



Safe at Home

A Criminal Justice Framework for
Responding to Family Violence in Tasmania

Options Paper • August 2003



Tasmania

DEPARTMENT of JUSTICE
and INDUSTRIAL RELATIONS

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Cover:

Winner of the Premier's Choice Category –
Material Girl Inaugural Art Competition 2002.

Senior Momentum

'Lifting the Blanket on Domestic Violence'

'Lifting the Blanket on Domestic Violence' had its genesis during a meeting of the Older Women's Network where participants were looking at ways to create supportive environments for women to come together to discuss 'difficult subjects'. A suggestion was that quilting and stitching groups might be a suitable setting to try. The meetings were advertised in the community and soon the women became engaged in discussions about domestic violence. The individual pieces created by participants began to reflect the complexity of the domestic violence problem.

'Lifting the Blanket' represents the efforts of ten talented women who have contributed intricate pieces for dramatic impact.

Foreword

Family violence has been an unspoken crime in our community for far too long. The Tasmanian Government believes that no member of our community should have to live in fear of violence, especially in their own homes.

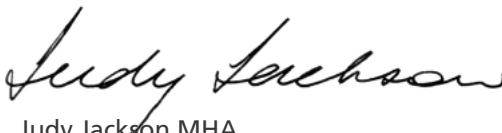
Many people experience family violence – it can happen in all kinds of relationships and all kinds of neighbourhoods. It is rarely a one-off event – many incidences of family violence escalate in severity over time, and some end tragically in death. All too often children are the victims or witnesses of violence in their homes. The cycle of violence must be broken if we are to help victims find happiness in their lives.

Stopping family violence is a job for everyone. We all have a role to play in giving support to victims and in helping to eliminate violence from our homes and our neighbourhoods.

This Options Paper, *“Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania”*, is built on the premise that family violence is a crime and should be treated as such. Victims of violence need to feel safe. The model proposed in this Paper seeks to achieve safety for victims with strong pro-arrest and pro-prosecution responses. It also proposes strategies which better manage family violence offenders within the criminal justice system.

The Tasmanian community, through the Tasmania *Together* process, has identified family violence as a major issue of concern. In producing this Options Paper, the State Government seeks to engage the whole community in finding the best possible solutions so that people can feel safe at home.

I encourage all Tasmanians to support the efforts of the Government in making our homes, our neighbourhoods, and our communities safer places in which to live. I invite concerned community members to become involved in the consultation process by attending a regional forum or providing written comments on this Options Paper.



Judy Jackson MHA

Attorney-General

Minister for Justice and Industrial Relations

August 2003

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1. Preamble and Request for Submissions

This Options Paper '*Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania*' has been developed by the Office of the Secretary of the Department of Justice and Industrial Relations (DJIR) in response to the announcement by the Attorney-General, the Hon. Judy Jackson MHA, in September 2002, of the establishment of separate Family Violence restraint order legislation to be introduced into Parliament in 2003.

In January 2003, the Attorney-General further requested that DJIR develop an implementation strategy for a pro-arrest, pro-charge, pro-prosecution response to family violence in Tasmania. The policy outcomes that the Attorney-General wishes to achieve through this reform process are the increased criminalisation of family violence and enhanced criminal justice system responses. This Options Paper has been drafted within those parameters as defined by the Attorney-General.

The Options Paper also represents part of whole of government efforts to address the very high priority given within the Tasmania *Together* process to reduce the level of family violence (Goal 2. "To have a community where people feel safe and are safe in all aspects of their lives.").

DJIR acknowledges the contributions of internal Departmental stakeholders as well as external stakeholders in the drafting of this Options Paper, particularly the Department of Police and Public Safety, the Department of Health and Human Services and Women Tasmania (Department of Premier and Cabinet).

1.1 Purpose of this paper

The purpose of this paper is:

- To create and facilitate discussion on the scope and extent of proposed new Family Violence legislation and the most appropriate service delivery response to effectively implement it;
- To contribute to the Government's goals in relation to safer Tasmanian families and a reduced level of family violence;
- To provide a framework for the consideration and discussion of legislative and justice related service delivery options.

In Tasmania the term and scope of what is 'family' or 'domestic' violence has not previously been defined in legislation. Although both terms are used throughout this paper, generally the term 'family violence' is used, except when describing historical issues or legislative provisions which make specific reference to 'domestic violence'.

There are also a number of ways used to describe parties to family violence. As this paper provides a criminal justice framework, the terminology utilised will be 'offender' and 'victim'. The term

'perpetrator' will be used when describing intervention programs in this area (i.e. perpetrator intervention programs) or when citing research where the term 'perpetrator' is used.

1.2 Outcomes of the strategy

The short term outcomes from this process of discussion and consultation will be the production of a fully costed, three year business case that will be forwarded for the consideration of Government as part of the development of the 2004/05 State Budget. This priority is in recognition of the fact that the development of a more effective service delivery response will not only require a re-engineering of the current way such services are delivered but, in all likelihood, an increase in the amount of resources available.

In the medium to long term this strategy underpins an effort to:

1. Ensure the safety and protection of all persons who experience family violence in Tasmania;
2. Reduce and prevent violence between persons who are in family relationships with each other recognising that family violence is a particular form of interpersonal violence that needs a greater level of protective response;
3. Enact provisions which are consistent with principles relating to domestic violence underlying the Declaration on the Elimination of Violence Against Women.

This could be achieved by initiatives including:

1. Providing appropriate responses to and programs for persons who are victims of family violence including providing mechanisms to facilitate their safety and protection;
 2. Utilising criminal law responses in the management of family violence incidents where evidence exists that a breach of the criminal law has occurred;
 3. Supplementing criminal law responses to prevent violence, harassment, stalking, and intimidation being perpetuated by an offender on the victim, their children or other members of their family;
 4. Employing civil law remedies to enhance the safety and protection of victims where evidence of a criminal offence does not exist or, where it does, to complement and augment criminal law responses;
 5. Providing more effective sanctions and enforcement in the event that restraint orders are breached;
 6. Requiring respondents to attend programs that have the primary objective of stopping or preventing family violence; and,
-

7. Ensuring that the system which is responsible for the delivery of justice responses to family violence does so in a manner which is effective, fast, responsive, accessible, and enforceable.

1.3 Indigenous Family Violence

In a separate but related process, the State Government is also working with the Aboriginal community to follow up the recommendations from the Partnerships Against Domestic Violence report *ya pulingina kani*- Good to see you talk. *ya pulingina kani* is a story told by Aboriginal people about Indigenous family violence in Tasmania.

ya pulingina kani will also help to inform the Commonwealth and State Governments as they work with the Aboriginal community to develop a project under the auspices of the Council of Australian Governments' Reconciliation Trials.

1.4 The Consultation Process

It is intended that this Options Paper will be widely circulated to interested stakeholders and service providers in order to seek their feedback, and that this process will coincide with regional consultation forums, allowing stakeholders and service providers to identify and discuss relevant initiatives, issues and responses.

Interested parties are encouraged to read and review this paper and to note and provide feedback on any suggested alterations, additions or inclusions that should be made. This will ensure that the final framework for the development of new Family Violence legislation is comprehensive and realistic, and that it achieves the Governments' and community's goals in relation to a safer Tasmania.

If you would like to provide feedback on the proposals in this paper or you would like further information or wish to participate in the regional consultation forums, please contact the Department of Justice and Industrial Relations on 6233 2477. Copies of this paper can be downloaded from our website at www.justice.tas.gov.au.

Contact details for written submissions are:

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Please ensure that comments on this paper is submitted on or before Friday 19th September 2003.

2. Background

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2.1 Introduction

It is proposed that Tasmania introduce a pro-arrest, integrated criminal justice response to family violence. The need for such a program is driven by a number of factors:

- Tasmania can no longer afford the economic or social costs of family violence – research by KPMG shows that domestic violence costs Tasmania over \$17.67 million per year. The intergenerational and opportunity costs (in the form of ill health, increased criminal behaviour etc) to the members of families in which such violence occurs are also significant and ongoing;
- Tasmania *Together* has identified a reduction in the reported level of family violence as a key indicator in the achievement of the goal to '*Have a community where people feel safe and are safe in all aspects of their lives*'. National and international research shows that the first step in reducing family violence is to increase the accessibility and responsiveness of the justice system in providing protection to the victims of family violence. The second step is to provide them with information about their rights and enhance their capacity to use the justice system to seek protection from and deal with the offender;
- Tasmania has been an active participant in the National Partnerships Against Domestic Violence program. As a result, we now have access to a national pool of evidence of 'what works' to make victims safer and reduce the incidence of family violence in our community; and,
- The *Justices Act 1959* (under which Restraint Orders are currently issued in Tasmania) will lapse with the implementation of the Criminal and General Division of the Magistrates Court. Therefore legislative action to enable the continued provision of civil protection orders will be required before this time.

2.2 Current situation

The National Committee on Violence Against Women defined domestic violence as:

Behaviour by a man, adopted to control his victim, which results in physical, sexual, and/or psychological damage, forced social isolation or economic deprivation, or behaviour which leaves a woman living in fear.

Frances¹ points out:

Not all abusive behaviours are technically against the law. Violence and abusive behaviours occur on a continuum which at one end may not appear to be particularly severe. The problem is that individuals, families and communities come to accept increasingly severe and more frequent violence as 'normal' behaviour.

¹ Keys Young Pty Ltd. Report to National Crime Prevention. *Ending Domestic Violence? Programs for Perpetrators*. 1999.

The breadth of intervention of the criminal justice system into family violence matters is determined by legislation. However it can, as in several other Australian jurisdictions (ACT, Qld, NT and WA), be extended beyond 'couples' to involve a range of people in a relationship or family context such as sibling violence, child assault, assault in same-sex relationships, and a range of offences including sexual offences taking place in a relationship or family context, assault, breach of protection orders, unlawful confinement, trespass and so forth.

In Tasmania the term and scope of what is family violence is not defined in legislation. The Tasmanian provisions that apply in this area are found in several pieces of legislation including the *Criminal Code*, the *Police Offences Act 1935*, and the *Justices Act 1959*. All of these pieces of legislation have general application to more than family violence issues.

Restraint Orders are currently issued under the provisions of the *Justices Act 1959*. This legislation will lapse with the implementation of the Criminal and General Division of the Magistrates Court, which is likely to occur before the end of 2003. Therefore some legislative action to enable the provision of civil protection orders will be required before this time. Consequently, the Attorney-General announced in September 2002, the establishment of separate Family Violence restraint order legislation to be introduced into Parliament in 2003. To this end, it is essential to:

- Review the current restraint order provisions in the *Justices Act 1959* in order to determine their relevance and appropriateness;
- Determine the nature and extent of the new legislation pertaining to family violence; and,
- Separately consider the extent and nature of change to general restraint order provisions to be contained in new Restraint Order legislation (paper to be released at a later date).

2.3 Legislation across Australia

There are a number of approaches to legislation in different jurisdictions (further information can be found at Appendix 5.5):

- Some states and territories have legislation which deals with domestic situations and non-domestic situations in separate pieces of legislation (Qld, SA, NT, Vic);
 - Others have continued to include domestic violence within the Criminal Code and other Acts (WA, NSW, Tas);
 - The Australian Capital Territory uses a combined approach with a consolidation of its *Domestic Violence Act 1986* with the restraint order provisions under the *Magistrates Court Act 1930* to create a new piece of legislation entitled the *Protection Orders Act 2001*.
-

Both Western Australia and New South Wales are in the process of reviewing their legislation in this area to determine whether separate Family Violence legislation should be drafted, and what provisions should appear in the legislation. While the New South Wales review is still in process, Western Australia has determined that they will continue the current practise of including domestic violence in the *Criminal Code* (with amendments) and leave non domestic matters in their *Restraining Orders Act 1997*. This is likely to make them the only state or territory to not legislate separately for domestic violence situations. Western Australia argues that amending their current legislation, rather than creating a separate piece of domestic violence legislation, will:

- Signal to the community that it does not accept domestic violence in any form;
- Strengthen two pieces of legislation that are working reasonably well;
- Prevent the legislative duplication experienced when domestic violence legislation mirrors other legislation used for non domestic situations;
- Allow the Government to incorporate previous work done on the *Restraining Orders Act 1997* and make changes to enhance the process in both the domestic and non-domestic sphere.

2.4 Definitions of domestic or family violence

According to Laing, “there is no uncontested terminology or definition of behaviours referred to as ‘domestic’ and ‘family violence’”.²

The Partnerships Against Domestic Violence Statement of Principles agreed by the Australian Heads of Government at the 1997 National Domestic Violence Summit defined domestic violence as:

... an abuse of power perpetrated mainly (but not only) by men against women both in a relationship or after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other.

Recent definitions have attempted to extend this definition beyond ‘couples’ to provide a more inclusive description of domestic violence. This expanded definition includes violence which occurs in gay, lesbian and transgender relationships, sibling violence, child abuse as well as abuse of parents by adolescents or adult children, abuse of older family members by non partner family members and abuse within kinship relationships.

The term ‘family violence’ is preferred by many indigenous communities, and includes all forms of violence in intimate relationships. Offenders and victims of family violence can include, for example, aunts, uncles, cousins and children of previous relationships. ‘Family’ covers a diverse range of reciprocal ties of obligation and mutual support.³

² Laing, Issues Paper 1, 2000.

³ Strategic Partners. *Domestic violence prevention: Strategies and Resources for working with young people*. April 2000

This does not preclude the fact that domestic violence remains a gendered issue, as in the majority of situations the offender is male and the victim female.

There is also discussion about what behaviours constitute domestic violence. Domestic violence includes a range of offences including sexual offences taking place in a relationship or family context; assault, breach of protection orders, unlawful confinement, trespass and so forth. The 1997 National Domestic Violence Summit in their definition of domestic violence wrote:

Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.

Commonly held definitions of domestic violence include physical abuse (direct assault, use of weapons, destruction of property); sexual abuse; verbal abuse (put downs and humiliation); emotional abuse (assaults on the person's self esteem and self worth); social abuse (systematic isolation from family and friends); and, economic abuse (complete control of monies and assets).

In addition, recent research has indicated a strong link between domestic violence and animal cruelty, with suggestions that in 70% of homes where domestic violence was an issue, animals were the first to be mistreated.⁴

Despite the scope of behaviours that are defined as domestic violence, research indicates that the community views domestic violence primarily as physical violence.⁵ However, legislative changes have been made both in Australia and internationally in order to more fully encompass the holistic nature of domestic violence.

2.5 Incidence

Most studies on domestic violence can only ever approximate the extent of the issue. Statistical information can be difficult to obtain as domestic violence is often under-reported. According to Bagshaw and Chung:

*We will never really know how much domestic violence exists in the community. This is because social sanctions prevent open discussion of the issue, and because the problem shows itself in various ways.*⁶

The Women's Safety Survey, conducted by the Australian Bureau of Statistics (ABS) in 1996, surveyed approximately 6,300 Australian women about their experience of actual or threatened physical and sexual violence.

⁴ Davies, C. *Justice Matters: Court Support Feasibility Study*. Tasmania 2002

⁵ Strategic Partners, April 2000.

⁶ Bagshaw, D. and Chung, D. *Women, men and domestic violence*. April 2000.

Based on the survey results, the ABS estimated that:

- 2.6 million women (or 38% of the adult female population) had experienced one or more incidents of physical or sexual violence since the age of 15.
- 1.2 million had experienced sexual violence and 2.2 million experienced physical violence.
- For the majority of women (2.5 million women) the violence was perpetrated by a man.
- 8% of women currently in a marital or de facto relationship had experienced an incident of physical or sexual violence perpetrated by their partner at some time during their relationship.
- Of women who had been in a previous relationship, 42% (1.1 million women) had experienced an incidence of physical violence by their previous partner.⁷

As a large number of cases remain under-reported, and as definitions of domestic violence are changed to become more inclusive and reflect the varied nature of intimate relationships, it is expected that the incidence of domestic violence and relevant reporting rates will be significantly higher than those cited above.

2.6 The interface between the criminal justice and civil systems

Although historical evidence identified domestic violence as an issue in the late 19th and early 20th centuries, it was not until the mid 1970s that second wave feminists named domestic violence as a public and political matter.⁸ Until then, domestic violence issues remained in the home. While efforts have been made to move the issue of domestic violence from the 'private' to the 'public' sphere, and to emphasise its criminal nature, domestic violence still remains an under-reported crime, with many victims too afraid, suspicious or unsure of how to navigate the criminal justice system to utilise it to assist them in addressing the abusive situation. Domestic violence therefore remains largely a hidden and private issue.

Researchers have identified a number of issues related to domestic violence and its interaction with both the criminal and civil justice systems. Some of these are barriers that victims of domestic violence face in accessing the system, and others are related to the nature of the response of the system. The Office of the Status of Women's final report **Good Practice Models for Accessing the Civil and Criminal Justice System**⁹ found that some of the barriers to access by victims included:

- Fear of retribution by the perpetrator;
- A belief by the victim that the perpetrator will change and cease his violent behaviour;
- Fear of embarrassment and shame if they report the abuse;

⁷ Domestic Violence and Incest Resource Centre. *Australian statistics on domestic violence*. 1996

⁸ Laing, Lesley. *Progress, trends and challenges in Australian responses to domestic violence*. Australian Domestic and Family Violence Clearinghouse Issues Paper 1, 2000.

⁹ Prepared for the Office of the Status of Women by urbis keys young *Research into good practice models to facilitate access to the civil and criminal justice system by people experiencing domestic and family violence*. Final report. August 2002.

- A preference for seeking assistance from more informal sources, such as friends, family and neighbours; and,
- Fear of violent ex-partners who use child contact and residence as an opportunity for further violence and harassment.

There were also additional issues for other victims including:

- *Victims in rural and remote areas* – a lack of anonymity; stigma; shame; and, lack of services.
- *Indigenous victims* – a lack of faith in criminal justice agencies; a lack of cultural awareness in criminal justice agencies; strong pressure on victims to keep family violence hidden; and, a perception that domestic violence is part of indigenous culture.
- *Victims with a non English speaking background* – limited English skills; cultural insensitivity; fear of rejection by the community if they report abuse or end a violent relationship; and, fear of deportation if on temporary student or visitor visas, or if sponsored as spouses or prospective spouses.
- *Victims with a disability* – a greater vulnerability to abuse due to factors such as dependence on carers and social isolation; difficulties in leaving a violent relationship due to dependence on care; and, difficulties in communication and access to resources and services.

In examining criticisms of the criminal justice system's response to domestic violence, Holder¹⁰ identified a range of dilemmas and concerns including:

- Criminal justice agencies not treating family and domestic violence matters seriously;
- Although domestic violence is a crime, the low charge and conviction rates suggest it is being considered otherwise;
- A lack of systemic and case coordination across the criminal justice system;
- Neither victim safety nor perpetrator accountability are practically and consistently addressed by criminal justice agencies;
- Insufficient attention is paid to 'belief on reasonable grounds', evidence gathering, victim safety and arrest options at the time of the incident;
- There appear to be irreconcilable dilemmas in balancing victim ambivalence over whether to proceed with responsibilities to uphold the criminal law and protect vulnerable persons;
- Sentencing options are ineffective in reducing repeat offending, do not provide for victim input, and pay insufficient attention to compliance with Court orders.

¹⁰ Holder, R. *Domestic and Family Violence: Criminal Justice Interventions*. Australian Domestic and Family Violence Clearinghouse. Issues paper 2, 2001

Justice agencies and community groups in Australian states and territories have identified and implemented a number of strategies to address these and other issues relating to domestic violence. These include:

- Identify a clear process for victims to utilise;
- Adequately reflect the criminal nature of offences;
- Ensure accountability by offenders; and,
- Ensure accountability by the criminal justice system in responding to domestic violence.

Restraint orders were developed as part of this wider legal reform strategy. The aim of restraint orders was to provide protection from further violence or harassment through a civil order that placed restrictions and conditions on the offender. They were not designed to punish offenders for violent behaviour or to provide general deterrents against violence through a penalties and sentencing regime. These objectives are associated with criminal legislation.¹¹

Although the main function of restraint orders is for the protection of the victim, there is recognition that a victim wanting the abuse to end does not always indicate a desire for the relationship to be over once criminal and/or civil action is taken. The Queensland Domestic Task Force argued "Protection orders are an acknowledgement that wanting the violence to end is not necessarily the same as wanting the marriage to end".¹² As restraint orders are a civil remedy and as such require a lesser standard of proof than criminal matters, it was thought that these orders would make protection more readily accessible to women, and that they would be more willing to pursue this course of action than to proceed with criminal charges for assault.¹³

In the creation of new Family Violence legislation in Tasmania and the separation of Family Violence Orders from other restraint orders, it is essential that the process does not further "decriminalise" domestic violence. There is, therefore, an issue regarding the extent and nature of Police powers under Family Violence legislation, in order to ensure that taking civil justice options, such as making applications for restraint orders, does not supplant criminal justice responses, such as arresting and charging the offender, when such action is justified.

Holder¹⁴ identified a range of reasons why arrest and charge of offenders should be considered the primary means of intervention including:

- Arrest is the only response that can guarantee the immediate cessation of violence and the short term protection of the victim;
- It upholds law enforcement as a primary Police role;
- It limits discretionary action based on the influence of attitudinal variables;

¹¹ Douglas, H., Godden, L. *The decriminalisation of domestic violence*. The Socio-Legal Research Centre reports. Report 2 of 2002. Griffith University.

¹² Queensland Domestic Violence Task Force Report, 1988.

¹³ Laing, Issues Paper 1, 2000.

¹⁴ Holder, 2001

- Arrest acts as a gateway for both victims and offenders to a range of services;
- It acts as an individual and public deterrent to further offending, with some evidence existing that for some offenders in some circumstances, arrest alone can prevent re-offending; and,
- It sends a message to the community that the use of violence within relationships and families is unacceptable.

2.7 Integrating justice system responses

An oft-cited successful 'integrated' intervention program is the Duluth Domestic Abuse Intervention Model (DAIP) developed in Minnesota, United States. One of the key features of the Duluth model is a strong pro-arrest policy and mandatory attendance at group education programs by offenders as part of sentencing.¹⁵ Its four main aims include:

- Provide victims of abuse with immediate protection and safety with a quick Police response, the provision of emergency shelter, advocacy and education for victims, and temporary Court intervention;
- Bring domestic violence into the Court system for resolution to deter, punish and rehabilitate abusers – accomplished by a firm pro-arrest policy by police, strong guidelines and procedures to increase prosecution convictions, pre-sentencing and post-conviction probation guidelines, enforcement of civil protection orders, and coordination of the flow of interagency information;
- Impose and enforce legal sanctions through the Courts with increasingly harsh penalties for repeat offenders; and,
- Provide treatment programs for assailants to change their abusive behaviour including long term mandatory Court ordered programs for repeat offenders.

Building on 'best practice' identified under the national Partnerships Against Domestic Violence program, an integrated, pro-arrest, pro-prosecution strategy (if it were implemented in Tasmania) may include the following responses to reported family violence incidents (further detail can be found at Appendix 5.4).

The key aspects of a Police response in an integrated approach would be:

- Where there is sufficient evidence to warrant it, the alleged offender would be arrested and charged, or if they are absent from the scene, a summons would be issued;
- There would be a presumption against bail where the offender is arrested or charged;

¹⁵ Keys Young Pty Ltd., 1999.

-
- The victim would be contacted as soon as possible after the arrest of the offender with an offer of support;
 - The offender would be held in custody until the Police and Courts were satisfied that they were no longer a risk to the victim or the victim's family;
 - Police would 'mark' the incident file to identify it as a family violence matter and forward it for perusal to the prosecuting authority.

The key elements of the role of the DPP and Police Prosecution Units in an integrated approach would be:

- The victim would be contacted to inform her/him of the prosecution and Court process, this information would also be conveyed to the victim's support person(s). The victim would be offered support before, during and after any Court appearance; and,
- The prosecuting authority would, in accordance with guidelines yet to be established, consider and determine whether the matter will be prosecuted.

The key aspects of the Court role would be:

- The matter would be listed in a specific family violence Court list and any hearings fast-tracked;
- Should an offender be found guilty of an offence, the Magistrate or Judge may consider a range of sentencing options including the imposition of a custodial sentence, with increasing penalties for second or subsequent offences;
- Prior to, or as an addition to, sentencing, the Court would also consider ordering an offender to attend a suitability assessment for participation in a Perpetrator Intervention Program; and,
- Offender compliance with Court orders and victim safety would be monitored and breaches acted on.

There would be comprehensive training for Court staff, Police, Prosecutors and victim support services in the changes to the treatment of family violence in the criminal justice system.

Robyn Holder, in considering the adaptation of the 'Duluth principles' in the Australian Capital Territory raised the following issues:

- There is a need to acknowledge that implementation is a negotiating, problem-solving process through differing interests, and that detail is all important;
-

- That change in this area rests on understanding the individual work practices, cultures and ideals of different people in different parts of the system;
- There is a need to be aware that 'the changes of practice and procedure you seek in any given agency will disclose a systemic problem that has nothing to do with domestic violence';
- That funding mechanisms need to be careful that they do not prematurely encourage 'ownership' of programs by particular sectors before collaborative structures are in place; and,
- To keep the momentum and pace of change flowing individuals need to be engaged in the process.

The success of the Duluth model and additional extensive research demonstrates that arrest and prosecution have a significant impact on subsequent violence. Tolman¹⁶ reports that the deterrent effect of arrest did not deteriorate over an 18 month follow up period and was most pronounced with previous offenders, giving support for introducing stronger responses for repeat offenders. Other research however, has indicated that although offenders may be deterred away from the criminal justice system, this does not necessarily mean the abuse will stop – it may become more hidden. Follow up research of victims and offenders emphasised the importance of perpetrator programs in order to address the issues and found they were successful in achieving a reduction in violence.¹⁷

Recognition of the need of the victim(s) for safety and protection, despite whether the relationship is to continue or end, the importance of addressing the abusive behaviour and the necessity that the offender is held accountable for the violence, demonstrates the complexity and interplay of the issues in family violence. There is, therefore, a need for an integrated response that includes legislation that articulates the role of both the criminal and the civil justice systems in addressing family violence and reflects the capacity and willingness of the various elements of the justice system to respond in a 'seamless' manner to intervene in and manage family violence incidents and provide safety and protection to victims.

2.8 Family violence and children

Although domestic violence is primarily perceived as occurring between two persons, more recent research is considering and investigating its impact upon children. Children and young people are often present in the house as witnesses, trying to intervene, attempting to seek help, and/or becoming targets of the violence.¹⁸ There is concern about the impact of domestic violence upon children in terms of the fear, helplessness and loss of control that they experience, and their learning in respect to human interactions and relationships. All of these can affect children's social and developmental pathways.

¹⁶ Keys Young Pty Ltd 1999.

¹⁷ Keys Young Pty Ltd 1999.

¹⁸ Strategic Partners, 2000.

A review of the literature cited in Laing, indicates that child witnesses of domestic violence exhibit a host of behavioural and emotional problems such as aggression, antisocial behaviour, anxiety and depression.¹⁹ Another body of emerging research links exposure to domestic violence with brain development, which may contribute to impaired cognitive functioning in later life.

Children also experience the effect of interventions, such as the involvement of the Police and criminal justice system, relocation to a place of safety such as a refuge or a relative's house,²⁰ and may experience social upheaval and educational disruption when needing to escape the violent situation.

In Tasmania, there is also the need to examine the interplay between the needs of children under the proposed Family Violence legislation and the provisions contained in the *Children, Young Persons and Their Families Act 1997*. Children are seen to be "at risk" under the Act if they have been, are, or are likely to be, abused or neglected. Abuse or neglect is defined under the Act as "*physical or emotional injury or other abuse, or neglect, to the extent that the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or the injured, abused or neglected person's physical or psychological development is in jeopardy*".

Experiencing family violence is therefore a 'risk' under the *Children, Young Persons and Their Families Act 1997* and would thereby warrant intervention by the appropriate statutory body under the provisions of that Act.

¹⁹ Laing, L. *Children, young people and domestic violence*. Australian Domestic and Family Violence Clearinghouse. Issues Paper 2 2000.

²⁰ Strategic Partners, 2000.

3. Issues for Family Violence Legislation in Tasmania

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3.1 The interface between the criminal justice and civil systems

Discussion:

One of the potential risks in the creation of separate legislation for family violence is the perceived decriminalisation of the offence. Queensland research conducted by Douglas and Godden²¹ found that domestic violence between intimate partners was rarely prosecuted as a criminal offence, as it was perceived to be a private, social issue rather than as a public matter and a concern for the criminal law. Their research showed that only 1% of files involving domestic violence protection orders were identified for possible prosecution of criminal offences and of these, only 0.3% resulted in a prosecution.

Separating out family violence provisions from general restraint order legislation has the potential to address these issues, as the enacting of separate legislation allows family violence matters to be clearly dealt with by two legal frameworks, the criminal justice system and through civil legislation. In doing so, the interface between the criminal and the civil systems can be articulated, with restraint order provisions in the legislation focusing on the safety and protective needs of the victim(s) and other provisions within the legislation focusing on penalties for both family violence offences, and breaches of bail conditions or restraint orders.

Tasmanian Magistrates and Police have both expressed the desire to differentiate between 'serious' and 'minor' restraint order matters. In the case of Magistrates, they express the view that significant Court time is taken up dealing with minor disputes, which should and could be settled by a number of other means. They believe this takes resources away from more serious matters. Similarly the Police view is that there is a need to flag more serious matters and to deal with less serious matters in a way which does not draw on Police resources. It is an effective use of available resources within the criminal justice system to identify and offer protection to individuals who are at risk of further harm, as well as to appropriately penalise family violence offenders.

In order to adequately address these issues, effective responses in both the criminal and civil justice systems are needed. The Duluth model, and others which have been based on 'integrated' responses, indicate that there is a strong correlation between an effectively deterrent criminal justice system and re-offending behaviour. A strong pro-arrest policy has been demonstrated to have a significant impact upon subsequent levels and incidence of violence. Key features of such a model is a combination of a firm pro-arrest policy by Police; strong guidelines and procedures to increase prosecution convictions; pre-sentencing investigation and post-conviction probation guidelines; enforcement of civil protective orders; and, the coordination of the flow of interagency information.²²

²¹ Douglas and Godden, 2002.

²² Keys Young Pty Ltd 1999.

Recommended way forward:

It is recommended that the new Tasmanian Family Violence legislation includes a strong response from the criminal justice system towards family violence including:

- A pro-arrest policy by Police;
- A presumption against bail where the offender is arrested and charged;
- Strong guidelines and procedures to increase prosecution convictions;
- A range of sentencing options which could be imposed in addition to a Court order to attend assessment for suitability for participation in a Perpetrator Intervention Program;
- Increased penalties for offences and breaches of restraint orders;
- Comprehensive training for Court staff, Police, Prosecutors, Victim support services and appropriate others;
- Support systems for victims and their children in their utilisation of and progression through the criminal justice system.

N.B. For offenders who are under 18, the relevant sections of the *Youth Justice Act* apply, e.g. alternate diversionary options such as access to community conferencing. (For further discussion see section 3.8.)

Discussion Questions

3.1.1 Should Family Violence legislation be enacted which separates out Family Violence Orders from general restraint orders?

3.1.2 Should restraint orders dealing with family violence issues be named Family Violence Orders?

3.1.3 Should the new Family Violence legislation incorporate reference to the role of the criminal justice system in responding to family violence?

3.1.4 Should the new Family Violence legislation support and facilitate the development of an integrated criminal justice response to family violence in Tasmania?

3.2 Definition of Relationship

Discussion:

Most Australian jurisdictions have defined domestic violence in legislation over the last ten years. The definition of both 'domestic relationship' and 'domestic violence' is not a simple matter. Tracing of the evolution of these definitions reveals an increasing effort to broaden the meaning of 'domestic' and/or 'family' to reflect changes in social mores. Focussed Family Violence legislation in Tasmania will require clarity about the scope of its application. Persons and actions not recognised as 'family violence' under this law would not be able to access the remedies it establishes. Well-targeted legislation will provide an opportunity for 'at risk' members of the community to gain more effective outcomes from the justice system and provide the justice system with the capacity to use its limited resources more efficiently.

In Tasmania the term and scope of what is 'family' or 'domestic' violence is not defined in legislation. Any definition of these terms in Tasmania would need to take into account both the type of violence being described and the diverse range of 'significant' relationships in which such violence occurs (e.g. same sex and guardianship).

The majority of states and territories have broadened their definitions of 'family' to include, at least, same sex relationships and a broader definition of 'relative' or 'family' in order to give due consideration to the wider concept of family understood in Aboriginal and Torres Strait Islander (ATSI) and culturally and religiously diverse background communities. Some jurisdictions have also included domestic relationships between a dependant and carer. Many of the amendments made to these definitions have been recent, which demonstrates the ongoing nature of debate and the legislative reform process.

A more expanded definition of family should also ensure that relationships are not based on narrow definitions alone, such as requiring the sharing of a house, having a sexual relationship or the sharing of finances, as this would preclude a large number of relationships such as dating, betrothal or carer relationships.

An extensive definition of relationships comes from Queensland legislation that defines relationships as 'spousal', 'intimate personal', 'family', and 'informal care' relationships.

- *Spousal relationship* – exists or has existed between spouses.
 - *Intimate personal relationship* – defined as including persons who are or were engaged to be married to each other, including a betrothal under cultural or religious tradition. It also includes a relationship between persons who date or dated each other "where their lives are or were enmeshed to the extent that the actions of one of them affect or affected the
-

actions or life of the other". It directs the Court to give regard to the circumstances of the relationship including trust and commitment, the length of the relationship, the frequency of contact and level of intimacy. The legislation includes relationships between two persons of the same or opposite sex.

- *Family relationship* – the Queensland legislation gives a lengthy definition of this and includes not only relatives who are ordinarily understood to be connected by blood or marriage, but broadens the definition to include a person whom the relevant person regards or regarded as a relative, and a person who regards or regarded themselves as a relative of the relevant person.
- *Informal care relationships* – includes dependency of one person on another (a carer) who helps the person in an activity of daily living (personal care activity) where the personal care is due to a disability, illness or impairment relating to that person. Examples of personal care include dressing or personal grooming, preparing the other person's meals or helping them with eating, shopping for the person's groceries. This precludes relationships which were entered into between the person requiring the care and a third party (i.e. the relationship between a person and a nurse who visits every day to help with bathing and physiotherapy is not an 'informal care' relationship if the nurse visits under an arrangement between the person and a community based in home care service). In addition, if the person pays a fee for the care, it is not an 'informal care' relationship.

Tasmania is also looking to adopt a broader recognition of relationship by virtue of the proposed *Relationships Bill 2003*. Under this Bill, a wider variety of relationships will have rights including significant or caring relationships. Such relationships may be registered. Significant relationships covers defacto and same sex, while caring relationships apply to domestic support and personal care relationships (provided without fee or reward). Any new Family Violence legislation will need to be consistent with this new legislation.

Recommended way forward:

That the term 'family violence' be used instead of the term '*domestic violence*' in order to take into account the diverse range of relationships that should be covered under the new legislation.

That a definition of *family* is introduced which is sufficiently broad to cover spousal relationships, intimate personal relationships (including dating relationships and same sex relationships), family relationships (with a broader definition of relative) and informal care relationships (between a person and a carer which takes place for no fee or reward).

That a definition of relationship be consistent with the proposed relationships legislation.

In instances where the definition of 'relative' is contentious (i.e. where the offender indicates there is a familial relationship but the victim indicates that there isn't), then the views of the victim would be considered as primary. This would also be the case when deciding whom to cover on Family Violence Orders (e.g. if the victim requests that her next door neighbour, whom she considers as a 'relative' be included on the order, then the Court would be able to join persons on the order). This allows for the subjective definition of the victim when deciding who can be protected.

Discussion Questions

- 3.2.1 *Should a definition of relationship be introduced which takes into account the diverse range of relationships in which violence occurs including: spousal, intimate personal relationship and family relationships?*
- 3.2.2 *Should the definition of relationship include informal care relationships, and what is the desired scope of this definition?*

3.3 Definition of Violence

Discussion:

Despite a community perception that family violence is primarily limited to physical assault, family violence takes a number of forms including physical, sexual, verbal, emotional, social and economic abuse. Articulating and expanding the definition under legislation would do much to influence the interpretation of family violence both within the community and the criminal justice system.

As previously discussed, what might be encompassed by family violence is not currently defined in legislation. Offences related to such violence are contained within the *Criminal Code* (e.g. indecent assault, aggravated sexual assault, nuisance, grievous bodily harm, assault, rape, stalking etc) and the *Police Offences Act 1935* (e.g. assault).

Most other jurisdictions have enacted separate legislation that defines violence in a domestic setting. While the definitions of domestic violence differ across states and territories, all other jurisdictions include as a minimum: personal injury; property damage; threats of personal injury or property damage; and, intimidation, harassment or otherwise inappropriate behaviour (e.g. molestation, provocative or offensive behaviour). In recognition that domestic violence can be more broadly defined than this, some states have extended their definitions.

An extensive definition of domestic violence is contained in the Queensland legislation. Not only does this legislation define violence in a broad sense, but it also provides clear examples of the intent of the section. Behaviours cited as examples include wilfully injuring a pet; intimidation and harassment of a person including following them when out in public, either by car or on foot; positioning oneself outside a relative's residence or place of work; and, repeatedly telephoning at home or at work without consent.

In addition, Queensland includes the following as an example of economic abuse "Regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque". The legislation also allows that the person committing domestic violence need not personally commit the act or threaten to commit it. Any person who counsels or procures someone else to commit an act is said to have himself or herself committed domestic violence.

South Australia also has quite extensively defined family violence, and delineates between various methods of communication such as fax, mail, telephone and Internet.

The New South Wales review cited a model domestic violence legislation definition as:

- Causing or threatening to cause a personal injury to the protected person, or the abduction or confinement of the protected person;
- Causing or threatening to cause damage to the protected person's property;
- Causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person's property;
- Behaving in an harassing or offensive way towards the protected person; or
- Stalking the protected person.

Currently in Tasmania, the grounds upon which a victim can obtain a restraint order in domestic violence situations is contained under s106B of the *Justices Act 1959*. Justices are able to grant a restraint order:

"... if they are satisfied, on the balance of probabilities that a person has caused personal injury or damage to property, or unless restrained is likely to again; or that they have threatened to cause personal injury or damage to property; or that a person has behaved in a provocative or offensive manner, where the behaviour is likely to lead to a breach of the peace and that person is, unless restrained, likely again to behave in the same or a similar manner".

This section also grants a restraint order when a victim has been stalked. The definition of stalking within the legislation is quite comprehensive and includes following another person, loitering

outside home or other places frequented by another person, entering or interfering with the property of another person, keeping them under surveillance, giving to or leaving offensive material, and acting in a way that could be expected to arouse a person's apprehension or fear.

Recommended way forward:

That a broader definition of violence is utilised which includes:

- Causing or threatening to cause a personal injury to a person, or the abduction or confinement of a person;
- Causing or threatening to cause damage to a person's property;
- Behaving in an harassing or offensive way towards the person;
- Stalking;
- Economic abuse (e.g. such as the controlling of the family finances or property in a manner which renders the other person unreasonably dependent on the other);
- Abduction or confinement;
- Specific mention regarding injury to animals;
- Intimidation or harassment; and,
- Provisions for offences occurring if a person counsels or procures someone else to commit an act of domestic violence.

That a crime be created under the new legislation where patterns of psychological and emotional abuse, such as intimidation and bullying behaviour, which if taken as individual incidents, would not reach a level of seriousness sufficient to be a crime but however, over time create or maintain a climate of fear which affects the family.

Discussion Questions

- 3.3.1 *Should a broad definition of violence be introduced which recognises physical, sexual, verbal, psychological, emotional, social and economic abuse?*
- 3.3.2 *Should there be the creation of a separate offence for patterns of abusive behaviour?*
-

3.4 Definition of Police/Prosecution powers and duties

Discussion:

Police have various powers under the *Justices Act 1959* and the *Police Offences Act 1935* to respond to family violence situations.

Section 106L of the *Justices Act 1959* allows Police to enter premises if they have reason to believe that a person on those premises is or may be under threat or attack. They may also apprehend, without warrant, a person on those premises in order to facilitate the application of a restraint order. In addition, Police may, without warrant, search any person or premises if they believe they may have an object which has been used or may be used to threaten or injure any person on the premises. The *Police Offences Act 1935* allows Police to charge an offender with offences such as unlawful assault (s35(2)), indecent assault (s35 (3)), destruction of property (s37) and unlawful entry (s14B).

As discussed earlier, some behaviours that constitute family violence are a crime and should be treated as such. In doing so, a clear pro-arrest policy by Police would ensure that an active approach is taken to charging offenders under the appropriate legislation. This approach would be similar to the Model Laws²³, following the New South Wales and Queensland provisions, which give Police clear directions concerning their role in obtaining orders where they are needed. In these, Police are obligated to investigate certain beliefs or suspicions:

- If a Police officer believes or suspects an act of domestic violence has been committed, is being committed, or is likely to be committed, they must investigate.
- If the Police officer investigates and does not make a protection application, or an application for a telephone interim protection order, the Police officer must make a written record of the reasons for not making an application.²⁴

A strategy for a pro-arrest policy for Tasmania is outlined in Appendix 5.1. In this strategy, Police would be mandated to arrest and charge offenders if sufficient evidence indicates an offence has been committed under relevant legislation such as the *Criminal Code* or the *Police Offences Act 1935*. Any Police action should be decided on the evidence and should not be affected by any perceived negative reaction to the Police by the victim, or acts of contrition by the offender.

If sufficient evidence is lacking, but a risk assessment of the situation indicates that the victim has been, or is likely to be at future risk under the provisions of the proposed Family Violence legislation, attending Police are either to arrest and charge for the purposes of seeking a restraint order, or, as proposed under the new legislation, issue a provisional Family Violence Order (see section 3.5).

²³ Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999.)

²⁴ WA Department of Justice, *Report on a review of legislation relating to domestic violence*. November 2002.

Figures obtained from the Productivity Commission from the 2003 COAG data collection (from which the *Report on Government Services 2003* is published) indicate that Tasmania does have the highest number of restraint order applications per capita on a national comparison. The current Tasmanian ratio is 7.71 restraint order applications per 1000 people. Other jurisdictions have an average of approximately 4 restraint order applications per 1000 people. (Western Australia 4.71; Queensland 4.44; and Victoria 4.35).

In Tasmania, Police rarely apply for restraint orders on the victim's behalf. According to recent research, anecdotal evidence suggests that only 5% or less of all restraining orders are initiated by Police. This figure includes restraint orders arising from family violence situations as well as non-family violence situations such as workplaces (schools, retail premises, cinemas) and neighbour disputes. At present there is no capacity to separate out general restraint orders from restraint orders taken out for family violence reasons, however a manual sample of orders lodged supports the anecdotal "feeling" that around 60% of these matters were arising from family violence situations. This means that a maximum of 8% of Family Violence Orders could have been initiated by Tasmania Police.

Even if the figure is higher than that reported anecdotally, it is still significantly lower than other jurisdictions such as South Australia (97% initiated by Police) and Queensland (80% initiated by Police). Reasons cited for the low Tasmanian figures include the perceived likelihood that victims will withdraw from applications, reconcile with abusers or aid and abet breaches, meaning that restraint orders are seen as a waste of time and effort.²⁵ These views run counter to the research that indicates that direct contact with the criminal justice system is correlated with decreased levels of re-offending behaviour.

Ensuring that a Family Violence Order is issued where criminal charges are not laid ensures that immediate safety and protection has been considered, and allows for an additional pathway into the criminal justice system should breaches occur (see Appendix 5.3). It has been suggested that Police should be granted the power to arrest a person should there be a reasonable suspicion that they have breached a Family Violence Order, and that such breaches should be heard and determined as a separate matter to any criminal charge that may have arisen out of the breach.

In some circumstances, Police may arrest and charge a perpetrator with an offence, but Police Prosecutors or the DPP decide that there is insufficient evidence to proceed with a prosecution. Decisions on whether to prosecute should be based upon sufficient evidence to proceed, and not in response to victim's requests to withdraw charges.

In these circumstances, up until the time the charges are dropped, the victim has been protected by the bail conditions or a Family Violence Order. In situations, where the victim has been or is likely to be at future risk of harm and no order is in place, Prosecutors should seek a Family

²⁵ Davies, 2002

Violence Order at the same time as they are tendering that there is insufficient evidence to proceed with a prosecution process. This process, outlined in Appendix 5.2, ensures again that the safety and protection of the victim has been considered, and again provides for an alternate pathway into the criminal justice system should the provisions be breached.

Ensuring that family violence is treated as a crime, while recognising that the ongoing safety and protection of the victim are paramount, are inherent to any effective family violence intervention strategy. While the decision to adopt a pro-arrest and pro-prosecution policy could be criticised on the basis that offenders may become more violent after police involvement, the majority of research indicates that intervention by the criminal justice system significantly decreases the level of abuse for 'low level offenders'. In addition, as discussed in section 2.6, although domestic violence is a crime, the low charge and conviction rates suggest it is being considered otherwise. While there is a dilemma in balancing victim ambivalence over whether to proceed with responsibilities to uphold the criminal law, there is a recognisable societal responsibility to ensure that the safety of vulnerable persons is paramount.

Recommended way forward:

That a pro-arrest policy is implemented which requires Police to pro-actively gather evidence and where sufficient evidence exists, proceed to prosecution. This would include a presumption against bail, would allow Police to arrest without warrant an offender who has left the scene, and proceedings would continue, regardless of the wishes of the victim to the contrary.

In cases where there is insufficient evidence to prosecute, Police would seek or issue a Family Violence Order. In cases where the prosecution process does not continue, Prosecutors would request a Family Violence Order be issued at the time of tendering that there is insufficient evidence to continue with the prosecution.

Discussion Questions

- 3.4.1 *Should Police powers be extended to include the presumption against bail in family violence circumstances?*
- 3.4.2 *Should a pro-arrest policy be adopted by Police including the capacity for Police to arrest on sight an offender who has left the scene?*
- 3.4.3 *Where sufficient evidence exists, should prosecution be pursued regardless of the wishes of the victim?*
- 3.4.4 *In the absence of criminal charges and following a risk assessment, should Police be required to seek or issue a Family Violence Order for the safety and protection of the victim?*
- 3.4.5 *In circumstances where the prosecution process does not continue, should Prosecutors be required to seek a Family Violence Order to be issued where one is absent?*

3.5 Family Violence Orders

Discussion:

While the central tenet of this paper is the need for a pro-arrest policy where evidence of a criminal offence exists, there will be situations where there is insufficient evidence of a criminal offence to arrest, however the circumstances will warrant the issuing of a restraint order. In these cases, it has been suggested that streamlining the restraint order process would provide a more expedient and complementary mechanism to support the criminal process and be less traumatic for victims.

Currently, s106D (2) of the *Justices Act 1959* provides for applications to be made to a Court for an interim order that operates for a period not exceeding 60 days. Section 106DA (2) enables a police officer to apply by telephone to a Magistrate for an interim restraint order if the police officer has reasonable grounds for believing a person has engaged in intimidatory behaviour that may result in an assault, but it is not practicable to immediately apply for a restraint order because of the time and place at which the incident giving rise to the application occurred. A telephone interim order operates for a period not exceeding five working days.

Police could be enabled to issue a 'provisional Family Violence Order' that has effect for 21 days (see Appendix 5.1). In practice, this would mean that a police officer, using powers of arrest and

detention would detain a person in order to prepare and serve a provisional Family Violence Order. As a safeguard to the process, the maximum time limit allowed for this purpose would be six hours. A copy of the provisional order would be lodged electronically with the Court at the time of service.

Under this model, if an offender does not accept the provisional Family Violence Order, they would be responsible for lodging a notice with a Court within 21 days to dispute the order and/or to seek any variation to its terms and conditions. After 21 days, if no notice of objection or application to vary the order has been made, it has full effect for a period of 12 months as if it were an order issued by a Court. No further service or proof is required. This proposal would provide a bridging mechanism by which immediate protection would be afforded to a victim, as well as potentially reducing Court time and placing the onus of objecting and responding to a provisional Family Violence Order upon the offender.

As the power to issue a provisional Family Violence Order may be viewed as not insubstantial, it is considered important that a police officer of some rank and experience governs the quality assurance mechanism for this approach. It is suggested therefore that the power to issue a provisional Family Violence Order only be exercisable by a police officer of the rank of Sergeant or above. In order to further quality assure this process, where a charge has not been laid, or a Family Violence Order is not issued following an incident, an Inspector of Police must review this decision within 24 hours.

A police officer considering an application will be required to review the circumstances of an incident to ensure that the potential for a criminal process has been fully investigated and deemed to be complete. This review may involve inquiries with attending officer(s), a review of any Domestic Violence Incident Reports already completed, specific questioning about any injuries or whether weapons may have been present or used with threats, and any witness statements that may have been obtained. A police officer who is not satisfied that offences have been fully investigated may direct the attending officer(s) to undertake further inquiries to satisfy the officer that the issuing of a restraint order is the most appropriate action.

Should circumstances deem that a criminal process could not be undertaken, the next step is to issue a provisional Family Violence Order. This strategy provides a civil response in situations where there is insufficient evidence to make an arrest under criminal provisions, but where the police officer feels that the safety of the victim is at risk. The provisional restraint order model is not meant to be an alternative to the requirement that when attending family violence incidents Police should arrest an offender where sufficient evidence of a criminal charge exists.

Provisional Family Violence Orders would be tailored to address parties' concerns and to take into account all of the circumstances of the parties and the situation.

Where a criminal charge is determined to exist, an offender would enter the Court process, but a provisional Family Violence Order could still be issued to protect the safety and well being of the victim.

Where an offender disagreed with the content or making of a provisional Family Violence Order, the order would suffice as an appropriate mechanism for the protection of a victim until a notice of objection to the order is lodged or application to vary is made. On setting a hearing date, the Court could extend or vary the order or issue a fresh bail document to the determined hearing date.

The question also arises regarding strategies and support services for offenders who are under the age of 18. In these cases, it has been suggested that the Department of Health and Human Services (DHHS) be contacted, in order to provide intervention and support services for young offenders.

Recommended way forward:

That a model be put in place where Police have the authority to make and serve provisional Family Violence Orders which, if not disputed by an offender within 21 days, have full effect as a Family Violence Order for a period of 12 months.

If the offender is under the age of 18, it will be mandatory for Police to notify DHHS.

Discussion Questions

3.5.1 Should Police be given the capacity to issue a provisional Family Violence Order for up to 21 days?

3.5.2 Should Police be required to notify DHHS in situations where the offender is under the age of 18?

3.6 Potential remedies available to the Court

Discussion:

Accommodation options are also an issue in family violence situations. At present, it is often victims who leave the family home (as encapsulated in the term “escaping domestic violence”). It has been suggested, however, that the presumption should be that victims be able to remain in the home, unless there are special circumstances to suggest otherwise.²⁶ Discussion is

²⁶ Office of the Status of Women, PADV, *Improving Women’s Safety Project*, Draft report 2003

necessary regarding how this could be extended to other groups covered under the definition of relationship under the new legislation, such as those included in informal care relationships.

In New Zealand's *Domestic Violence Act 1995*, there is a standard condition that applies when a domestic violence order is made that the offender is prohibited from entering or remaining on any land or building occupied by the victim. This condition always applies unless the victim expressly consents otherwise.

In the Australian Capital Territory, under s41 (1) (c) of the *Protection Orders Act 2001*, the accommodation needs of the aggrieved person, and any child of either the aggrieved person or the offender, must be considered before making any final order. This ensures that the principles of the act provide a mechanism to facilitate the safety and protection of those who experience family or personal violence (ss 5 and 6) as a priority.

In determining the nature of the orders which may be included in a restraint order in Tasmania, under s106 B (4A) of the *Justices Act 1959*, Magistrates "must consider the protection and welfare of the person for whose benefit the order is sought to be of paramount importance". When making an order for an offender to vacate the premises however, s5 goes on to state that justices must consider "the effect of making or declining to make the order on the accommodation of the persons affected by the proceedings".

It has been suggested that Magistrates in other jurisdictions are reluctant to make orders excluding men from the family home, as provisions such as s5 mentioned above raise concerns about accommodation options for all parties involved. Research has supported the view that some Magistrates believe that there are plenty of accommodation services for women escaping family violence, but none for men, which impacts upon their willingness to grant an exclusion order.²⁷ Some jurisdictions are addressing these issues through providing Magistrates with a list of accommodation services that men can use within the region.

Another accommodation issue potentially affecting the victim is in situations where there is a joint tenancy arrangement or when tenancy is held by the offender. Of the Australian jurisdictions only Queensland has detailed provisions in Residential Tenancy legislation about domestic violence. The Queensland legislation enables transfer of a joint residential tenancy to the victim, termination of the tenancy of the offender and the making of an interim order restraining a person from further injury or damage to the premises.²⁸

There are also legislative provisions in New Zealand's *Domestic Violence Act 1995* which allows for tenancy to be transferred where the offender was sole tenant or held joint tenancy where the order is necessary for the protection of the victim or is in the best interests of a child of the victim's family.

²⁷ OSW 2003

²⁸ Improving Women's Safety Project, 2003

In addition, it is recognised that exclusion provisions within the legislation could financially impact on the victim and any children who remain in the home. A potential remedy that could be invoked by the Courts in these situations would be the order of financial maintenance by the offender. These provisions could also operate in those circumstances where there is evidence of economic abuse, with Courts able to order that bank accounts be accessed by victims for their, and any children's ongoing maintenance.

Recommended way forward:

Legislation should be enacted in this area to ensure victims who wish to remain in the home are able to do so. In line with this, exclusion order provisions would be included automatically in Family Violence Orders, unless the aggrieved person expressly requests otherwise. This request will be taken into consideration in the final decision made by the Courts, with full consideration of the safety of the aggrieved person and/or any children.

In addition, the legislation would include provisions which allow the Court to transfer tenancy to the victim and where the exclusion of the offender has a potential adverse financial effect on this person, make orders to ensure that financial support is maintained.

Discussion Questions

- 3.6.1 Should the legislation provide for exclusion provisions to be included as standard, in order to allow the victim and/or any children to remain in the home?*
 - 3.6.2 Should the legislation allow the Courts to ensure continuity of tenancy through transfer to the victim?*
 - 3.6.3 Should the legislation allow the Courts to make orders to ensure that victims do not suffer undue financial difficulties through maintenance order and other financial provisions?*
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3.7 Provision for Orders to be made in agreement

Discussion:

Legislation in other jurisdictions makes provisions for orders to be made by consent. In New South Wales, a Court can make an Apprehended Violence Order (AVO) without being satisfied that the victim has reasonable grounds to fear and in fact fears domestic violence, if both parties consent to the making of the order. Both interim and final orders can be made by consent.

As discussed earlier, ensuring that orders are specifically tailored to suit the circumstances of the family, particularly when there are issues of sharing access to children and property should ensure that concerns by Police would be alleviated.

An advantage to granting orders by consent is that it expedites the matter, as it does not have to go to a final hearing. Also, the victim benefits from immediate protection without having to wait for the order to be served on the offender. It is important however that the offender understand the consequences of the Family Violence Order. An order may direct the person to vacate premises, restrain or limit their access to premises, prohibit a person from possessing a firearm and prohibit the person from stalking the victim.

It is most important that for orders to be made in agreement, that the victim is able to give consent freely and without duress. One potential way to reduce the risk of undue influence is to ensure the victim is the applicant for the order. The role of the offender therefore is to provide consent for the order to be made in agreement.

Recommended way forward:

That orders can be made in agreement between the parties, but the victim must be the applicant of such an order.

Discussion Question

3.7.1 *Should provisions be included for orders to be made in agreement between parties?*

3.8 Defining the level of risk to the victim

Discussion:

The difficulties of defining the risk to the victim under the current legislation have been highlighted by Magistrates when attempting to decide on the making of orders and by Police seeking to enforce the orders. One benefit of separating Family Violence Orders from general restraint orders is that it would assist Magistrates and Police by differentiating the type of order; ensuring that appropriate emphasis is placed on Family Violence Orders.

In managing offenders who are part of the criminal justice system, risk assessment is an important part of this process as it takes into consideration the specific context and needs of each family violence situation and the potential of the offender to escalate their violent behaviour. 'Lethality' and 'risk assessment' tools are in use in a number of locations throughout North America and Australia (such as Joondalup Family Violence Court, Western Australia, and New South Wales Police) to determine the level of risk that an offender of violence poses to his partner or ex-partner. These tools are based on research that indicates that there are a number of factors that indicate that an offender may continue or increase their use of violence.²⁹

As discussed earlier, relationships do not necessarily end because of violence and in some circumstances the parties involved may have further contact, including sharing access to children and property. In these circumstances, risk assessments can be beneficial as bail conditions or Family Violence Order provisions could be tailored to ensure that continued contact is allowed, but any further violence or threat of violence would constitute a breach and lead to further interaction with the criminal justice system.

Risk assessment of offenders early in the process can ensure that the safety and protection of the victim remains paramount, while the violence is still treated as a criminal offence. It would also allow the Courts to make better-informed decisions in relation to the management of offenders.

Including risk assessment of the alleged offender as part of the Police process would contribute toward defining the risk to the victim. These assessments would also allow the level of risk to be fully considered by the Court and reflected in orders made and penalties handed down. Also, should the assessment of risk change, this could be used as a stimulus to make fresh applications to the Courts for amended orders.

Recommended way forward:

Part of the Police process should include the facilitation of risk assessment of repeat family violence offenders and first time offenders who are deemed to potentially pose a further risk to the victim or the victim's family.

²⁹ Improving Women's Safety Project, 2003.

For a first time offender, Police would facilitate the risk assessments; therefore they could conduct it themselves or request an outside assessment (e.g. from Community Corrections). For a subsequent offence, an appropriate external provider should conduct the assessment (e.g. Community Corrections, private practitioner etc.)

Discussion Questions

3.8.1 *Should risk assessment of the offender be included as part of the bail process?*

3.8.2 *Should all repeat family violence offenders be subject to formal risk assessment?*

3.9 Family Violence Order breaches

Discussion:

One of the recurring criticisms of the Justice System in Tasmania and all other Australian jurisdictions is that family violence matters are not dealt with as serious criminal behaviour and are seen as civil matters by nature. Therefore one imperative is to recognise that family violence offences, including breaches of Family Violence Orders, are serious criminal matters and need to be reflected as such in the Criminal Justice System.

This could be achieved by adopting similar approaches to the recommendations made in the recent Western Australian Review of Legislation relating to Domestic Violence. The Western Australian model follows similar approaches to those adopted in Canada and the United States. This approach requires Courts to take into account abuse in family violence situations as an aggravating factor when sentencing an offender for a crime.

Western Australia is also increasing the protection for children by making family violence offences committed in the presence of children an aggravating factor. This means that in situations where children are involved, either the order is made tougher, or the penalty for breach increased.³⁰

Differentiation between first offenders and repeat offenders is also an area that needs to be explored in the context of penalties. One sentencing option is that it may be more appropriate to refer first offenders to intervention programs with suspended sentences, with failure to complete a rehabilitative program or a repetition of the offence resulting in imprisonment.

In Tasmania, in the period from September 1998 until 31 January 2001, Police dealt with 35 breaches of restraint orders, however Hobart Magistrates Court records 203 breaches in 1999 and 402 in 2000. According to Davies³¹, the majority of breaches dealt with by the Hobart Court

³⁰ WA Department of Justice, 2002.

³¹ Davies, 2002.

were dismissed, adjourned without conviction, or resulted in the imposition of fines. Serious penalties (which included conviction, community service orders, prison sentences or a detention order) applied in only 48 cases (24%) in 1999 and 73 cases (18%) in 2000.

At present, breaches of restraint orders in Tasmania carry the least serious penalties for any state or territory in Australia. Breaches of restraint orders in Tasmania carry a fine not exceeding 10 penalty units (e.g. \$1000) or a period of imprisonment for a period not exceeding six months. Most other jurisdictions differentiate between first and subsequent offences, with penalties increasing significantly for the latter.

In comparison, for example, the maximum penalty for a subsequent breach in the Northern Territory carries a mandatory prison term; in Victoria it carries a maximum of five years imprisonment; and, in New South Wales two years imprisonment, a fine of \$5,500 or both. In addition, in New South Wales, if the defendant is over 18, they must be sentenced to a term of imprisonment unless the Court orders otherwise. In these cases therefore, a rationale for the decision is required.

There is also an issue regarding sentencing options and severity of penalties in those cases where children (i.e. under the age of 18) are the offenders of family violence or when they breach a Family Violence Order. In these cases, Family Violence legislation will need to interface with both the *Children, Young Persons and their Families Act 1997* and the *Youth Justices Act 1997* to ensure that the objects and principles of those Acts are adhered to. Although it is recognised that some children can perpetrate family violence and should be held accountable for this under Family Violence legislation, the sentencing options and penalties for children will be dictated by the *Youth Justices Act 1997* and would therefore include a range of diversionary options not available to adult offenders.

Recommended way forward:

That a penalty be introduced for first offences which are more indicative of the serious nature of the offence and which specifies both a minimum and maximum level. These penalties could include a fine and/or a term of imprisonment (e.g. for a first offence breach of restraint order the minimum penalty is 50 penalty units and/or a term of imprisonment not exceeding two years).

That the seriousness of subsequent breaches be reflected in a minimum penalty which is more severe than that for a first offence (e.g. a subsequent offence is a mandatory jail term, or a minimum of 50 penalty units and/or a term of imprisonment not exceeding five years).

That in cases where offenders are under the age of 18, police are under the obligation to contact the Department of Health and Human Services in order to provide support and assistance for the young person under the objects and principles of the *Youth Justice Act 1997*.

N.B. The above penalties are for the purposes of illustration only – discussion is needed regarding appropriate fines and/or terms of imprisonment.

Discussion Questions

- 3.9.1 Should violence in the context of families be seen as an aggravating factor when sentencing an offender for a crime?*
- 3.9.2 Should offences which are committed in the presence of children with whom the offender has a family relationship be seen as an aggravating factor?*
- 3.9.3 Should penalties be increased in relation to the breach of the provisions of orders?*
- 3.9.4 Should different penalties apply to a subsequent offence compared with a first offence?*

3.10 Perpetrator Intervention Programs as sentencing options

Discussion:

Although most family violence legislation includes provisions for restraining orders, some jurisdictions have a focus that includes giving consideration to those circumstances where the relationship between the parties will continue.

Recent research has indicated that interventions that are directly linked with the offence have the most likelihood of reducing re-offending behaviour. Perpetrator intervention programs are one strategy which links the offender to the actual offence so that individuals have the opportunity to gain a clearer understanding of what they did, the choices they made, and the consequences of their actions. It is generally accepted that a pre-condition for attendance at such programs is that an offender has either pleaded guilty or been found guilty of an offence. This relates to the need for the offender to accept responsibility for his violent behaviour. In addition, as discussed earlier, where offenders attended programs, the risk of further violence was generally reduced.

Interventions that utilise a holistic perspective are the most valuable as they adhere strongly to the need for primacy of safety for victims. Where there are perpetrator programs for the offending partner therefore, parallel programs and/or support services need to be available to non-offending partners and children, with sufficient linkages between them to ensure that any potential risk is either averted or assessed quickly and effectively.

Some jurisdictions include the attendance at perpetrator programs as a part of their family violence legislation. The New Zealand *Domestic Violence Act 1995* includes the provision of programs for victims of domestic violence, and the requirement that offenders attend programs that have the primary objective of stopping or preventing domestic violence.³² The Court must direct the offender to attend a specified program, unless there is good reason not to do so. The programs may be general violence prevention or anger management sessions, or may be specifically tailored to meet particular needs. An independent two-year study of the Act showed that this rehabilitative component, and the provision of free Court approved programs for victims and their children were viewed very positively.³³

The Northern Territory *Sentencing Act* also makes provision for perpetrator program orders, where if a Court finds a person guilty of a domestic violence offence, they may order the offender to participate in a perpetrator's program. The Court can only make this order if they receive a report stating the person is a suitable person to take part in the program, and that there is space available for them. Conditions also apply for attendance at the program, including attending all sessions without being under the influence of drugs or alcohol and not acting in a disruptive manner. Breach of a perpetrator program order carries a penalty of \$5,000.

Allowing for the use of offender intervention programs as a sentencing option could be one avenue to provide a rehabilitative focus, in order to address the violent behaviour itself and to reduce the level of violence in continuing or future relationships, particularly for first time offenders.

Discussion will also be necessary regarding whether or not the offender needs to bear the cost, or at least part of the cost for attending a program. Arguments for this proposal would include the issue of valuing what one pays for, in addition to ensuring that offenders bear some financial responsibility for their actions. Conversely however, it could be argued that if these programs are to be used as a sentencing option, and those who are required to serve a jail sentence are not required to pay for their incarceration, that this would not be an equitable sentencing option in this regard.

Recommended way forward:

That Tasmania introduces perpetrator programs as a sentencing option for offenders who have been identified as suitable for rehabilitation and for whom there is an available position on an accredited program.

³² NSW Law Reform Commission Discussion Paper 45. November 2002

³³ NZ Ministry of Agriculture and Forestry. September 2000

Discussion Questions

- 3.10.1 *Should perpetrator intervention programs be a bail and sentencing option for family violence offences?*
- 3.10.2 *Should failure to comply with the provisions of such an order be subject to a significant penalty?*
- 3.10.3 *Should Courts only refer offenders to quality assured and accredited perpetrator intervention programs?*
- 3.10.4 *Should perpetrator programs operate in parallel with victim support programs?*
- 3.10.5 *Should perpetrator programs utilise a user pays system?*

3.11 Reversal of the onus of proof

Discussion:

One direction that should be examined is the potential reversal of the onus of proof. Currently under, s106B (1) of the *Justices Act 1959* Justices can grant a restraint order when they are satisfied on the balance of probabilities (i.e. under the civil standard rather than the more onerous criminal standard of beyond reasonable doubt) that a person has caused or threatened personal injury or damage to property and that person is, unless restrained, likely again to behave in the same or similar manner. Under the current legislation therefore, the victim needs to demonstrate that further violence is likely to occur and that they fear for their safety.

The requirement that a victim demonstrate that abuse has taken place, or that a breach has occurred, potentially points to inconsistency in the *Justices Act 1959* as s4AAB(a) states that Justices "must consider the protection and welfare of the person for whose benefit the order is sought to be of paramount importance".

Reversing the onus of proof would mean that the requirement for a victim to demonstrate that there is a potential of further violence is not necessary. It would be the fact of the violence or threat of violence that places the person at risk, not the likelihood of future risk. The reversal of the onus of proof in this area will make the Court processes in relation to changing orders and/or breaching orders less cumbersome, lengthy and stressful for the victim. In addition, changing the onus of proof would also provide more congruence with the concept of "protection and welfare" contained within the Act.

Reversal of the onus of proof could also extend to breaches of Family Violence Orders. Currently it is the responsibility of the victim to demonstrate that a restraint order has been breached. Sufficient evidence must therefore be provided to convince the Court of the breach. A change in legislation will instead place the onus upon the offender to demonstrate that they did not breach the order. This however, does not mean that a defendant would need to disprove each and every allegation contained in the charge and if unable to do so, be convicted of an offence. Rather, it requires the Court to consider all the evidence in order to decide whether the case on the balance of probabilities, rather than requiring the prosecution to prove each and every alleged offence.

Some offences in Tasmania already utilise a reversal of the onus of proof method. In trespass, for example, a person, without reasonable or lawful excuse (proof of which lies on the person), must not commit the offence of trespass.

Reversal of the onus of proof would ensure primary consideration is given to the victim during the Court process, and be in line with the principles of safety and protection outlined in the Act.

Recommended way forward:

That the onus of proof is reversed when Justices grant a Family Violence Order, and in relation to breaches of Family Violence Orders.

Discussion Questions

3.11.1 *Should the onus of proof be reversed when Justices grant a family violence order?*

3.11.2 *Should the onus of proof be reversed in relation to breaches?*

3.12 Specific provisions for children experiencing family violence

Discussion:

In Tasmania, there is a need to examine the interplay between the needs of children under the proposed Family Violence legislation and the provisions contained in the *Children, Young Persons and Their Families Act 1997* which covers issues of child abuse and neglect. Although there may be a perceived tension between some parts of the *Children, Young Persons and Their Families Act 1997* with its emphasis on a strengths based, family focused response and the proposed Family Violence legislation with its pro-arrest, pro-charge and pro-prosecution framework, the object of

both pieces of legislation is the same. Under the *Children, Young Persons and Their Families Act 1997*, although serious consideration is given to the desirability of keeping the child within his or her family and preserving and strengthening family relationships, the Object of that Act under 7 (1) is “to provide for the care and protection of children in a manner that maximises a child’s opportunity to grow up in a safe and stable environment and to reach his or her full potential”. For both pieces of legislation therefore, primacy of safety of the child is paramount.

As discussed earlier, research has indicated that exposure to family violence can have an emotional and developmental impact upon children. New South Wales, Victoria and the Australian Capital Territory specifically define experiencing family violence as a form of child abuse while other jurisdictions, including Tasmania, generally interpret the witnessing of family violence as emotional abuse.

In the New Zealand *Domestic Violence Act 1995*, it is recognised that abuse has occurred if the abuser:

- Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
- Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.

While this legislation acknowledges the effect of witnessing family violence on children, it also ensures that it protects other abused persons, as it makes provisions that a person also suffering the abuse is not regarded as having caused the child to be at risk.

The Tasmanian *Children, Young Persons and Their Families Act 1997* requires mandatory reporting for a number of persons, including Police. Under the *Justices Act 1959* a police officer, parent or guardian of a child, or a person with leave of the Court can take out a restraint order. The inclusion of the provision that any person with leave of the Court may take out an order makes this a broad provision, however other jurisdictions have specified certain people who are eligible to take out orders on behalf of a child e.g. in Western Australia a child welfare worker can take out applications on behalf of children and in New Zealand a social worker or other family member can make an application on the child’s behalf, even if the child was not a direct victim of the violence.

Other jurisdictions have also defined the provisions of their family violence legislation to specify the age at which a child can take out a restraint order on their own behalf. In Tasmania the *Justices Act 1959* does not limit the age at which a person can take out an order. As the definition of child is not defined under this Act, it could be assumed that a child of any age can take out an order under these provisions.

In Western Australia adolescents over the age of 18 can apply for a restraint order on their own behalf (although the Review of Domestic Violence in that state is recommending this be lowered to 14). In Victoria and South Australia, a child over 14 years can make an application with the leave of the Court, if the Court is satisfied that the child understands the nature and consequences of the order. A new section in Queensland legislation states that children can only be respondents or aggrieved if a spousal relationship, intimate personal relationship or informal care relationship exists. The question in Tasmania therefore is whether it is necessary, or desirable, to make clear and specific provisions regarding age limits for children in the proposed Family Violence legislation. The question also remains about support systems for those children who are taking out restraint orders on their own behalf, and the interplay between this and child protection agencies.

There are also stipulations in the Queensland legislation concerning who receives documentation if the child is under or over 16 years of age. If under 16 a copy must also be given to a parent of the child (with parent defined under the *Child Protection Act 1999*), but if over 16 a copy must not be given to a parent unless the Court orders otherwise. There are also stipulations about where and how documentation must be given, i.e. if under 16 it cannot be given to a child while at school unless there is no other place available and if over 16 it must be given as discreetly as possible.

In Tasmania, Police do have the power to apply for a restraint order where children have been the victims of family violence, however they are not mandated to do so. In some jurisdictions, police powers are prescribed when children are involved in family violence matters. In New South Wales, for example, Police are obligated under the *Crimes Act 1990* to take out an order when children under the age of 16 are involved as s562H(2) of that Act states:

“The police officer attending the incident concerned must make an application under this section if the police officer suspects or believes that a domestic violence offence, or an offence under section 227 (Child and young person abuse) of the Children and Young Persons (Care and Protection) Act 1998 against a child under the age of 16 years, has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made”

Section 227 of the *Children and Young Persons (Care and Protection) Act 1998* encompasses physical injury, sexual abuse, emotional or psychological harm and harm to physical development or health.

Recommended way forward:

That the age that children are able to take out Family Violence Orders on their own behalf be specified as over 14, with the proviso that the Court is satisfied they understand the nature and

consequences of the order. If a child on their own behalf takes out a Family Violence Order however, it will be mandatory for Courts to make a report to child protection authorities.

That the list of specified persons eligible to make an application on the child's behalf include child protection workers and other family members, even if the child is not a direct victim of the violence.

In situations where the respondent or applicant is a child that specific provisions are made as to how and where documentation can be given:

- If a child under the age of 16 is an applicant, then a copy of the documentation should be given to a parent of the child (except where the parent is the subject of the order), and if over 16 it should not be provided unless the Court orders otherwise.
- In situations where the child is a respondent and under 16, documentation should not be given while at school unless there is no other alternative and if over 16, should be given as discreetly as possible.

That where children under the age of 14 are involved in family violence situations (either through direct violence or through experiencing family violence) police be mandated to take out a Family Violence Order.

Discussion Questions

3.12.1 Should there be a minimum age at which a young person can take out a Family Violence Order on his or her own behalf (with the proviso that the Court is satisfied they understand the nature and consequence of the order)?

3.12.2 If so, what is the minimum age that should be included in legislation?

3.12.3 Should the legislation specify who is eligible to make applications on behalf of children?

3.12.4 Should the legislation specify to whom, where and how the documentation related to these applications are provided?

5.5.5 Should Police be mandated to take out a Family Violence Order if children are involved (i.e. have no discretion in these instances)?

5.5.6 If so, what should be the maximum age of children in these cases (i.e. under 14, 16 or 18)?

3.13 Family Violence legislation and family law proceedings³⁴

Discussion:

Family violence issues are a very relevant issue in the context of family law proceedings. Domestic violence is often about control within relationships, and this control factor is often at its worst at the end of a relationship. In the early years of the *Family Law Act (FLA) 1975* (Cth), in keeping with a focus on 'no fault' divorce, the Family Court minimised the relevance of domestic violence as a factor in affecting the welfare of children. This approach had changed significantly by the mid 1990s and the *Family Law Reform Act 1995* (Cth) constructed a framework for dealing with issues of family violence. Section 68F(2) now recognises the "need to protect the child from physical or psychological harm caused, or that may be caused" by factors including family violence.

However the Act also introduced other principles aimed at shared parenting, with the emergence of a distinct pro-contact policy with both parents enshrined in the legislation under s 60B(2). This has been noted as an almost contradictory response, as on the one hand it is recognised that family violence is a serious matter which must be considered before the Court, yet simultaneously a presumption in favour of contact seems to have developed. Studies conducted into this issue have found that it is now more difficult to obtain orders of no contact at interim hearings, even where there are allegations of violence against the contact parent and that the Court is more likely to try to preserve contact between the child and the non-resident parent.³⁵ A further research study found that the previously held view which recognised the impact of domestic violence upon children appears to have been superseded by concerns about maintaining contact between a parent and a child.³⁶

Although there is a procedure for obtaining restraint orders under the FLA it would appear that orders under the Justices Act are more commonly used by people seeking protection. Given that contact between children and non-resident parents is given great emphasis, it is important that contact orders need to focus on the safety of the children and the accompanying parent at the time of hand over as well as generally.

Both the local Courts and the Family Court need to be aware of the presence of restraint orders or contact orders. Under s 68R of the *Family Law Act* the Family Court has the discretion to make a contact order which is inconsistent with a restraint order, but must explain the rationale of the order. Under s 68T of the *Family Law Act* the local Court has the power to make, revive, vary, discharge or suspend a Division 11 contact order if the Court considers that a person has been, or is likely to be, exposed to family violence as a result of the operation of the contact order.

³⁴ This section is taken from the NSW Law Reform Commission document, 2002

³⁵ Dewar, J et al. *Parenting, planning and partnership: The impact of the New Part V11 of the FLA 1975*, Griffith University, Family Law Research Unit, March 1999.

³⁶ Rhodes, H et al. *The Family Law Reform Act 1995: The first three years*, University of Sydney and the Family Court of Australia, 2000.

Discussion Questions

- 3.13.1 *What concerns are there about the use of Family Violence Orders in family law matters?*
- 3.13.2 *What additions can be made to the Tasmanian Family Violence legislation to address these concerns?*

4. Implementation

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4.1 Governance

As foreshadowed by the Attorney-General, it is intended that Tasmania will have new legislation providing for restraint orders in family violence situations. This paper also foreshadows more extensive legislative provisions and revised practices that would have a significant impact on the level of servicing required from Police, Courts, corrective services, prosecution agencies and victim support services. If implemented these provisions and practice would require the development of certain new services including perpetrator intervention programs. They would also require a significant investment in the training of participants in the criminal justice system in the operational requirements of any new legislation.

This process would be most effectively managed within the governance structure of an Interagency Steering Committee, convened under the auspice of the Department of Justice and Industrial Relations and may include representatives from:

- Magistrates Court;
- Office of the Director of Public Prosecutions;
- Tasmania Police;
- Department of Justice and Industrial Relations;
- Department of Health and Human Services;
- Victim Support Services;
- Legal Aid Commission of Tasmania;
- Corrective Services (Community Corrections and Prison Services);
- Victims Assistance Unit; and,
- Other community services as identified and appropriate.

Should the introduction of more extensive Family Violence legislation proceed in the framework identified in this paper, resources sufficient to provide for new or extended programs would need to be made available. This will require preparation of a business case for consideration by Government in due course, once the detail of the proposals has been finalised. Further detailed work on possible throughput numbers of offenders and their demand impact on the family violence service response system would need to be undertaken as part of the business case development. It will be necessary to prioritise and phase the implementation of the various program elements.

The Steering Committee would identify the framework for the program, including the legislative developments, and develop a business case including an implementation schedule and detailed costing for a joint budget submission. It is suggested that the Business Plan be based on a phased approach occurring over a four-year budget period commencing in 2003/04. If this approach were adopted, Phase 1 (starting in 2003-04) would necessarily consist of program elements whose funding could be met through internal agency reallocation of resources, e.g. legislation drafting, service planning, research and consultation.

4.2 Program Evaluation and quality assurance framework

Evaluation should be a key feature of the development and implementation of this strategy. The major purpose of evaluation is to help provide clearer baseline data and identify measurable outcomes from which to extract 'sign posts' so that criminal justice agencies can assess whether they are 'on the right track'. It is not about assessing the overall success or failure of the strategy but about supporting an 'intelligence led' planning process which will lead to an improved response to family violence in Tasmania.

Key aspects of the evaluation would include:

- Appointment of an external evaluator;
 - Action research for ongoing improvements;
 - Establishment of data sets, baseline and statistical measures;
 - Exploration of victim satisfaction;
 - Exploration of perpetrator program outcomes;
 - Analysis of the scope and dynamics of interagency collaboration;
 - Analysis of practitioner decision making; and,
 - Establishment of 'sign posts' for future directions.
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5. Appendices

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Appendix 5.1 Police process

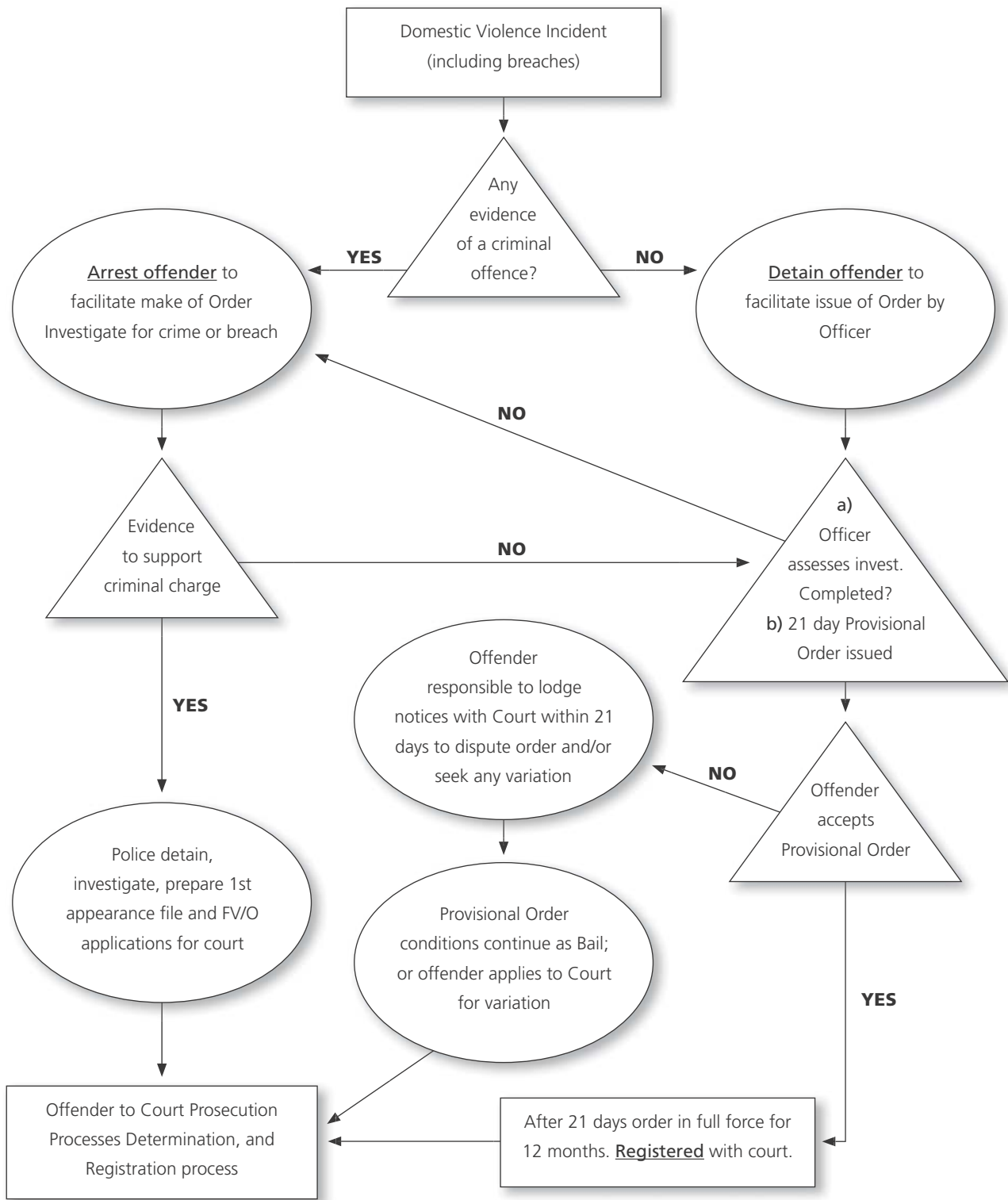
Appendix 5.2 Family Violence Order Application by Prosecution

Appendix 5.3 Breach of a Family Violence Order

Appendix 5.4 A Model for a Tasmanian Integrated Response

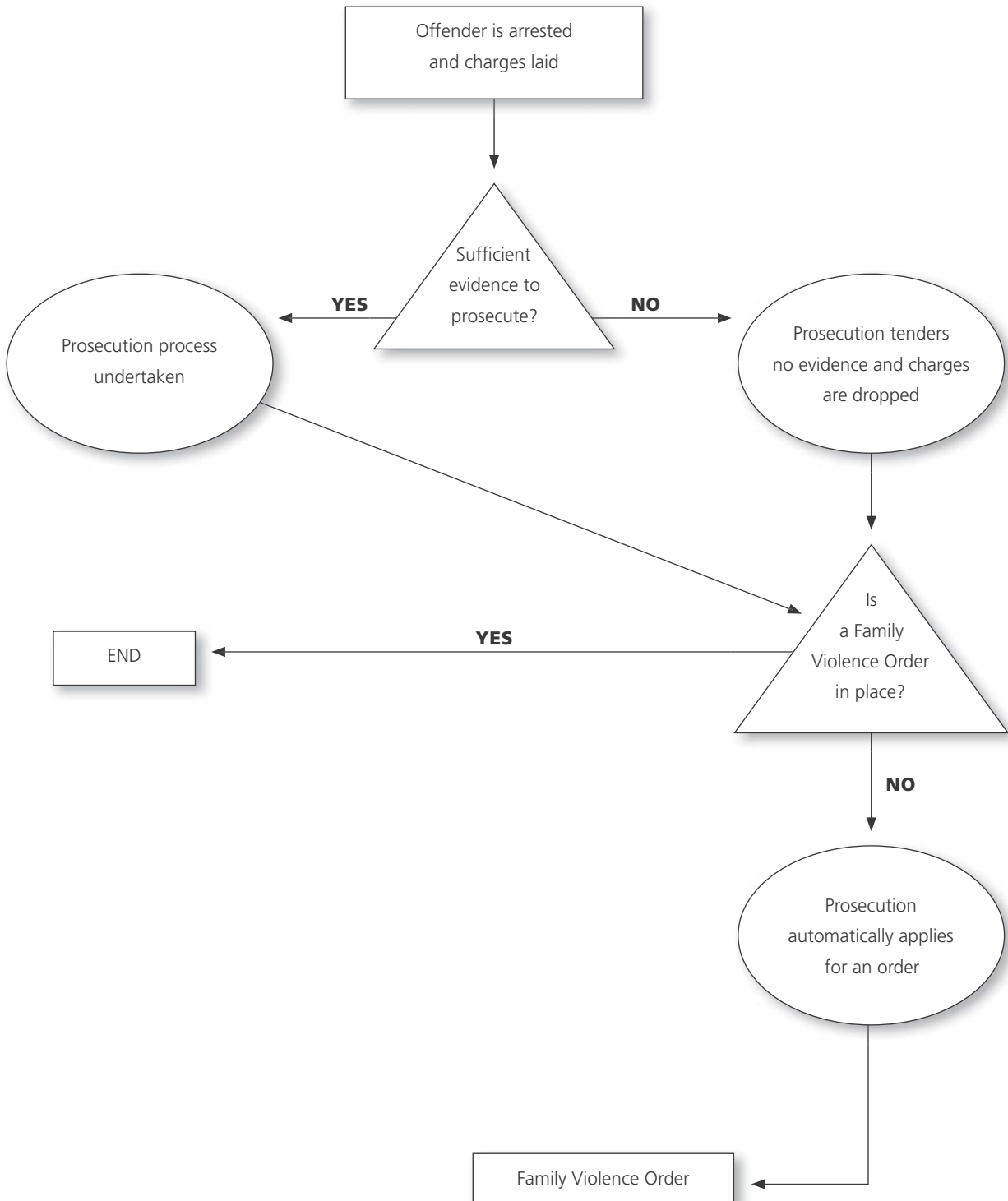
Appendix 5.5 Legislation in other jurisdictions

Appendix 5.1 Police process



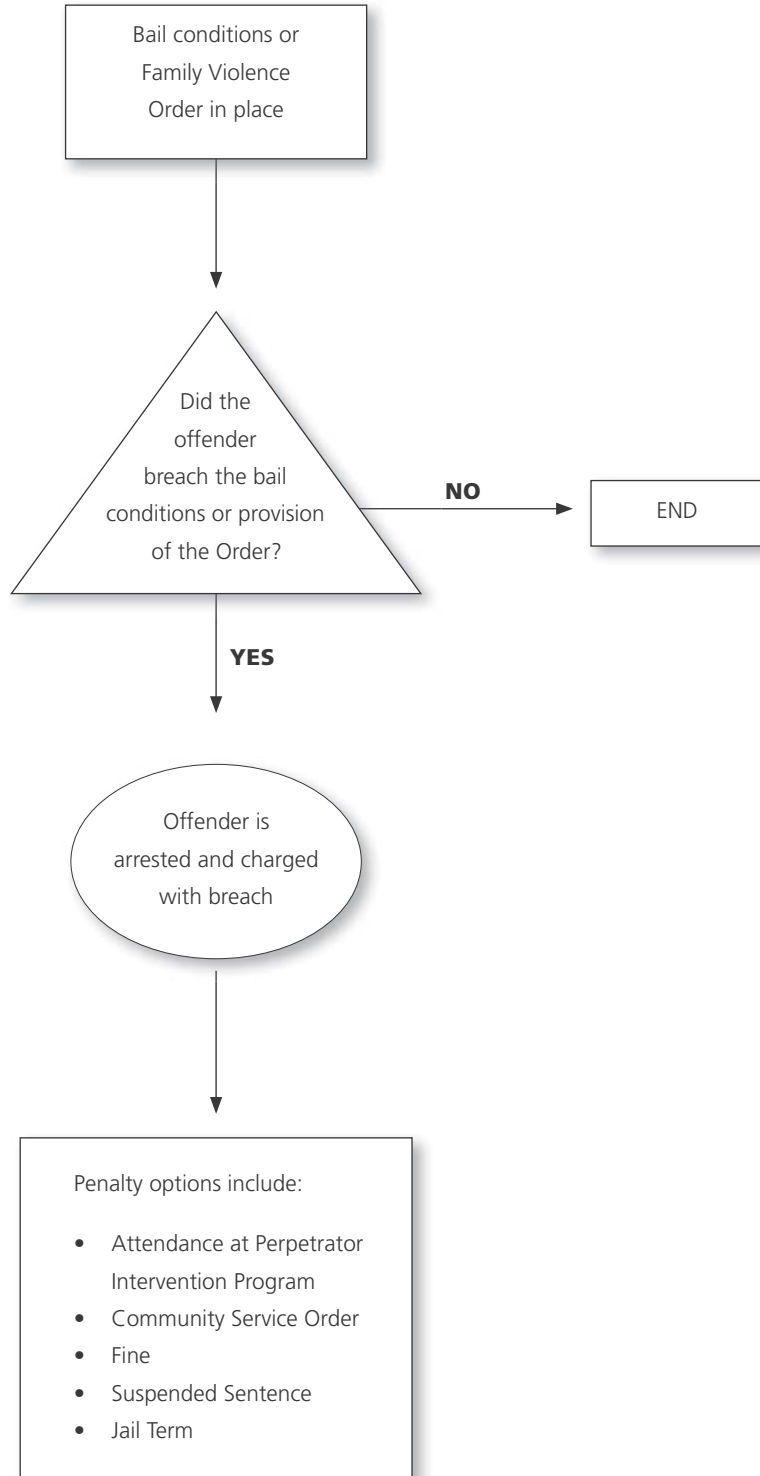
Appendix 5.2

Family Violence Order Application by Prosecution



Appendix 5.3

Breach of a Family Violence Order



Appendix 5.4 A Model for a Tasmanian Integrated Response

The implementation of an integrated response to family violence in Tasmania would require that criminal justice and related agencies commit to the following principles:

- Working together co-operatively and effectively;
- Maximising safety and protection for victims of family violence; and,
- Providing for offender accountability and rehabilitation.

The following proposals for an integrated approach in Tasmania has been informed by the findings of the successful *National Partnerships Against Domestic Violence* Family Violence Intervention Program pilot project conducted in the ACT from 1998 to 2001. This project was based on 'Duluth' principles and has now been implemented as an ongoing program in the ACT. It applied a phased, developmental, problem-solving approach to the issues which confronted the criminal justice system in responding effectively to family violence. It was an 'intelligence-led' initiative driven by independent evaluation and other research findings. It involved cross-agency, cross-sectoral collaboration with all participating agencies and services having an active role in the development of ongoing policy, procedural and operational responses to the family violence issues confronting the criminal justice system.

Key achievements of the ACT pilot program noted by the independent evaluators Urbis Keys Young Pty Ltd include:

- An 8% increase in the number of people charged with family violence related offences;
 - An increase from 24% to 40% in the number of cases finalised by way of an early plea of guilty without police being required to produce a full brief of evidence;
 - A significant shift in the quality and depth of investigative practice and brief preparation by police in the pilot patrol area;
 - A significant shift in police attitudes towards, confidence in handling, and implementation of proactive approaches to family violence matters in the pilot patrol area compared to other areas;
 - Improved quality and consistency of Police/Prosecution handling of family violence cases;
 - A more co-ordinated, proactive and better-informed approach to family violence matters before the Court, particularly with regard to victim safety issues;
 - A reduction in the number of cases which are withdrawn due to lack of evidence and/or victim/witness reluctance to proceed;
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- Strengthened referral, assessment and 'breaching' practices and procedures between the Courts, Corrective Services, and other service providers for offenders involved in perpetrator programs;
 - Positive feedback on Police, Prosecution and Corrections responses from both victims and perpetrators; and,
 - 'Greater ownership' of the implementation and monitoring of the Family Violence Intervention Program by participating agencies.

The implementation of an integrated criminal justice approach to family violence in Tasmania could involve the following range of program strategies among others:

1. Tasmania Police

The key aspects of a police response in an integrated approach would be:

- Implementation of a pro-arrest policy – where prima-facie evidence of an offence existed, then positive intervention and action in the form of arrest would follow;
 - Enhanced evidence collection processes through strategies such as the introduction of Family Violence Investigators Kits into patrol cars;
 - Active pursuit of charges based on available evidence (with the full range of possible offences to be considered);
 - Pursuit of applications for and prosecution of breaches of Family Violence Orders;
 - Consolidation of existing arrangements for a victim support service to attend call-outs with other relevant groups or agencies;
 - Application of provisions relating to the presumption against bail;
 - Facilitation of the 'risk assessment' of repeat family violence offenders and first time offenders who are deemed to pose a further risk to the victim or the victim's family;
 - Submission of briefs as required by a protocol arranged between the Tasmania Police and the DPP;
 - Provision of information, support and referral to family violence victims in cases where criminal charges have been laid; and,
 - Flag family violence criminal matters as required within agreed protocols.
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The above reference to 'positive intervention and action' specifically includes:

- *If members attend a family violence incident and it is established that there is prima facie evidence of an offence, best practice policing requires that action be taken to apprehend the offender and ensure the safety of the victim. The possible disposition of the matter by the DPP and the Courts would not be taken into account when considering police action.*
- *Any police action taken in relation to the disposition of the offender would be decided on the facts and would not be affected by any perceived negative reaction to the police by the victim.*

2. Prosecuting Authorities

The role of the DPP and Police Prosecution Units in an integrated approach would be as follows:

- Implementation of a pro-prosecution approach which, consistent with the independence of the DPP, incorporates the provision of advice to Tasmania Police on questions of evidence and ensures appropriate charges are prosecuted;
- Prosecutors would decline victim's requests to withdraw charges where sufficient evidence exists to proceed and would refer victims to other support services;
- Provision for witness preparation and, in conjunction with Tasmania Police and other relevant agencies, ensure questions of victim safety and support are addressed; and,
- Identification/tagging of family violence files as required within agreed protocols.

Prosecutors might also need to:

- Consider briefs provided by Tasmania Police and explore evidence to ensure that they have as much information as possible for making decisions on whether to proceed with a prosecution or not;
 - Determine reasons why victims may not wish to proceed with prosecutions and inform relevant authorities when this involves coercion by the perpetrator;
 - Inform the Court of any concerns regarding bail including information in relation to risk assessment;
 - Inform the Court of any recommendations in relation to the perpetrator's attendance at perpetrator rehabilitation programs as part of their sentencing, probation or parole conditions;
 - Ensure that a Victim Impact Statement is taken and submitted to the Court;
 - Ensure that the Court process is outlined to the victim;
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- Request use of the Court video link where this may assist a victim's safety or willingness to participate in Court proceedings; and,
 - Where practicable, ensure the continuity of prosecutors.

3. Magistrates Court

The role of the Magistrates Court in an integrated approach would be to manage family violence criminal cases in a manner that reduces the 'drop-out' rate, achieves a timely disposition of cases, and reduces the stress and anxiety for those involved. Essentially this would entail streamlining and fast-tracking the processing of Family Violence Orders and family violence criminal cases in order to facilitate the provision of Court support services and timely access to offender case management information.

The key aspects of the Court role would be:

- Early identification of family violence matters through manual tagging of Court files plus the use of a family violence code on the Criminal Registry database (CRIMES);
 - Introduction of the electronic lodgment of Family Violence Order Applications;
 - Processing of Family Violence Interim Orders on the day of lodgment;
 - Creation of a family violence list day, whereby all family violence matters estimated to take three hours or less would be listed on the designated day, with matters listed for hearing for more than three hours being allocated a date in line with other hearing matters;
 - Process defended criminal family violence matters within 12 weeks from initial Court appearance to sentencing, subject to the provision of pre-sentencing reports, or the undertaking of any program by the defendant;
 - Setting of a hearing date within eight weeks from the date of the first Court appearance;
 - Development of the CRIMES database to provide adequate statistical information about family violence matters;
 - Provision of Court support services as a designated contact point for victims of family violence offences and to provide relevant information about and support for victims and their families throughout the Court process;
 - Utilisation of pre-sentencing reports which take into account victim impact statements and offender risk assessments; and,
 - Suspended jail terms for first time offenders with Court ordered participation in Perpetrator Intervention Programs.
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4. Corrective Services (Community Corrections and Prison Services)

The role of Community Corrections would be to:

- Take into account victims impact statements and risk assessment in the preparation of pre-sentencing reports;
- Ensure that the compliance of offenders with the conditions of their sentences is monitored including their attendance at any Court referred treatment program;
- Treat non-attendance at a Court mandated treatment program as a breach; and,
- Ensure that any breaches of orders are reported to the Courts in a timely manner.

The role of Prison Services would be to:

- Facilitate the risk assessment of offenders held on remand; and,
- Monitor and report on offender behaviours which would indicate risk of further family violence offences.

5. Perpetrator Intervention Program

It is envisaged that any Perpetrator Intervention Program implemented in Tasmania would follow 'best practice' principles established under the findings of the National Partnerships Against Domestic Violence program. These include:

- Mandatory participation of offenders in rehabilitation programs based in the criminal justice system supported by strong sanctions for non-participation and increasing penalties for further offences;
 - Outcome evaluation based on victim safety;
 - Programs designed to meet agreed minimum standards in relations to the:
 - nature, content and conduct;
 - parallel programs for the support of partners and children;
 - external evaluation and accountability mechanisms;
 - appropriately qualified and trained staff;
 - comprehensive documentation, data collection and information sharing.
 - Formal protocols in relation to the coordination and delivery of services; and,
 - Access and equity strategies.
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6. Legal Aid Commission Of Tasmania

Under an integrated approach the Legal Aid Commission would provide legal advice and assistance to victims of family violence seeking assistance with protection orders and matters associated with custody of children and access to joint property. There may be an increase in applications for grants of legal aid from people charged with criminal family violence offences as a result of a pro-arrest, pro-prosecution approach. There may also be a corresponding increase in the number of applications for Family Violence Orders, placing additional demands upon the legal aid system.

7. Victim Support and Advocacy

A key component of an integrated approach is the provision of victim and witness support. There is already an active partnership between Tasmania Police and the Domestic Violence Crisis Service (DVCS) to facilitate victim contact. The DVCS provides advice, assistance, referral and support to victims of family violence, and works in partnership with the Police in responding to crisis calls on a 24 hour per day service.

Under an integrated approach victim support and advocacy could be further developed to facilitate contact with a wider range of victims than those currently reached and to strengthen the program's focus on enhanced victim safety. In order to reduce 'case attrition' it could also provide ongoing support to the victim through the criminal justice process by providing a support person of her/his choice. This aspect of the approach would need further development over the initial stages of the program, however it is anticipated that the primary providers of victim support would be:

- Attending police;
- Victim support services;
- Victims Assistance Unit (VAU); and,
- Court support services.

Other services and practitioners such as GPs, the Sexual Assault Support Services, women's shelters, and Youth Justice may also have a support role. The main aims of victim support under an integrated approach would be to:

- Provide early intervention (by early contact with DVCS or other support services) and the provision of information and presentation of options;
 - Provide support through the criminal justice process; and,
 - Develop links with other support services.
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8. Case Management, Tracking and Monitoring

Case management, tracking and systems monitoring would be integral components of an integrated approach. The principal difficulty in this area lies in coordinating the data systems of Tasmania Police, the DPP, DVCS, Magistrates Court, and Community Corrections. The Tasmanian Partnerships Against Domestic Violence project on Domestic Violence Integrated Information Management and the systems which were the outputs of this project, along with the Court based CRIMES system, have gone a long way to achieving the co-ordination of the data systems. Further work on these systems will occur in the short to medium term as part of the ongoing development of the CRIMES database. The broad objectives of case management, tracking and monitoring would be to:

- Uphold the safety imperative for victims of family violence by enhanced system responsiveness;
- Hold the abuser accountable for his/her actions by monitoring and signaling order compliance and re-offence patterns;
- Improve the level and quality of victim information at different decision-making points in the criminal justice system;
- Improve interagency communication within a case management framework;
- Improve the retention rates of cases within the system;
- Enhance the quality of evidence; and,
- Act as an accountability mechanism for practitioners in the system.

Agencies would need to agree that their collective processing and handling of victim matters would follow a set of agreed principles. Agencies would also need to develop a set of protocols for case processing, and mechanisms for case management, monitoring and tracking.

Appendix 5.5 Legislation in other Australian states and territories

Relevant Act/s	ACT	NT	Qld	Vic	NSW	WA	SA
	Protection Orders Act 2001	Domestic Violence Act 1992	Domestic and Family Protection Act 1989 for domestic Peace & Good Behaviour Act 1982 for non domestic	Crimes (Family Violence) Act 1987 for domestic Under review Justices Act 1928 for personal violence orders	Crimes Act 1900 Under review	Criminal Code for domestic Restraining Orders Act 1997 for non domestic Under review	Domestic Violence Act 1994
Definition of Domestic Relationship	Includes in their legislation relationships between spouses, de facto spouses and ex de facto spouses, as well as the relationship between parents and children. Domestic relationship is "personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage. Recently an amendment made to the legislation, the <i>Legislation (Gay, Lesbian and Transgender) Amendment Act 2002</i> s169 (1) and (2) was made in relation to discrimination on the basis of sexual orientation replaced the definitions of <i>spouse</i> and <i>de facto spouse</i> with the more encompassing term of "domestic partner". domestic partner – a reference to someone who lives with person in a domestic partnership, and includes a spouse (s169(1)). domestic partnership – the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis (s169 (2)).	(a) is or has been a relative of the other person (b) has or had the custody or guardianship of, or right of access to, the other person, or is or has been subject to the custody, guardianship or access (c) ordinarily or regularly resides or has resided with the other person or with a relative of the other person (d) is or has been a relative of a child of the other person (e) has or has had a relationship with the other person who is a member of the opposite sex	(a) spousal (b) intimate personal (c) family (d) informal care relationships NB. Although a domestic relationship exists only between 2 persons, 1 aggrieved or an authorised person may make an application for a protection order naming 1 or more than 1 respondent	domestic partner means an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person family member – (a) spouse or domestic partner (b) intimate personal relationship (c) is or has been a relative (includes those who would be a relative if the domestic partners were married) (d) a child who resides with person (e) a child of whom that person is a guardian (f) another person who is or has been ordinarily a member of the household	Domestic relationship if - Are or have been married - Are or have been in de facto relationship - Have or had intimate personal relationship - Living in the same household or other residential facility - Have or had a relationship where one party is dependent on the other providing ongoing paid or unpaid care - Are or have been relatives	A definition of domestic relationships is to be added to both the <i>Criminal Code</i> and the <i>Restraining Orders Act 1997</i> which is sufficiently comprehensive to cover all situations recognised as "domestic", including same sex circumstances, a simple approach to the concept of "relatives" and recognition of wider concepts of 'relative' as they may exist in Aboriginal, non-English speaking and religious communities	Family Member means spouse or former spouse, child of whom they have custody, or child who normally or regularly resides Spouse includes a person of the opposite sex who is cohabitating with the defendant as de facto

	ACT	NT	Qld	Vic	NSW	WA	SA
Definition of Domestic Violence	<p>(a) causes injury</p> <p>(b) causes damage to the property</p> <p>(c) is directed at a relevant person and is a DV offence</p> <p>(d) is a threat made to a relevant person</p> <p>(e) is harassing or offensive</p> <p>In addition, as the ACT Act covers both 'domestic' violence and 'personal' violence, it includes a wide range of offences including workplace bullying and harassment.</p>	<p>(a) has assaulted or caused personal injury or damaged property and</p> <p>(i) is, unless restrained, likely again to do so</p> <p>(b)</p> <p>(i) has threatened the above and</p> <p>(ii) is, unless restrained, likely to do so again</p> <p>(c)</p> <p>(i) has behaved in a provocative or offensive manner</p> <p>(ii) behaviour is likely to lead to a breach of the peace including ... cause another person to fear violence or harassment</p> <p>(iii) unless restrained, likely again to behave such</p>	<p>(a) wilful injury</p> <p>(b) wilful damage to property (including pets)</p> <p>(c) intimidation or harassment (including stalking, repeatedly telephoning, threatening an aged parent with the withdrawal of informal care if don't sign over cheque)</p> <p>(d) indecent behaviour without consent</p> <p>(e) a threat to commit (a) to (d)</p> <p>NB. The person committing the DV need not personally commit the act or threaten to commit it (i.e. may procure someone else to commit the act)</p>	<p>(a) the person has assaulted or caused damage to property and is likely to again</p> <p>(b) the person has threatened to assault or cause damage and is likely to again</p> <p>(c) the person has harassed or molested a family member or has behaved in an offensive manner</p>	<p>No express definition of domestic violence under the Crimes Act</p>	<p>Violence restraining orders (VRO) where:</p> <p>(i) a violent personal offence against the applicant</p> <p>(ii) behave in a manner that could reasonably be expected to cause the applicant to fear that the respondent will commit such an offence</p> <p>Misconduct restraining orders (MRO) where:</p> <p>(i) behave in an intimidating or offensive manner</p> <p>(ii) cause damage to property</p> <p>(iii) behave in a manner that is, or is likely to, lead to a breach of the peace</p>	<p>(a) Personal injury to a member of family</p> <p>(b) damage to property</p> <p>(c) on two or more occasions follows a family member, loiters, interferes with property, gives or sends offensive material (including via internet), communicates by phone, mail, fax, internet, keeps a family member under surveillance, or other conduct which raises fear</p>
Types and length of orders	Final, interim (maximum 16 weeks) or emergency order.	Restraining order Consent orders Perpetrators program order under s78K (1) of the Sentencing Act	Temporary order – in force until returnable before a Court or is revoked by Court DV order – continue for 2 years unless Court orders longer	Interim order – period specified or further order of Court Intervention order – for period specified by Court or until revoked by Court	Interim and final orders. No limitation on how long an interim AVO can last.	VRO and MRO split At first hearing Court can make an interim order (up to 3 months) or a "cooling off" order (up to 72 hours)	DV restraining order includes a supplementary firearms order
Penalty for breaches	50 penalty units and/or 2 years prison for first offence Subsequent is 50 penalty units and/or 5 years prison	\$2,000 or 6 months for first offence Mandatory prison term of between 7 days and 6 months for subsequent offence	40 penalty units or 12 months imprisonment	First offence, maximum of 240 penalty units or 2 years imprisonment Subsequent offences 5 years imprisonment	2 years imprisonment, a fine of \$5,500 or both	\$6,000 or 18 months imprisonment for VRO. Where cooling off order, \$2,000 or 6 months imprisonment MRO is \$1,000	Maximum is 2 years imprisonment