Institute of Family Studies (2009), *Evaluation of the 2006 family law reforms*, Melbourne, at 26–28]

This section looks at the relationship between family violence and family law, with reference to Part VII of the *Family Law Act 1975* (Cth) (FLA). Part VII deals with children.

It is outside the scope of this Bench Book to consider the wider operation of Part VII of the FLA, the interaction between parenting orders and child welfare legislation, or the content and effect of parenting orders (except where family violence is a relevant consideration).

5.14.1 Intersection between family violence and family law

Family violence becomes visible and relevant in the family law system in a number of areas, for example:

- the term 'family violence' is defined in s 4AB of the FLA;
- an object of Part VII of the FLA is protecting children from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence;
- the need to protect a child from being subjected to or exposed to family violence is a primary consideration in determining a child's best interests, which is the paramount consideration when making parenting orders; and
- the presumption in favour of equal shared parental responsibility is excluded if there are reasonable grounds to believe that a parent of a child has engaged in family violence.

These considerations are discussed in more detail in the following

Last updated: 3 May 2013

5.14.2 Definition of family violence

The Family Law Act 1975 (Cth) defines family violence as:

> violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
>
> [FLA s 4AB(1)]

The Act then gives examples of the types of behaviour which may constitute family violence. This non-exhaustive list includes:

- an assault
- a sexual assault or other sexually abusive behaviour
- stalking
- repeated derogatory taunts
- intentionally damaging or destroying property
- intentionally killing or injuring an animal
- unreasonably denying a family member the financial autonomy they would otherwise have
- unreasonably withholding financial support which is needed to meet a family member's reasonable living expenses or the living expenses of their children, when the family member depends, entirely or predominantly, on the perpetrator for financial support
- preventing a family member from making or keeping connections with their family, friends or culture
- unlawfully depriving a family member, or any member of their family, of their liberty

[FLA s 4AB(2)]

The FLA also defines when a child is exposed to violence. Thus, a child is exposed to violence if that child sees or hears family violence or otherwise experiences the effects of family violence.

[FLA s 4AB(3)]

Examples of situations which may constitute a child being exposed to violence include a child:

- overhearing threats of death or personal injury by a family member towards another family member
- seeing or hearing an assault of a family member by another family member
- comforting or providing assistance to a family member where they have been assaulted by another family member
- cleaning up a site after a family member has intentionally damaged property of another family member
- being present when police or ambulance officers attend an incident involving the assault of a family member another family member

[FLA s 4AB(4)]

See 2.6.2 Power to modify Family Law Act orders for a discussion on the differences between the FLA and the FVPA definitions of family violence.

Reform of the definition

This definition was substantially amended by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth). These amendments were based on recommendations contained in reports provided to the Commonwealth government regarding the interaction between the family law system and family violence. These reports were:

- Family Law Council (2009), Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence in Family Law Issues, Canberra
- Australian Law Reform Commission (2010), Family Violence – A National Legal Response (ALRC Final Report 114), Canberra
- Chisholm, Professor R. (2009), Family Courts Violence Review, Canberra

The Family Law Council's report recommended amending the definition of family violence by adopting the definition used in the Family Violence Protection Act 2008.

[Family Law Council (2009), *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence in Family Law Issues*, Canberra, p25]

Professor Chisholm recommended major structural reform to Part VII to remove the legislative consequences of finding that family violence has occurred. Doing so would, he argued, require the court to focus purely on the child's best interests and reduce the importance of any debates regarding whether conduct constitutes 'family violence.'

[Chisholm, Professor R (2009), *Family Courts Violence Review*, Canberra, p9]

Finally, the ALRC recommended a definition of family violence which extended to coercive and controlling behaviour, or conduct that caused a family member to be fearful. The Commission recommended supporting the definition by providing examples of what would constitute family violence, such as sexual assault, emotional abuse and harm to animals. The ALRC's recommended definition was closely based on the definition in the Family Violence Protection Act 2008.

[Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra]

Last updated: 3 May 2013

5.14.3 Objects and purposes of Part VII of the Family Law Act

Section 60B states the objects of Part VII of the *Family Law Act 1975* (Cth) and their underlying principals.

The objects are:

> to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> [FLA s 60B(1)]

The principles underlying these objects are:

> that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

[FLA s 60B(2)]

These objects and principles demonstrate that the purposes of Part VII of the FLA is 'to ensure the best interests of children in relation to their parents' and that 'although this purpose overlaps with the purpose of protecting people from family violence, it is different to that purpose'.

[*AA v BB* [2013] VSC 120 at [57]]

These purposes reveal, however, an inherent tension in the way that the FLA deals with children and family violence. For example, the need to ensure that children have the benefit of both parents having a meaningful involvement in their lives is not always compatible with the need to protect children from physical or psychological harm as a result of being subjected, or exposed, to abuse, neglect or family violence.

Section 60B does not state clearly which objects and purposes of Part VII prevail if a tension or conflict exists between them. The same applies to the purposes in Division 11 of Part VII (Family Violence). It is therefore left largely to courts to determine whether children's rights to know, be cared for and spend time with both parents should prevail over the need to protect children from exposure to family violence.

Last updated: 3 May 2013

5.14.4 Parenting orders and family violence

The FLA recognises that the need to protect a child from family violence, as well as other forms of abuse and neglect, is a primary consideration in determining a child's best interests. The following sections examine the effect of family violence and allegations of family violence on the process of making parenting orders.

Family violence and the best interests of the child

In deciding whether to make a particular parenting order in relation to a child, a court must regard the child's best interests as the paramount consideration.

[FLA s 60CA]

Section 60CC of the FLA then sets out how a court determines what a child's best interests are. That section states:

Determining child's best interests

(1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

Additional considerations

(3) Additional considerations are:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child;

(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j) any family violence involving the child or a member of the child's family;

(k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

Consent orders

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

Thus, in the case of conflict between the two primary considerations, the court must give greater weight to the need to protect the child from family violence.

Family violence and family violence orders as 'additional considerations'

In determining a child's best interests, the court must also consider family violence issues as part of two 'additional considerations'. These are:

(j) any family violence involving the child or a member of the child's family;

(k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;

[FLA s 60CC(3)(j) and (k)]

Thus, the court must consider, and give appropriate weight to, any family violence order made, including interim, non-contested and police issued orders. Previously, courts were only required to consider final or contested orders.

[FLA s 60CC(3)(k)]

Parental conduct is relevant when determining a child's best interests only where it is relevant to assessing a person's fitness as a parent. Evidence of family violence is highly relevant to a child's best interests, whether or not they witnessed the violence, and will be taken into account in making a parenting order (see *In Marriage of Irvine* (1995) 125 FLR 77).

Although courts are clearly directed to give paramount consideration to the interests of any children who are the subject of a parenting order, courts may consider the impact of parenting arrangements on parents, and other significant people who are involved in the children's lives.

Arrangements that expose a person to an unacceptable risk of family violence may reduce that person's capacity to function effectively as a parent. The court will then need to consider the impact of the order on a person other than the child – for example, other members of the child's family.

Under s 60CG(1) of the FLA, a court is required to ensure that, 'to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration', an order:

> (a) is consistent with any family violence order; and
>
> (b) does not expose a person to an unacceptable risk of family violence.

[FLA s 60CG(1)]

This section does not preclude a court from making an order under Part VII of the FLA that is inconsistent with an intervention order when it is considered to be in a child's best interests to do so.

'Friendly parent' provisions

Before the reforms to the FLA brought about by the Family Law Legislation Amendment (Family Violence and Other Matters) Act 2011, s 60CC(3)(c) of the FLA required courts to consider one parent's willingness to facilitate a child's relationship with the other parent when making parenting orders.

The effect of this was to discourage disclosure of family violence and child abuse. This was because parties feared that disclosing concerns about family violence and child abuse would cause them to be found to be an 'unfriendly parent'.

[See Australian Institute of Family Studies (2009), *Evaluation of the 2006 Family Law Reforms*, Melbourne; Family Law Council (2009), *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence in Family Law Issues*, Canberra]

This provision was repealed in 2012, with the intent that doing so would remove the disincentive to disclosing family violence and child abuse, and thereby enable all relevant information to be placed before the court when considering whether to make a parenting order.

New s 60CC(3)(c) and (ca) are intended to ensure that, when determining a child's best interests, the court considers whether a person has failed to fulfil their parental obligations in the past.

The court must consider the extent to which each parent has fulfilled their parental responsibilities, including the extent to which each parent has spent time with the child, communicated with them and participated in decision-making about major long-term issues in respect of the child.

[FLA s 60CC(3)(c)]

The court is also required to consider the extent to which each parent has fulfilled their obligations to maintain the child.

[FLA s 60CC(3)(c)]

Family violence removes presumption of equal shared parental responsibility

Family violence can also affect the operation of certain legislative presumptions built into the FLA. Section 61DA(1) of the FLA requires the court to presume that it is in a child's best interests for their parents to have equal shared parental responsibility. This presumption does not apply if there are reasonable grounds to believe that a child's parent (or a person living with a parent) has engaged in:

> (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
>
> (b) family violence.

[FLA s 61DA(2)]

Rebutting the presumption of equal shared parent responsibility can affect the formulation of contact orders. Section 65DAA requires the court to consider ordering equal time, or substantial and significant time only if a parenting order provides for equal shared parental responsibility. Removing the presumption in favour of equal shared parental responsibility can, in turn, remove the obligation to apply s 65DAA.

The presumption in favour of equal shared parental responsibility has, however, been criticised. It has been argued that courts should always consider all arrangements to find one that meets the child's best interests and that the legislation should not suggest that a particular outcome is likely to be best.

[Chisholm, Professor R (2009), *Family Courts Violence Review*, Canberra, p135]

In interim proceedings, a court may not have the opportunity to assess all the evidence on which the parties intend to rely. In such cases, the presumption of equal shared parental responsibility applies unless the court considers that it would not be appropriate to apply that presumption. This allows a court some scope to avoid applying the presumption where there is untested evidence of family violence.

[FLA s 61DA(3); see also *Goode v Goode* (2007) 36 FamLR 422]

Allegations of violence in parenting proceedings

When a party files a notice alleging family violence or abuse of a child by a party to the proceeding, the court must:

- consider what interim or procedural orders (if any) it should make to assist in expeditiously obtaining appropriate evidence and to protect the child or any parties to the proceeding; and
- make whatever interim or procedural orders the court considers appropriate; and
- deal with the issues raised by the allegation as expeditiously as possible.

[FLA, s 67ZBB(2)]

- Such action must be taken as soon as practicable or, in appropriate cases, within eight weeks of the notice being filed.

[FLA, s 67ZBB(3)]

The court must also consider whether to:

- make orders make orders under s 69ZW of the FLA to obtain reports from State and Territory agencies regarding the allegations; and
- make orders or grant an injunction under s 68B of the FLA.

[FLA s 67ZBB(4), (5)]

Third party violence and parenting orders

Evidence of violence in the household of one of the parties is relevant in proceedings for a parenting order. If a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that party must inform the court of the order. Non-parties aware of a family violence order may inform the court of the order. Failure to inform the court of the family violence order does not affect the validity of any order made by the court.

[FLA s 60CF. See also *In Marriage of Jaeger* (1984) 18 FamLR 126]

In considering what parenting order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:

(a) is consistent with any family violence order; and

(b) does not expose a person to an unacceptable risk of family violence.

[FLA s 60CG(1)]

The court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

Judicial considerations of family violence

Family violence can impact on appropriate parenting orders in several ways. The Family Court has held that:

- Violent behaviour may demonstrate that the violent party is a poor role model and potentially unsuitable as a parent (*Marriage of Patsalou* (1994) 18 Fam LR 426).
- Family violence can be directly or indirectly relevant to the welfare of the child, including by affecting the other party's parenting capacity (*In the Marriage of G* (1994) 122 FLR 209).
- The court must consider whether spending time with the violent parent is more likely to be detrimental than beneficial for the child, regardless of whether the violence has taken place in the child's presence (*In Marriage of G* (1994) 122 FLR 209).
- Threats to the other party may result in the child feeling unsafe and insecure with the violent party (*Marriage of Sedgley* (1995) 19 Fam LR 363).
- A parent's reasonable fear for a child's safety or well-being during the time a child spends with the other party is relevant, as the anxiety is likely to adversely affect the person's ability to care for the children (*Marriage of B* (1993) 112 FLR 45).

Last updated: 3 May 2013

5.14.5 Frictions between family law and family violence systems

Despite several dedicated provisions to smooth the transition between the Commonwealth family law system and State and Territory based family violence jurisdictions, there are several matters that have the potential to cause problems between the two systems.

Different definitions of family violence

The definitions of family violence differ between the State and Commonwealth systems. As discussed in 2.6.2 - Power to modify Family Law Act orders, it is arguable that the power in s 68R to revive, vary, discharge or suspend family law orders can only be exercised when a court makes a 'family violence order', in accordance with the definition of family violence in s 4 of the FLA. This, as previously noted, is narrower than the FVPA definition of family violence. However, proposed amendments to the Commonwealth definition of family violence will, if implemented, eliminate this source of friction between the two systems.

While the definition of family violence in the FLA has been amended to more closely align it with that contained in the FVPA, differences remain. It is not yet clear what the significance of those differences will be for the operation of the family violence and family law regimes in Victoria.

See 5.14.2 Definition of family violence for information on the proposed amendments to the definition of family violence.

No national register of family violence orders

There is currently no national register of family violence orders. While parties in proceedings under Part VII of the FLA must notify the court of any family violence orders that apply to the child or a member of their child's family (FLA s 60CF(1)), this depends on the diligence of the parties.

Studies have shown very low levels of compliance with the procedure for notifying family law courts of allegations of family violence. For example, data presented by the Australian Institute of Family Studies suggests that between 30 percent and 50 percent of parenting cases in the Family Court of Australian and the Federal Magistrates' Court involve allegations of child abuse or family violence where the parties fail to comply with the mandatory process for notifying the court by filing a Form 4 Notice of Child Abuse and Family Violence.

[Australian Institute of Family Studies (2009), *Evaluation of the 2006 family law reforms*, Melbourne, at 312]

In its final report on family violence, the Australian Law Reform Commission recommended that a national register be created which includes information on interim and final protection orders, police-issued safety notices, child protection and related orders, and injunctions under the Family Law Act 1975. This register would be available to police, child protection agencies, federal family courts and state and territory courts that hear family violence and child protection matters. A comprehensive privacy framework would underpin the register.

[Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra, Recommendations 30-18, 30-19]

Limitations on discharging a family law order at interim hearings

When a State or Territory court makes an interim family violence order, it cannot discharge a family law order. Instead, it may revive, vary or suspend the order for up to 21 days. The onus is then on the protected person to obtain urgent interim relief from a family law court to maintain that position until the application for a family violence intervention order is heard and determined. If the protected person fails to do this, or a family law court does not make an order within 21 days, the variation, revival or suspension will lapse, and the family violence order will be invalid to the extent of any inconsistency.

The ALRC recommended that the 21-day limit on modifications to family law orders be repealed. Instead, it recommended that any variation should last until the date specified in the order, the interim intervention order expires or until further order. This recommendation has not been implemented to date.

[Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra, Recommendations 16-5]

Effectiveness of family law injunctions

While the FLA contains provisions to allow family law courts to issue injunctions for the protection of a child or a party to a marriage, these injunctions cannot be enforced as readily as state-based intervention orders.

Due to enforcement costs, delays inherent in the family law system and the lack of criminal sanctions for breach, injunctions are not an adequate substitute for family violence intervention orders. Parties will, therefore, continue to need to navigate two separate systems that are enforced by different courts in different hierarchies.

The ALRC also made recommendations aimed at improving the family law injunction system. These recommendations included separating the provisions on personal protection injunctions from the general injunctions power and making breach of a personal protection injunction a criminal offence. As yet, these recommendations have not been implemented.

[Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra, Recommendations 17-3, 17-4]

Last updated: 3 May 2013

5.14.6 Further reading

- Australian Institute of Family Studies (2009), *Evaluation of the 2006 family law reforms*, Melbourne
- Australian Law Reform Commission (2010), *Family Violence – A National Legal Response* (ALRC Final Report 114), Canberra
- Chisholm, Professor Richard (2009), *Family Courts Violence Review*, Canberra
- Family Law Council (2009), *Improving responses to family violence in the family law system: An advice on the intersection of family violence in family law issues*, Canberra

Last updated: 3 March 2011