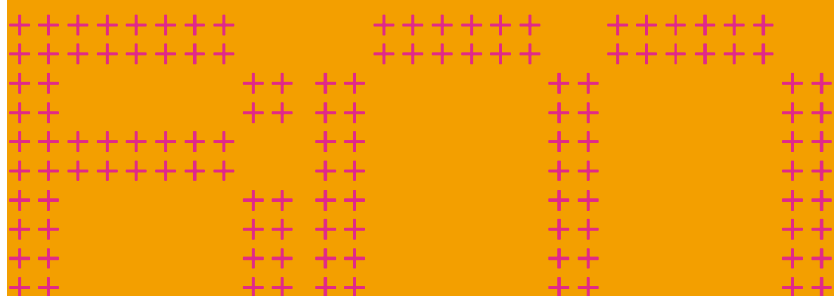
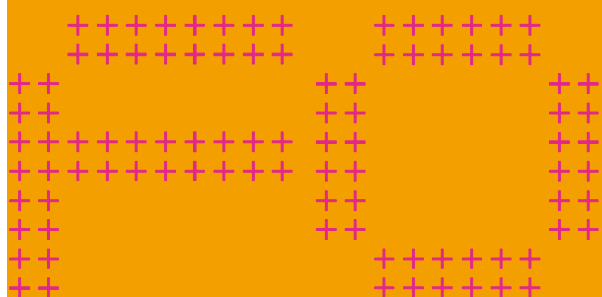
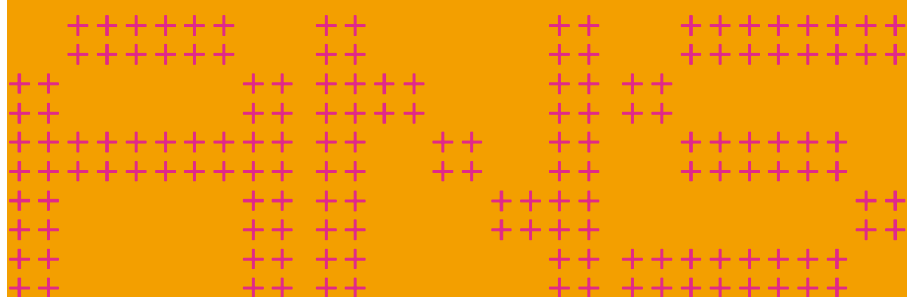
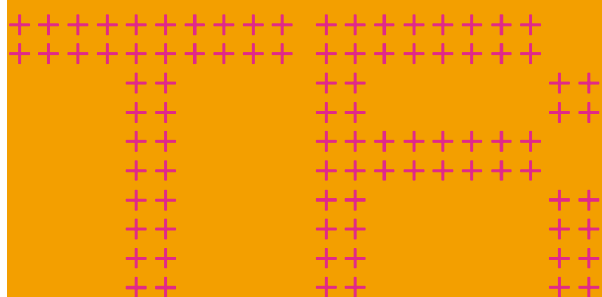


Review of the *Family Violence Act 2004* (Tas)

March 2008



urbis



Review of the *Family Violence Act* (Tas)2004

Prepared for Department of Justice

Level 14, 110 Collins Street

HOBART Tasmania 7000

March 2008

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Claire Greal
Associate Director	Dr Ania Wilczynski
Consultant	Kylie Smith
Advisor	Terese Henning
Job Code	KAJ55307

Executive Summary	i
1 Introduction	7
1.1 Previous commentary on the Act	8
1.2 This review	8
1.3 Methodology	9
1.3.1 Consultations	9
1.4 About this report	9
2 Scope of definitions of family violence	11
2.1 Definition of family violence	11
2.1.1 Property damage	11
2.1.2 Emotional and economic abuse	11
2.2 Definition of relationships	12
2.2.1 Definitional clarity	12
2.3 Children	12
2.4 Summary recommendations	13
3 Criminal justice process	14
3.1 Police powers	14
3.1.1 System changes	15
3.2 Bail	15
3.2.1 Periods of remand	17
3.2.2 Risk assessment screening tool (RAST)	17
3.3 Sentencing	18
3.4 Children	19
3.5 Jurisdictional issues	20
3.6 Summary of recommendations	20
4 Provision 38: Informing of concern	21
4.1 Summary of recommendations	21
5 References	22
 Appendix A Review Participants	

Executive Summary

The *Safe at Home* strategy has sought to firmly establish that family violence is criminal in exactly the same way as violence in any other context. By introducing dedicated legislation in 2004 the State Parliament of Tasmania (The Parliament) made a clear statement that a new response was required, and that a new effort and resources would be invested.

The *Family Violence Act 2004* (Tas) (the Act) has as the stated object:

In the administration of this Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations. (s. 3).

The object makes clear that the Act itself is a means to a social policy objective, and specifies the objectives of the *Safe at Home* framework as:

- Reduce the level of family violence in the medium to long-term
- Improve safety for adult and child victims
- Change the offending behaviour of those responsible for the violence.

Substantial public interest surrounded the legislation through the development process, as well as after proclamation. It would be fair to say that there were equally significant hopes and apprehensions about the impact of the Act, and in light of this the Parliament required a review of the Act within 3 years of its commencement:

A review into the provisions of this Act including an investigation of the effectiveness of its mechanisms will be conducted by the Minister and tabled in Parliament within 3 years of the commencement of the Act. (s.43).

This is the report of the review commissioned by the Tasmanian Department of Justice (The Department). Terms of Reference set the scope of the review, and limit it specifically to reviewing the effectiveness of the mechanisms of the legislation.

A challenge for many participants in this review has been the limited scope – focused on the legislation, rather than the array of systems, protocols, responses and efforts surrounding the Act, flowing from the broader *Safe at Home* framework. The Review has provided the opportunity to consider the extent to which aspirations and concerns engendered in the Act have come to fruition. A subsequent review of the effectiveness of the *Safe at Home* integrated response system will be commissioned subsequent to this report. A number of areas are identified in this report for attention in the review of the integrated response, referred to as 'phase 2'.

A number of detailed operational issues are identified in this report, some of which are relatively straightforward matters to address and would ease the day to day administration of the Act, for example, repetition of definitions in the provisions removing the need to cross reference the definitions section. Other issues are more substantive, for example the extent to which certain provisions may preclude or enable children from seeking protection under the Act, as was intended in the drafting. Other issues pertain directly to the safety objective of the Act, where strengthening will address the stated object, for example, extending the provision relating to firearms to include the seizure of ammunition as well as guns, and prohibiting a person from accessing further firearms when existing firearms have been surrendered. Specific amendments put forward to the review have been provided to the Department.

In order to maintain the focus on the terms of reference, it has been important to separate the degree to which reported strengths or limitations pertain to provisions within the legislation, or whether issues pertain to matters beyond the legislation. In some cases this is a difficult line to hold, as the legislation does not operate in splendid isolation, and its effectiveness is necessarily linked with other factors. The key issues raised in the review which are beyond the scope of this phase have been provided to the Department.

Summary of findings

The mechanisms provided within the Act were designed to deliver on each of the three objectives of *Safe at Home*. In summary, the review has drawn the following conclusions, each of which is detailed within this report.

- In relation to achieving a reduction in the level of family violence in the medium to long term, it is still early days. To determine when, and to what extent, family violence is decreasing will require particular research attention, tracking trends over time and undertaking meaningful assessment. The data available to the review indicates that in the 2007-08 year to date, police are attending an average of 403 incidents of family conflict each month. This is down 3.5% from the 2006-07 average of 418 per month.
- The safety of adult victims of family violence has seen improvement, particularly at the first point of contact with police, as a result of the new police powers and changed practices. A view commonly raised, however, is that *Safe at Home* is yet to fulfil its potential, with concerns that the positive front end impact being delivered by police is being diminished through the course of the criminal justice process.
- Under the *Children, Young Persons and Their Families Act 1997* (Tas) police are mandated to report all family violence incidents where children are present. According to the Department approximately 30% of such reports result in a child being allocated to a child protection caseload. It is beyond the scope of this review to evaluate whether such a response is improving the safety of child victims of family violence, or the impact of the Family Violence Counselling and Support Service. Of note is the lack of confidence amongst well-placed stakeholders that child victims are experiencing improved safety.
- The final objective of the Act is to change the offending behaviour of those responsible for violence. There are essentially two points of impact in relation to this objective. Firstly, *Safe at Home* was intended to have a deterrent impact, that is, a reduction in repeat offending. Without a base line this is not reliably measured, however, the Department advised the review that initial trends are indicating positive results. The other mechanism within the Act is referral of convicted offenders to the Family Violence Offender Intervention Program (FVOIP). The data available in relation to the effectiveness of this measure in achieving the object of changing offending behaviour was anecdotal, and included concerns about the narrow eligibility and the restricted availability of the course, and in some areas, an absence of referrals to the course.

While it is early days for assessing progress toward each objective in full, two and a half years of formal operation under the Act has been adequate time for well placed participants in the community and the criminal justice systems to offer a well informed perspective on the operation of the Act.

For the most part, participants in the review have offered a holistic and measured critique, acknowledging that the history of spousal murders in Tasmania and findings of subsequent coronial inquiries have been significant and serious drivers for a new paradigm for responding to family violence. The point of most significant change identified by stakeholders has been within the culture and response of Tasmanian Police, driven primarily by requirements placed on officers by the new legislation, and supported by highly regarded leadership within the police.

Stakeholder perspectives vary depending on their role, with defendant advocates continuing to raise concerns and victim advocates identifying a number of positive impacts, but equally reporting a range of operational issues to the review.

A continuing point of concern relates to periods of remand, particularly those which go beyond any likely penalty should a conviction be recorded. While periods of remand have reduced from the early days of operation under the Act, individual matters continue to be identified as examples where 'natural justice' may not have been sufficiently provided. While the Act requires the Court to consider the safety and wellbeing of the victim in considering bail applications, it is neither the legislation nor the Court per se which determines the period of remand but rather a complex combination of factors, including readiness of the prosecution, adjournments, court listing and so on.

There is, however, the continuing philosophical issue, that is, the extent to which the State may intrude into the traditionally private domain of the family home, and the strength of response a community is willing to endorse in light of the social, economic and personal costs associated with family violence. As such, if commitment remains to the philosophy of *Safe at Home*, then the provisions within the Act remain, with minor exceptions, relevant. This is not to say that further work is not required to enhance the broader family violence system response, ensuring the most efficient and timely operation of the legislation, which will be to the benefit of complainants and defendants alike.

One measure of effectiveness of the legislation put forward by police to the review was, in fact, the history of spousal murders in Tasmania, which saw seven women murdered in the three years preceding the enhanced police response to family violence (which predated the legislation by several months). In at least one of these incidents the family violence history was known to police. Since the enhanced police response three and a half years ago there have been four spousal murders, two of which were known to police, a third which was unknown to police and subject of a current coronial inquiry, and a fourth involving a victim of violence fatally stabbing their partner.

It is generally agreed that the great strength of the Act is the safety now available to victims at the first point of contact with police - through the pro arrest and removal policy. On the day to day level, however, concerns were raised by senior stakeholders including members of the judiciary about the extent to which the potential of the Act and *Safe at Home* has been realised to date.

It is not clear to the review whether the concerns reflect a perception of the effectiveness of the Act or are indeed supported by other data. For example, senior stakeholders expressed concern that the majority of convictions under the Act are being reached through guilty pleas, with too few matters proceeding to hearing. The problems reported with this include concern that the decision to proceed with charges has been returned to the complainant and that there is a reluctance on the part of police prosecutors to test circumstantial evidence in cases where complainants are reluctant or uncooperative.

Response to the terms of reference

In brief, the findings of the review are summarised here, against the terms of reference. Discussion of the issues is provided in the body of the report.

1. *The effectiveness of the integrated criminal justice response to family violence (Safe at Home) in promoting the safety of people affected by family violence*

The area in which it is generally agreed the integrated response has been effective is in relation to the safety of adult – predominantly female – victims of family violence. There is less confidence that child victims of family violence are experiencing increased safety, with confusion reported about their status in the legislation. In relation to the final objective of the *Safe at Home* framework to change the offending behaviour of those responsible for the violence stakeholders there is little hard data. Stakeholders reported a lack of evidence, in their view, that the integrated response is effective in this regard. Given it is through participation in behaviour change programs that change in offending behaviour is expected to occur, these programs will require targeted evaluation as well as inclusion in phase 2.

2. *Whether the scope of the definition of family violence as determined by ss. 7, 8 & 9 is appropriate and operating in a way that is consistent with s3 Objects of Act*

The breadth of the definition of family violence in s.7 is well supported in that it is seen to capture the range of behaviours involved in family violence, which effectively become criminal behaviours by virtue of their inclusion in the Act. This includes a range of non-physical behaviours including verbal abuse, intimidation, coercion, stalking, threats, abduction and, emotional and economic abuse.

The inclusion of sexual assault in family violence legislation is a first in Australia and important, in that it allows this offence, when perpetrated in the context of family violence, to be managed within the one Act. The inclusion of economic abuse, again unique to this legislation, has received raised questions and some criticism, but is generally regarded as reflecting a known method of coercive and abusive

behaviour in the context of family violence. A notable absence from the definition is property damage, which commonly forms a part of family violence incidents and was identified as a limitation.

3. *Whether police powers and the mechanisms identified under ss. 10, 11 12 & 14 in relation to the prevention, investigation and management of family violence are effective in promoting the safety of people affected by family violence*

A range of perspectives were reported to the review on the issue of police powers, including that the powers are appropriate to meeting the s.3 Objects of the Act, through to the perspective that the powers are too broad ranging. The report details this discussion. The final conclusion of the review is that the powers are aligned with the s.3 Objects of the Act.

4. *Whether the provisions under s. 13 (a) are appropriate and operating in the way that effectively manages the impact of family violence on children and in informing the Court about matters in relation to the 'risk' that an offender might pose and their capacity for successful rehabilitation*

s.13 (a) requires the Court to consider the presence of a child or a pregnancy in the affected person as aggravating factors when sentencing. The operation of this provision does not appear to be increasing the safety of children who have witnessed or been affected by violence. Shortfalls are, however, related to the systems supporting the safety of children, rather than the provision itself. The systems issues have been referred to Department for consideration in the scope of phase 2.

5. *Whether the powers granted to the Court under ss. 12, 13 & 16 are effective in promoting the safety of people affected by family violence*

The provisions dealing with bail are effective in promoting the immediate safety of those affected by violence, and have been identified along with the pro-arrest policy as bringing about the most significant change – for the better in family violence in Tasmania. At the same time, the presumption against bail is seen by some as too high a price before allegations are investigated and tested in Court. Some argue the Court's discretion has been removed, while others consider the additional consideration of risk to safety as highly appropriate, and a modest change in emphasis from the *Justices Act 1959* (Tas).

The extent to which the RAST is being used beyond its original purpose, and in particular the weight it is given in deciding bail applications was raised as a concern. The review looked into this in some detail and is addressed below.

There is a view amongst some stakeholders that interaction with the criminal justice system is a significant deterrent for some defendants, and that this group may be unlikely to re-offend, or to come to Police attention again. Sentencing, however, remains problematic from the judicial perspective, given the narrow options available.

Court ordered Family Violence Orders (FVOs) are generally viewed as being well tailored, in contrast to Police FVOs, discussed below. The variation and withdrawal of orders has led to concerns for Magistrates and Police Prosecutors, and the workings of the Integrated Case Coordination Committee (ICC) from whom advice is frequently sought, is discussed within the report.

6. *Whether the scope of the provisions of s.14 in relation to Police Family Violence Orders are appropriate and operating in a way that is consistent with S3*

Only in WA and Tasmania are police empowered to make Orders. In WA police can make interim Orders in emergency situations, lasting only 72 hours. In contrast, Tasmanian police have been empowered to make Orders lasting up to 12 months. Complainants and defendants have the option of applying for variation or revoking of Orders. These provisions enable immediate protection, and also mean that victims do not have the burden of making the application to the Court.

Key issues in regard to Police and Court FVOs is that defendants do not always understand the conditions of their Order and complainants do not always understand their obligations to adhere to the conditions. Both these issues are exacerbated when English is a second language, when poor literacy is a feature, or when younger people are involved.

A concern reported to the review has been the ‘blanket’ nature of PFVOs, particularly in relation to contact between a defendant and a child/ren. Numerous examples were put to the review of PFVOs which required variation. Two reasons appear to contribute to this, firstly that complainants want highly protective Orders in the immediate distress of an incident, but later change their mind, or succumb to pressure from the defendant. Secondly, that police make Orders in the first instance prohibiting contact between the parties to secure the safety of the victim, who later wishes to continue the relationship. A strength of the legislation is that the parties can individually or collectively apply for variations to Orders, including to have an Order revoked, should circumstances have changed.

A third contributing factor, however, may have been a problem with the IT system used by police to create the Orders, which has resulted in a default option exempting any of the clauses permitting contact in certain circumstances. Tasmania Police has advised this problem is being addressed. Once rectified it can reasonably be expected that PFVOs will be better tailored to individual circumstances, and less applications to vary Orders may result.

7. *Whether provisions at ss. 14(3a), 16(3b), & 17 which address the right of the victim to remain in the family home, are appropriate and operating in a way that is consistent with s.3*

Participants in the review were not aware that this provision had been utilised to any great extent, if at all. At the outset of *Safe at Home* there was concern it would cause complications for parties, including Landlords however this has not yet been tested. Some expressed concern that Police Prosecutors were not identifying it as an option relevant to complainants for whom it may serve a protective function.

8. *Whether the scope of the provisions of Ss.16, 18, 19, & 20 in relation to Family Violence Orders are appropriate and operating in a way that is consistent with S3*

The making of FVOs is considered straightforward, in that they are easily tailored and appropriate tools for situations where they are likely to be respected by the parties. It is the applications to vary and revoke Orders which are causing concern for Police Prosecutors, Magistrates and victim advocates. Three key areas of concern are the extent to which applicants are under duress in making the application to vary or revoke, the extent to which applicants are ‘free to consent’ to return to a violent relationship, and how children are considered in the applications. These areas illustrate the complexity of the issues confronting the system in these matters.

9. *Whether s.33 in relation to Family Court Orders operates in a way that enables the effective management of victim safety*

The key issue raised was one of efficiency in matters being resolved. For example, the Magistrates Court may be reluctant to make long term orders if Family Court proceedings are also underway. While the Magistrates Court can hear Family Law matters, it is not the usual practice for this to occur, so to some extent people can be ‘caught between’, with each jurisdiction waiting for the other. Safety issues particularly for children, were noted as a concerning implication. These problems do not pertain to provisions within the Act, and arrangements to strengthen the integration of the response should be considered in phase 2.

10. *Whether s.37 in relation to information sharing is sufficient to support the Safe at Home integrated response system*

The information sharing allowed for under this provision is restricted to the government agencies within the *Safe at Home* program. There is frustration on the part of some non-government advocates who may be supporting a particular complainant and/or child, who are at this point prohibited from participating in the Committee deliberations and accessing information. Equally, defendant advocates (and some Magistrates) expressed concern at the lack of transparency in the ICC process, lack of clarity in relation to its legislative base, its membership, and power to advise the Court. The role of the ICC is the management of risk and safety on a case by case basis. Further evaluation of the operation of the ICC should be included in phase 2.

11. *Whether s.38 in relation to ‘mandatory reporting’ should be proclaimed*

If s.38 were proclaimed it would compel “prescribed persons,” usually professionals involved in family violence cases, to inform a police officer where they suspect that family violence involving the use of a

weapon, sexual or physical violence, or where a child is affected, has occurred or is likely to occur. Failure to comply would be an offence and is subject to a penalty of a fine (current maximum \$2400).

Critically, this provision would mandate reporting of concern regarding adults *and* children. The *Children, Young Persons and Their Families Act 1997*(Tas) already requires concerns about children's safety to be reported; proclaiming this provision would create unnecessary duplication.

The risks to *adult* therapeutic relationships and the potential for victims to avoid seeking medical intervention are the two strongest concerns raised against proclamation. While some participants in the review thought medical staff should be legally – and ethically – bound to act, this aim could be achieved in other ways which would not have the potential negative consequences described here. On the basis of the advice to the review, the provision could be excised from the Act.

Limitations

Measuring the degree to which the Act has contributed to the *Safe at Home* objectives is a complex undertaking. While *Safe at Home* does have three clearly stated objectives – to *reduce* family violence, to *improve* safety and to *change* offending behaviour, more work is needed to align the data that is currently collected, to track progress against the objectives, before an accurate rigorous measurement can be reported.

The time available to undertake the review has been limited to a number of weeks, and the time of year was reported by some stakeholders to be problematic in terms of their availability and preparation to participate.

1 Introduction

The *Family Violence Act 2004* (Tas), proclaimed by the Tasmanian Parliament on 30 March 2005, is intended to facilitate an integrated criminal justice response to family violence, promoting the safety of those affected by family violence (Department of Justice 2007).

The legislation emphasises both the safety of the victim and the criminal nature of family violence, enabling direct action to prevent further violence, primarily through the delivery of the *Safe at Home* framework.

Safe at Home is based on the following principles:

- the safety of the victim is paramount
- police are responsible for providing immediate intervention to secure victim safety and manage the risk that the offender might repeat or escalate the violence
- the victim does not determine the response of the justice system
- family violence is a crime and arrest and prosecution will occur wherever sufficient evidence of an offence exists
- wherever possible, victims should be able to choose to remain in or return (as soon as possible) to their homes
- the criminal justice response to family violence should be seamless and the roles and responsibilities of each participating agency and service should be clear (Department of Justice 2007).

The objectives of the *Safe at Home* framework are to:

- achieve a reduction in the level of family violence in the medium to long term
- improve safety for adult and child victims
- change the offending behaviour of those responsible for the violence.

The Act, and the broader framework, result from a strong State-level commitment to reducing family violence in Tasmania. They are also based on recognition of certain barriers to achieving this goal, in particular the tendency of criminal justice agencies not to treat family violence with appropriate seriousness, a lack of integration and coordination across services, and victim ambivalence about proceeding with criminal charges. The State plan, *Tasmania Together 2020* (2001) contained a commitment to reduce the incidence of domestic violence by one third in the first 15 years of operation. Following the setting of this goal the then Attorney-General Judy Jackson requested an options paper to identify ways of reducing family violence (McFerran 2007). The paper was widely disseminated and a series of forums held with service providers and other stakeholders to inform development of the *Safe at Home* framework and legislation (Department of Justice and Industrial Relations 2003).

Safe at Home integrates responses from key agencies – in particular Justice, Police, Health and Human Services – and overarches the criminal and civil justice systems at a legislative level (Little 2005, McFerran 2007). The cornerstones of the framework are managing the risk that an offender might repeat or escalate their violence, and identifying and implementing strategies to enhance the safety of victims (Little 2005). The Act reinforces the criminal nature of family violence and mandates the management of both risk and safety through an integrated response.

Under the framework, funding of \$17.7 million for four years was announced in the 2004-5 State budget. Items funded have included 12 new family violence programs (Australian Institute of Criminology 2005) including:

- 21.6 full time equivalent (FTE) additional police and 6 (FTE) extra police prosecutors (Parliament of Tasmania 2005)

- a range of counselling, court support and referral services for adults and children.
- an enhanced child protection response
- a family violence offender rehabilitation service.

The implementation model for the framework is managed and implemented by three government agencies, each with a clearly defined role and led by the Department (McFerran 2007).

1.1 Previous commentary on the Act

Observers have described *Safe at Home* as 'innovative' and 'benchmark setting' (McFerran 2007), and the information available to date suggests that the framework has had some positive outcomes. For example, following the introduction of the framework there has been a sustained 40% increase in family violence reporting rates (Little 2007). This is an anticipated increase, given historical under-reporting and degree of variation in police responses historically. Reductions in repeat offending have also been reported. In addition there is significant anecdotal evidence that *Safe at Home* has improved cooperation between police and community workers in the family violence service sector and made police more responsive to reports of family violence (McFerran 2007).

Nonetheless, the legislation has also caused some controversy. The legislation has attracted criticism in relation to inclusion of the offence of emotional abuse. In relation to the upholding of protection orders, the practice of dual accountability (whereby both the victim and offender can be prosecuted for breaching or instigating a breach) has also been criticised. In addition, some legal stakeholders have expressed concern about the reversing of the onus of proof in relation to granting of bail, and argued that this approach swings too far against the rights of offenders.

Some stakeholders raised problems in the implementation of the *Safe at Home* program, including a lack of ongoing consultation and information sharing with Non Government Organisations (NGOs) and perceived lack of services in northern Tasmania.

1.2 This review

Parliament included provision in the legislation for a review of the Act to be conducted within three years of its introduction (Department of Justice 2007). There is also considerable demand for evaluation of the broader framework, particularly from the community sector (McFerran 2007), and the Department will be commissioning a comprehensive evaluation of the *Safe at Home* framework.

The Department commissioned Urbis to conduct the first stage of the external review. The First stage assesses the effectiveness of the Act specifically. The second stage of the review will consider the broader *Safe at Home* integrated response.

The terms of reference for this review are:

1. The effectiveness of the integrated criminal justice response to family violence (*Safe at Home*) in promoting the safety of people affected by family violence;
2. Whether the scope of the definition of family violence as determined by ss. 7, 8 & 9 is appropriate and operating in a way that is consistent with s.3 Objects of Act;
3. Whether police powers and the mechanisms identified under ss. 10, 11 12 & 14 in relation to the prevention, investigation and management of family violence are effective in promoting the safety of people affected by family violence;
4. Whether the provisions under ss. 13 (a) are appropriate and operating in the way that effectively manages the impact of family violence on children and in informing the Court about matters in relation to the 'risk' that an offender might pose and their capacity for successful rehabilitation;

5. Whether the powers granted to the Court under ss. 12, 13 & 16 are effective in promoting the safety of people affected by family violence;
6. Whether the scope of the provisions of S.14 in relation to Police Family Violence Orders are appropriate and operating in a way that is consistent with s.3;
7. Whether provisions at ss. 14(3a), 16(3b), & 17 which address the right of the victim to remain in the family home, are appropriate and operating in a way that is consistent with s.3;
8. Whether the scope of the provisions of ss.16, 18, 19, & 20 in relation to Family Violence Orders are appropriate and operating in a way that is consistent with s.3;
9. Whether s.33 in relation to Family Court Orders operates in a way that enables the effective management of victim safety;
10. Whether s.37 in relation to information sharing is sufficient to support the *Safe at Home* integrated response system;
11. Whether s.38 in relation to 'mandatory reporting' should be proclaimed.

Information gathered from the stakeholder consultations and from written submissions included issues, observations and suggestions which were not in the scope for the first stage of the review, however would be appropriately considered for the second stage. In order to ensure that these valuable contributions are captured for the purposes of the overall evaluation.

1.3 Methodology

The methodology for conducting this review consisted of the following three components:

- inception, advertising the review and development of the question guide
- in-depth consultations with key stakeholders, via a field visit of up to four days, up to 20 telephone interviews, and a call for written submissions
- analysis and preparation of the draft and final reports.

1.3.1 Consultations

The review was asked to undertake an extensive consultative process with key stakeholders in relation to the Act.

Over 60 stakeholders were consulted during the field visit to Hobart and via teleconference for those stakeholders with time restrictions or who were unable to attend the meetings in Hobart. The range of stakeholders included relevant Government departments, Members of Parliament, Magistrates, Members of the Tasmanian Law Society, Tasmanian Legal Aid, specialist academics; Court Registrars, Tasmania Police, various NGOs, support services and interest groups. These are detailed in Table 1.

A total of 28 written submissions were received from a broad range of stakeholders, these are detailed in Table 2.

1.4 About this report

This report comprises 4 chapters. Chapter 1 sets out the background to the Act and for the review, the terms of reference and the methodological approach. Chapter 2 examines the appropriateness of the scope of definitions within the Act. Chapter 3 captures the issues pertaining to the criminal justice process including police powers, bail considerations, sentencing, the management of children and jurisdiction overlaps. Chapter 4 discusses s.38 of the Act – the informing of concern about family violence provision.

The appendices include a list of participants in the review; the discussion guide; and the guide to legislative provisions.

2 Scope of definitions of family violence

Summary of issues

- Definition of family violence
- Definition of relevant relationships
- Children

The Act is innovative and unique in a number of aspects in the Australian legislative context, including through the breadth of the family violence definition. This section discusses the definition and the operational implications, as well as perceived limits to its inclusivity, and the particular place of children within the Act.

2.1 Definition of family violence

The definition of family violence is well supported in its breadth and subsequent capture of the range of behaviours that may constitute family violence, which effectively become criminal behaviours by virtue of their inclusion in the Act.

Section 7 of the Act defines family violence as:

(a) any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:

- (i) assault, including sexual assault;*
- (ii) threats, coercion, intimidation or verbal abuse;*
- (iii) abduction;*
- (iv) stalking within the meaning of s.192 of the Criminal Code;*

attempting or threatening to commit conduct referred to in subparagraph (i); (ii); (iii); or (iv); or

(b) any of the following:

- (i) economic abuse*
- (ii) emotional abuse or intimidation*
- (iii) contravening an external family violence order, an interim FVO, an FVO or a PFVO.*

2.1.1 Property damage

Stakeholders did note the absence of property damage within s.7(a), which was reported to be a common feature of family violence incidents, and at present cannot be pursued under this Act.

2.1.2 Emotional and economic abuse

Tasmania is the first jurisdiction to include economic abuse in the definition of family violence, and includes: coercion to relinquish control over assets or income; disposing of property; preventing participation in decision making; withholding or threatening to withhold financial support. It is with some anticipation that stakeholders await the first case resting on this offence. Police have identified as a potential barrier the 'statute of limitation' effectively in place by virtue of s26 of the *Justices Act 1959*. Given the likelihood of economic abuse involving a range of behaviours over a lengthy period of time, a six month timeframe limits the behaviours that can be considered for a complaint. Consideration of this unintended time limit should be undertaken by the Department.

Emotional abuse or intimidation is another of the non-physical forms of violence captured by the broad definition in the Act. To date, a charge on this offence has not been brought. It has, however, been used in support of applications for Orders where emotional abuse has been a feature of the violence.

The provisions are relevant to the range of behaviours which are commonly features of family violence and as such are relevant to the Objects of the Act.

2.2 Definition of relationships

A decision was made at the time of drafting that this legislation would focus on intimate partner violence and as such, the definition of 'relationship' would be limited to current or past *intimate* relationships, between adults, but inclusive of people aged 16 – 18 years. The Act provides this guidance:

family relationship means a marriage or a significant relationship within the meaning of the Relationships Act 2003, and includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of that Act. (s.4)

This definition is considered by some as too narrow to capture the range of relationships which should attract the protection of the Act, and that the definition of family relationship should be sufficiently broad to cover all intimate personal relationships including dating and non-sexual intimate relationships, people who are ordinarily members of the household and family relationships which reflect the extent of kinship within Indigenous and culturally and linguistically diverse communities.

An expanded definition was seen to have the benefit of being inclusive of these familial and care relationships, offering the same protection to victims against the behaviours captured in the definition of family violence. There was a commitment by the Department, in the drafting phase that a broadening of the definition would be considered, once the current legislation was up and running. This has not been further explored by Government at this stage.

It is also important to note that while some stakeholders advocated a broadening of the definition of relationship to include a range of other familial, kin and care relationships, this review did not test the extent to which stakeholders had thought through the implications of a criminal justice response in these contexts. If a broader definition were to be explored by the Tasmanian Government, the implication of a criminal justice response is a critical point to test with stakeholders.

2.2.1 Definitional clarity

The ability to define an applicable relationship under the Act can be problematic. Consideration must be given to two definitions within the Act ('spouse or partner', and 'family relationship') and reference to a 'significant relationship' under the *Relationships Act 2003* (Tas). Clarity and ease of use could be enhanced with minor amendments, for example repetition of key phrases, in the relevant sections.

2.3 Children

Safe at Home recognises children as being affected by family violence, and includes improved safety of child victims as a specific objective. A number of provisions within the Act pertain directly to children, including:

- the Object of the Act refers to people affected by family violence to include 'affected child' - meaning one whose safety, psychological wellbeing or interests are affected or are likely to be affected
- the definition of economic abuse refers to *an affected child* in relation to disposing of property, and in the withholding of financial support
- bail provisions reference consideration of an *affected child*
- the presence of a child is an aggravating factor in sentencing

- children can be included in PFVOs and FVOs, and are also listed under s.15 (2)(c) as eligible to make application for a FVO
- children are to be protected from the *publication of any material relating to proceedings ...which may disclose the identity of an affected child*
- by implication, and in practice, the Information Sharing provision results in exchange of information about children for the *purposes of furthering the objects of this Act*, whereby paramount consideration be given to safety, psychological wellbeing and interests of people affected by family violence.

As stated above, the policy intent of the legislation was to address intimate partner violence, while at the same time increasing the safety of children. This has given rise to concern that the Act falls short of the potential afforded in the philosophy of *Safe at Home*. As a result, for some stakeholders the Act pays only 'lip service' to children.

There are a number of areas where greater clarity would strengthen the response to children. Areas raised in the review include:

- inconsistency in the Court's attention to children's wellbeing
- the absence of independent representation at key points in proceedings eg. FVO/PFVO variation applications
- confusion about how to 'trigger' assessments of children's interests for the Court to consider
- timeliness of assessments is also reported to be problematic.

The treatment of children as an 'affected person' does not automatically offer improved safety unless independent assessment or representation is afforded that child. It is assumed that the interests of the complainant, generally the mother, coincide with the interests of her child. This should not be assumed, and should be tested in each case.

An example of the lack of alignment between a provision and the supporting system is in relation to children's ability to apply for a FVO under s15, yet the relevant form (FV1) does not currently provide for the child to be the party making the application.

The extent to which the provisions reflect the intent of the Act, and the clarity of the relevant provisions, should be considered by the Department. The issues of the timeliness of reports and related processes outside the Court are matters for phase 2.

2.4 Summary recommendations

- If an expansion to the definition of family relationship is to be considered by the Department, the implications of a criminal justice response will need to be tested with stakeholders as part of the process.
- Act be amended to achieve consistency in the use of language within the Act removing the need to cross reference.
- The Department consider the alignment between the intent to improve the safety of children affected by family violence, and the effect of the provisions pertaining to children, including the administrative systems supporting the provisions.
- The adequacy of the integrated response in promoting the safety of children be included in the phase 2 review of *Safe at Home*.

3 Criminal justice process

- Police powers
- Bail
- Sentencing
- Children
- Jurisdictional issues

Promoting a clear criminal justice response to family violence has been welcomed by many stakeholders. However, some continue to consider *Safe at Home* an intrusion of the State into private domains. Other stakeholders see these as early days in a significant effort to change long-tolerated behaviour, and link the resistance to the mechanisms within the Act as reasonably anticipated resistance to not just challenging the status quo, but to actively changing it.

This section explores the central mechanisms of the Act, including police powers, bail and sentencing provisions, and the impact of the mechanisms on children's safety.

3.1 Police powers

Funding for *Safe at Home* commenced in 2004-05. The 'enhanced Police response' began, using the existing legislative framework, in September 2004. There was an immediate increase in reported family violence incidents. The extent to which this is a result of an increased rate of reporting, or more accurate recording of matters by police officers initially attending incidents, is beyond the scope of this review, but is a matter of some interest in the overall evaluation of the initiative.

Stakeholder perspectives on police powers under the Act varied and were in some instances contradictory. It is clear that the coordinated response to family violence is welcomed by the vast majority, and it is the police response which is recognised as the most significant point of difference under *Safe at Home*.

The alternate minority noted that the Act disadvantages defendants in family violence matters and gives police too much power in dealing with individuals accused of committing family violence offences. Some argue for the return of greater discretion to police. However, police have retained the power to determine - based on the evidence available - if an incident constitutes 'family violence' as defined by the Act. In the context of the pro-arrest and pro-prosecution policies, others argue for police powers to be limited in order to increase the 'balance' between complainants and defendants.

The tension is captured in a submission provided to the review:

On one hand the FVA [the Act] upholds the principles of the Convention on the Elimination of All forms of Discrimination Against Women and the Convention on the Rights of the Child. On the other hand, section 12 of the FVA, relating to bail, raises questions about defendants rights to the presumption of innocence, pursuant to Article 14(2) of the International Convention on Civil and Political Rights.

The Department of Police and Emergency Management incorporated detailed suggested amendments in their submission based on the problems they have experienced operationalising the Act and gaps in the drafting of provisions. Amendments essentially relate to the (PFVO) provisions; powers to detain while searching person or premises; police bail; prohibiting the purchase of firearms and equipment; damage to property and premises; and the process for variations. Similarly the Interdepartmental Committee drafted suggested amendments following the initial implementation of the Act.

Police making assessments at the scene and making Orders based on those assessments was viewed as problematic by some for the usual rules of procedure, and that police powers to make PFVOs should be restricted to making interim orders only and that final or further interim orders should require police to apply to the Court. While Tasmania is the only jurisdiction where police have the power to make such

Orders, the balancing factor that parties can apply for variations has at least two advantages. The first is that interim Orders place a burden on the Court with each matter needing to be reviewed and this is avoided in Tasmania, and secondly the avenue is open to both parties to make application to vary or revoke Orders.

3.1.1 System changes

It is noteworthy that in parallel to the pro arrest and presumption against bail, the North West Police District are trialling a process for reviewing the charges against remanded defendants. The strength of the evidence is now reviewed by a supervising officer to ensure the decision to continue with the proceedings is both soundly based and made in a timely manner. This is an example of a system change that has occurred in light of the presumption against bail. It will be important for system changes to be tracked and evaluated over time, ensuring changes in one area are not undermined in another, or where changes have been effective and could be generalised across the system.

3.2 Bail

Whilst some stakeholders expressed responses ranging from concern to extreme discomfort with the bail provisions in the *Family Violence Act 2004*, there was equally a view that the bail requirement is appropriate. There was in fact general agreement that family violence is in the category of offences that calls for the pro-arrest, pro-prosecution approach articulated in the Act, and in place since September 2004.

There were, however, a number of stakeholders who expressed concern that the Act weighs against the rights of the accused. In this regard the most criticism was levelled at the bail provision s.12(1), and that the onus of proof to grant bail is effectively reversed by the operation of the Act. It should be noted, however, that there is a presumption against the granting of bail where there is a history or threat of domestic violence in most Australian jurisdictions.

Police are unable to bail defendants following a contravention of a PFVO or a FVO. In practice, this can lead to a situation where there are insufficient grounds to oppose bail, yet the defendant is remanded to go before the court, where no variation or action is sought by police prosecutors. The preference expressed to the review is that an officer of suitable seniority should be permitted under the Act to bail a defendant.

s.12 has attracted criticism in the Supreme Court of Tasmania judgements - *Re: S* [2005] TASSC 89, *S V White* [2005] TASSC 27 and *Olsen v Tasmania* [2005] TASSC 40. The central tenant of these cases is perhaps best illustrated by Justice Underwood in his submission:

It is one thing to take into account the safety, wellbeing and interests of an affected person or an affected child, it is quite another to refuse liberty unless the defendant discharges the onus of proof cast on him (or her – but it is invariably him) by s12(1).

The Act sets out a number of factors for the Court or a police officer, to consider in determining whether a defendant will be bailed. This provision has been subject to the greatest criticism by defence advocates in particular, but also gives rise to concern for judicial officers and a range of secondary stakeholders in the *Safe at Home* program.

In relation to bail the Act states:

S12 (1) A person charged with family violence is not to be granted bail unless a judge, a court or police officer is satisfied that release of the person on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person or affected child.

Without limiting the matters to be taken into account in considering whether or not to grant bail to a person, a judge, court or police officer must have regard to the following:

(a) any available risk screening or rehabilitation program assessment;

(b) the person's demeanour;

(c) the result of any available safety audit;

(d) the availability of suitable accommodation for the person and any affected person or affected child;

(e) any other matter the judge, court or police officer considers relevant.

The reference to *risk screening* brings the Risk Assessment Screening Tool (RAST) to the Court's attention, and gives rise to a catalogue of concerns for defence advocates. This is discussed below.

In asking Magistrates about the practical implications of the bail provision, the simple answer is that they are more reluctant to grant bail under this Act. In terms of treatment of these matters over time, there was a view expressed from a range of stakeholders that Magistrates do seem to be granting bail more frequently than in the first year of the legislation. Data is not available to the review to determine whether this is in fact the case, but the comments of Magistrates are nevertheless enlightening. For example, one said that they had initially been 'quite tough and implemented it as it meant to be' but over time the 'abuse from wives' within the Court has led to a more lenient approach.

For the majority of Magistrates the key points of consideration are:

- The defendant's record, for example, breaches of an Order to date
- Seriousness of the allegations and whether threats are likely to be carried through
- Whether or not an Order could be made that is likely to be observed.
- Has the defendant got somewhere to reside.

It is worth noting the legislation which informed decisions regarding bail prior to the *Family Violence Act 2004* (Tas). The provisions relating to bail in the *Justices Act 1959* (Tas) have been amended over many years, strengthening various elements. Under the *Justices Act 1959* (Tas) the following direction applied:

In determining whether to refuse to bail or to admit to bail a person who is a prescribed person within the meaning of section 34A or a person referred to in section 34A(1) who has been taken into custody in respect of an offence constituted by a breach of a restraint order, interim restraint order or telephone interim restraint order, the justice –

(a) must consider the protection and welfare of the person for whose benefit the restraint order, interim restraint order or telephone interim restraint order is sought or was made to be of paramount importance; and

(b) must take into account any previous violence by that person against the person for whose benefit the restraint order, interim restraint order or telephone interim restraint order is sought or was made or against any other person whether or not that person was convicted of an offence, or had a prior restraint order made against him or her, in respect of that violence.

One view of the new legislation is that the discretion of the Court has been removed, but another view is that the requirement to assess safety is, on balance, a reasonable one. It is at this point that defendant advocates argue that to get bail a defendant has to 'prove' there is no risk to the victim's safety, which is where the discussion about reversal of the onus of proof occurs. It was notable in the review that some stakeholders, primarily community members rather than those directly involved in the criminal justice system, referred to the 'reversal of the presumption of innocence'. It can only be assumed that this language stems from the reversal of onus in the bail provision, but is in fact incorrect and adds heat to an already inflamed aspect of the legislation.

A senior stakeholder made this point about the additional considerations under the new Act:

Previously we considered the likelihood a defendant would abscond, the likelihood of further offences, and that of interfering in the process of justice. Well the latter doesn't seem to happen in this context, but if we paid due regard to the others we would be making very similar orders to those we are now – how likely are they to further offend? – well it would seem many are very likely to; how likely to interfere with the victim? Well 50% walk out of here and seem to immediately apply pressure through direct contact.

3.2.1 Periods of remand

Following the introduction of *Safe at Home*, the periods for which defendants were remanded was a particular focus of concern. A number of reasons were put forward for the perceived reduction, including that defence advocates are more adept at addressing the concerns of the Court in regard to alternative accommodation for the defendant and assurances of no further risk, and that Magistrates are remanding fewer defendants.

For some, the remedy to long periods of remand is a priority in the listing, for others it is a dedicated family violence Court. The anecdotal evidence is that periods of remand have reduced, but remain longer than many would like. With the assumption against bail there is an ongoing argument that family violence matters could be prioritised as a means of balancing rights. Others are of the view that as soon as a matter is ready it gets scheduled into next available hearing date, suggesting delays with Police being ready to proceed, rather than delays being within the Court itself.

Some argue that the Act undermines natural justice principles, specifically a transparent and speedy process. Identifying the reason for delays in matters being resolved is not in scope of this review, but it is a significant factor in satisfaction with the operation of the Act. There are also flow-on effects within the Court to the delays occurring outside of it, in that a number of Magistrates commented that, over time, they have become less likely to order remand than they were when the Act was first passed, because of the risk of remanding a person for what may be several weeks; the likelihood of 'tender no evidence' from Police Prosecutors; no hearing; and a longer period of remand than is likely to follow any conviction in an area where convictions following not guilty pleas are rare. It is in this context the comment was made 'the tail still wags the dog', that is, the administration of matters outside the Court, is influencing the administration of the Act within the Court.

3.2.2 Risk assessment screening tool (RAST)

The RAST was developed to achieve consistency in decision making and response by operational police attending a family violence incident. The tool was developed by drawing on evidence-based indicators of risk of further violence, and was subject to evaluation through the University of Tasmania, by a specially convened committee. It allows police to assess the level of risk associated with a family violence incident, using the complainant's responses to a series of questions. The answers are given a numerical value. Police also rate the 'Source Reliability' and 'Information Accuracy', using their judgement as to the veracity and reliability of the complainant's claims. It is noteworthy that several well placed stakeholders advised the review this section of the RAST is 'rarely completed'. This is an area which may warrant further inquiry in phase 2 of the review.

The RAST has drawn a great deal of criticism from defendant advocates, and was also raised in some public submissions as an example of what is seen as a pro-complainant system which undermines principles of natural justice.

Concerns reported to the review included the weight given to the RAST score by Magistrates in deciding whether to bail or remand a defendant; that the score is used beyond the intended purpose of directing the service response to a complainant; that the score remains untested in the process until a hearing yet has undue influence prior to a hearing; and the lack of procedure for defendants to be provided with a copy of the tool. While the Act does not require a copy of the RAST to be made available to the defendant, S12(2)(c) requires the Court to consider any risk assessment that has been undertaken, hence the RAST is commonly provided to the Court.

A similar point about defendant access to the RAST was raised in relation to the safety audits conducted by police to identify any security and personal safety issues for the complainant. Some stakeholders raised the point that disclosing the information contained in the safety audit to a defendant may place the victim at further risk. The IDC has recommended deleting the reference to the safety audit from s.12.

Given the level of concern expressed about the RAST the review specifically asked Magistrates, Police Prosecutors, and defence advocates about their observations and experience in relation to the weight given to the RAST score, in bail applications. Magistrates responded consistently that little weight is placed on the RAST, with some describing it as ‘hearsay upon hearsay’, whereas others saw it as the complainant’s perspective on a number of indicators, and weight it accordingly. Of more interest to Magistrates is the severity of the complaint, the defendant’s record, and whether an Order is likely to be observed in this situation.

The position that the RAST is ‘untested allegation’ at the point of the bail application does not set it apart from any other aspect of the allegations. All allegations remain untested, as in any criminal proceeding, until the hearing, and bail applications are decided on untested assertions on both sides.

3.3 Sentencing

Section 13 addresses sentencing, and options for referral to rehabilitation. Discussion of this provision raised strongly held views, with defendant advocates and judicial officers alike making the point that ‘the only people getting convicted are those pleading guilty’. The data available to the review that the rate of conviction for family violence matters is 68%, whereas for other serious matters the rate of conviction is 72%.

At present the *Safe at Home* rehabilitative response is targeted to convicted offenders only. This approach was widely criticised in the review. A number of Magistrates discussed a strong preference for a therapeutic jurisprudential approach to running their Courts, and noted that rehabilitation and support programs should be available in consideration of sentencing decisions.

Some stakeholders marked a return to ‘the old blunt tools contained in the Sentencing Act, plus a Family Violence Order’, rather than the co-existence of punitive and rehabilitative options such as those available under the Court Mandated Diversion of drug offenders program (CMD). The opinion of some is that achievement of the third stated objective of the *Safe at Home framework* – change in the offending behaviour of those responsible for the violence – relies on an approach such as this.

Interaction with the criminal justice system is seen by many stakeholders as the ideal opportunity to engage people using violence in behaviour change programs. One stakeholder spoke about the moment of opportunity in these terms:

A number of men who clearly have got to where they are in life by being bullies – for the first time they’ve been called on it and its not working any more, raising their voice to us (lawyers), to Police – they are cut adrift from the way they have succeeded throughout life – suddenly it isn’t working.

The operation of the FVOIP, developed by the Department as the referral options in relation to convicted offenders, was criticised. Issues included the infrequency with which the program is run; the uneven referral patterns across the State; the eligibility criteria which requires full time availability and literacy; and a lack of available information about its efficacy.

Whilst the operation of the FVOIP is beyond the scope of this review, it was raised in the context of sentencing options, and in terms of the *Safe at Home* objective pertaining to ‘changing the offending behaviour of those responsible’. The preference of some stakeholders is captured in this comment, and should be considered within the scope of phase 2 of the review:

FVOIP anger management courses are run so infrequently, I commonly suspect probation would be finished before a course was available. If the FVOIP were expanded and immediately available so someone who offended and admitted offending could go

immediately to a program with periodic review – we might get to feel we were getting somewhere.

3.4 Children

There is a view that children are not yet adequately protected under the *Safe at Home* initiative. While a number of investments have been made, the general view is that children remain vulnerable in a system focused on adult complainants and defendants. At this stage the interpretation of the legal officers and the Court on their obligations in relation to children varies significantly. One consistent factor, however, is a lack of clarity for who is responsible, or even best placed, for getting submissions regarding children before the Court.

Child focused stakeholders want safeguards explicitly in place, ensuring what is commonly referred to in other jurisdictions as ‘the best interests of the child’ are available to the Court when any decision affecting a child is being made. For example, when it is clear in the facts that children were present when Police attended an incident, the expressed preference would be that the Court require that child to be assessed by a suitably qualified and independent body.

Police Prosecutors are not best placed or appropriately qualified, to make submissions on how family violence has affected a child, and with the absence of another mechanism to bring this perspective to the Court, children’s interests are not yet being adequately addressed.

The present system requires all applications for variations to Orders, and in particular applications for charges not to proceed, to be considered by the Integrated Case Coordination Committee. This is commonly viewed by prosecutors and Magistrates as the ‘safety net’ in the proceedings, in particular for children. But questions remain as to the level and timeliness of assessment by appropriate child agencies to the ICC. If the child is known to agencies participating in the ICC, the information available to the ICC members will be considered. If the child is not known, no further assessment is undertaken.

Some Magistrates stated they are not in a position to raise concerns in regard to children when Police are applying to withdraw charges. When a variation is being sought, the expectation of some Magistrates is that Police will raise any matters relevant for the Court to consider. But if the prosecutor does not have evidence supporting a submission of impact on the child, they are unable to provide any information to the Court regarding affected children. Hence an assumption by Magistrates that other service providers in the process are undertaking their duties may lead to missed opportunities to improve the safety of children.

Some Magistrates perceived risks in taking a pro-active stance in relation to children, making the point that it is inappropriate to go into too much detail at a bail application, with the risk of unearthing details which are not part of the allegations before the Court. Given the size of the jurisdiction, the likelihood of being the Magistrate who will hear a matter should it proceed was also raised, contributing to a reluctance for some to get ‘too involved too early’.

For other Magistrates these were not particular concerns, however, their more interventionist approaches had not necessarily satisfied them in relation to the wellbeing and safety of children:

I get very worried in so many of these cases – where there is good reason to think there’s been ongoing behaviour in front of children and yet get reasons [for variations] like ‘I need him at home to help look after the children’. There’s been quite a few cases I’ve specifically asked for submissions about future proceedings from CFS (Child and Family Services) – almost never had a reaction to this request. I’m being asked to put my imprimatur on an Order where I am so concerned at the proposition put by police prosecutors – that Order be withdrawn, revoked, or so watered down as to be ineffective. I get frustrated by the lack of response from the CFS in some cases.

The key question is who is attending to a child’s interest when the ‘person protected’, generally the mother, is attempting to withdraw allegations, uncooperative with police, or seeking a variation of an Order.

Children witnessing violence is treated as an aggravating factor in line with the legislation. Some Magistrates expressed the view that they are limited in their consideration of children by due process. For example, if Police Prosecutors are not proceeding with a matter, they are not in a position to inquire as to the wellbeing of any children involved in an allegation if charges are not proceeding.

3.5 Jurisdictional issues

A number of stakeholders expressed concern that jurisdictional cross-overs can potentially compromise the safety of those affected by violence. This was described as evident in situations where a FVO or PFVO is in place and where Family Court proceedings are either pending or a Family Court Order has been made. In particular it was posited that children's safety, emotional needs and reactions to violence occurring in their family were not adequately considered in Family Court Orders.

Concerns were raised about children continuing to be exposed to abusive behaviours on visitations to the abusive parent and that visits can continue (even when a FVO or PFVO is in place) without a thorough assessment being made of the impact of the violence on the children. Many support services noted that women are fearful of stopping visits because it may be detrimental to their Court case.

This was also highlighted in submissions from the public describing personal accounts of navigating criminal justice pathways for family violence, while dealing with the requirements of the Family Court.

Stakeholders described situations where 'each jurisdiction is waiting for the other', for example, the Magistrates Court may be reluctant to make long term child protection orders if Family Court proceedings are also underway.

Police advised the review they are not satisfied that victim safety – of adults or children – is assured by FVOs, Interim FVOs and PFVOs where a Family Court Order exists. In response to these concerns police now participate in a protocol negotiated between the Tasmanian Magistrate's Court and Tasmanian Registry of the Federal Family Court. Under the protocol if a concern arises that a Family Court Contact Order poses a risk to the safety of a victim of family violence, the Police Prosecutor alerts the Magistrate of this concern. The Magistrate can suspend the Order for a period of days, and make the FVO. Under the protocol, the Magistrates Court file, with the grounds for the suspension, is transferred to the Family Court for review of the Contact Order within the period of suspension. The effectiveness of the protocol in improving the safety of both adult and child victims of family violence should be evaluated over time.

3.6 Summary of recommendations

- Reaffirm the stated commitment to the philosophy of *Safe at Home* and subsequent relevance of the provisions.
- Police be empowered to both detain and search a person located at an incident.
- Police be empowered to vary a PFVO to increase the protection afforded to the victim where the offender has contravened the PFVO without the consent of that person against whom the Order is made.
- Amend s.12(1) to enable police of suitable seniority to bail a defendant following a breach of a PFVO or FVO where there is insufficient grounds to oppose bail.
- The extent to which children are supported by the integrated response, including the management of cross jurisdictional matters, be a central consideration of phase 2.
- IDC continue to track changes made to various parts of the system in response to the legislation. Where changes are supportive of the philosophy of *Safe at Home* such strategies may have broader application. Where strategies do not contribute or detract, remedial action can be taken.

4 Provision 38: Informing of concern

The overriding view of stakeholders in relation to s. 38 is that it should not be proclaimed, due to the risks it poses to help-seeking by people affected by family violence. The key issue is the risk it may pose, at which point:

the Act is destructive if it leads to the breakdown of therapeutic relationships.

Services who support victims and their children were particularly concerned that the provision would jeopardise the relationship between clients and workers, undermine trust, remove adults' rights to choose when they report an incident and send the issue 'underground' again due to the unwillingness of victims to seek support.

There is support for people in key positions of care and responsibility, such as health practitioners, to meet what is perceived to be an ethical obligation to report concerns of violence against their patients. For some stakeholders, proclaiming this provision is a reinforcement of this obligation. There were, however, grave concerns expressed of the risk that victims of violence may not seek medical assistance, should emergency room staff, paramedics and so on, be mandated to report concerns.

4.1 Summary of recommendations

On the basis of the advice to the review, the provision could be excised from the Act.

5 References

Little, E (2005) *Safe at Home: A criminal justice framework for responding to family violence in Tasmania*, Department of Justice, Tasmania

McFerran, L. (2007) *Taking back the castle: how Australia is making the home safer for women and children*, Australian Domestic & Family Violence Clearinghouse, Canberra

Tasmania Together Progress Board (2001) *Tasmania Together 2020*, Tasmania Together Progress Board, Hobart

Appendix A Review Participants

A.1 Consultations

Stakeholder organisation
Department of Justice
Secretary Department of Justice
University of Tasmania Institute of Law Enforcement Studies
University of Tasmania Law Faculty
Women's Legal Service
Domestic Violence Coordinating Committee (DVCC)
Court Support Liaison Service (CSLS Statewide)
Members of the Upper House Tasmanian Parliament
Commission of Children
Members of the Tasmanian Parliament
Tasmanian Council of Social Services (TasCOSS)
Child and Family Services - DHHS
Law Society of Tasmania
Tasmania Legal Aid
Department of Police and Emergency Management Tasmania Police
National Council of Women Tasmania
Family Violence Counselling and Support Service
Tasmanian Magistrates Court – Magistrates
Tasmanian Magistrates Court – Court Registrar
Court Support and Liaison Service
The Honourable Judy Jackson

A.2 Submissions received

Stakeholder organisation
Department of Police and Emergency Management
Supreme Court of Tasmania
Australian Lawyers Alliance
Office of the Anti-Discrimination Commissioner
Member for Mersey
Local Government Association of Tasmania
Department of Education
Centacare Tasmania
Anglicare Tasmania
Support, Help and Empowerment Counselling Service
Sorell Council
Burnie City Council
Women with Disabilities Australia
Waratah-Wynyard Council
National Council of Women Tasmania Inc
Tasmania Association of Community Legal Centres
Hobart Community Legal Centre
Hobart Women's Shelter
Jireh House
Colony 47 Family Services
Huon Domestic Violence Service
Tasmania Men's Health and Wellbeing Association
Tasmanian Aboriginal Centre
Australian Domestic and Family Violence Clearinghouse
ya pulingina kani
6 public submissions (personal details not released for confidentiality reasons)

A.3 Discussion Guide

Background

Urbis have been engaged by the Tasmanian Department of Justice to conduct the first stage of the review of The *Family Violence Act* 2004. The first stage will assess the effectiveness of the Family Violence Act in facilitating the *Safe at Home* Framework. The second stage will consider the broader *Safe at Home* integrated criminal justice response.

The objectives of the framework are to:

- achieve a reduction in the level of family violence in the medium to long term
- improve safety for adult and child victims
- change the offending behaviour of those responsible for the violence.

A guide to relevant legislative provisions is provided with this discussion guide to facilitate easy understanding of the Act in order to assist stakeholders to participate in the consultation process.

More information about the review is available at

[\[http://www.safeathome.tas.gov.au/review_of_family_violence_act_2004\]](http://www.safeathome.tas.gov.au/review_of_family_violence_act_2004)

If you have any questions, or require more information please contact:

Kylie Smith, Urbis

Ph: 03 8663 4830

Email: ksmith@urbis.com.au

Question	Relevant section of the Act
1. What is your role and in what context have you worked with the <i>Family Violence Act 2004</i> (Tas)? (The Act) .	
2. Overall how effective or otherwise has the Act been in promoting the safety, psychological wellbeing and interests of people affected by family violence? Why or why not? 2.1 The Act recognises children as victims in their own right by specifically including children's safety, well being and interests in various provisions. There is also a provision which allows the court to consider whether children witnessed violence or if a victim was pregnant at the time of the offence, in sentencing offenders. Do you think this is beneficial or otherwise? 2.2 Can you describe how offences against children are managed practically? 2.3 What do think the impact of including economic and emotional abuse as offences has been? Can you give examples? 2.4 Are there any tensions or conflicts in balancing the safety of victims and the rights of offenders? If yes how are these resolved in practice?	3 7, 8, 9
3. In your view does the legislation facilitate the effectiveness of the <i>Safe at Home</i> framework? If so how? Are there any unintended impacts?	All
4. In what ways, if at all, do you think the definition of family violence (including economic and emotional abuse) is effective in promoting the safety, psychological wellbeing and interests of people affected by family violence? 4.1 Do you have any theoretical or practical concerns about the scope of the definition?	3, 7, 8, 9
5. The Act gives police additional powers in relation to entering premises, arrest and detention, as well as the power to make a Police Family Violence Order (PFVO) on behalf of any victims. 5.1. To what extent, if any, have these measures been effective in promoting the safety and psychological wellbeing of adults and children affected by family violence? Are they sufficient? 5.2 Can you tell us about any specific experience with PFVOs? 5.3 Can you comment on the additional police powers or the use of PFVOs?	10, 11, 14
6. The Act includes a presumption against bail for offenders charged with a family violence offence unless the judge, court or police officer is satisfied that the release of the person will not adversely affect the safety, wellbeing and interests of people affected by family violence. 6.1 How has this provision been operating? 6.2 Are there any tensions or conflicts in balancing the safety of victims and the rights of offenders? If yes how are these resolved in practice?	12
7. Upon sentencing for a family violence offence the court can consider whether the offender knew that a child may witness or otherwise be affected by the violence, or that the affected person was pregnant. 7.1 In your view does this assist in the management of impact of family violence on children? 7.2 Can you comment on whether it assists in informing the court about the potential risk factors the offender poses? 7.3 The court must also take into account the results of any rehabilitation assessment of the offender when determining a sentence. Can you comment on the extent to which this assists	13(a) 13(b)

Appendix A

A.4 Guide to legislative provisions

The following is a brief plain English guide to provisions in the *Family Violence Act 2004* relevant to the review. It is designed to facilitate easy understanding of the Act in order to assist stakeholders participate in the consultation process.

Table: Summary of relevant provisions

Section No	Content area	Summary of the effect of the provision
43	Review of the Act	Compels the Minister for Justice and Industrial Relations to conduct a review of the effectiveness of the Act within 3 years of its commencement.
3	Object of the Act	Sets out the fundamental principles behind the act which may be useful in interpreting it. These are that “the safety and psychological well being of adults and children affected by family violence are of paramount consideration”
7	Definition of Family Violence	Defines family violence to mean conduct or threatened conduct against a spouse or partner including, “assault, sexual assault, threats, coercion, intimidation or verbal abuse, abduction, stalking, economic or emotional abuse”.
8	Economic Abuse	Prohibits the intentional control or intimidation of a partner or spouse by preventing their access to or threatening to withhold joint financial assets for meeting normal household expenditure or preventing participation in decisions over household expenditure or coercing their spouse or partner to relinquish control over assets or income.
9	Emotional Abuse or intimidation	Prohibits conduct which “has the effect of unreasonably controlling or intimidating, causing mental harm, apprehension or fear” in a spouse or partner. It specifically included situations where one partner impedes the freedom of the other to lead a life outside the home.
10	Police powers – enter premises	Empowers police to enter certain premises without warrant, using reasonable force if necessary, for the purpose of preventing family violence. This can only be at the request of a person who lives on the premises or if the police officer reasonably suspects that family violence is being committed or is likely to be committed. Under this provision the police have a range of other powers such as the ability to conduct “safety audits”, search premises and seize objects which may have been used to commit family violence. There is also a specific power of entry to facilitate the confiscation of a firearm where the owner’s licence has been suspended for family violence reasons.
11	Police powers - arrest and detention	Empowers police to arrest and detain a person they suspect has committed a family violence offence, without warrant, for a period required to determine if charges should be laid; conduct and implement a “safety audit” or make and serve a Police Family Violence Order (PFVO) or an application for a Family Violence Order) FVO.
14	Police powers - Police Family Violence Orders (PFVOs)	Empowers a police officer of the rank of sergeant or above to make a PFVO against a person if they are satisfied that the person has committed or is likely to commit a family violence offence. Most of the conditions in a PFVO are similar to those commonly found in restraint orders and will operate to protect the spouse/partner who is the affected person. The maximum period for a PFVO is 12 months although this can be extended by

		application to the Magistrate's Court. Any party wanting to change a PFVO can apply to the Court to do so – if changed the order becomes a Family Violence Order.
12	Bail	Includes provision for a Judge, Magistrate or Police Officer to consider the safety, wellbeing and interests of people affected by family violence when making decisions in relation to bail. A Judge, Magistrate or Police Officer should be satisfied that release would not adversely affect the safety, well being or interests of the affected person or an affected child.
13(a)	Sentencing factors	Sets out the aggravating factors (presence of a child, pregnancy of the victim) which can be considered in sentencing for a family violence offence.
13(b)	Sentencing factors	The court must take into account the results of any rehabilitation program assessment of the offender when determining a sentence.
14(3)(a)	Right of victim to stay in the family home	A person who has a PFVO against them may be required to vacate premises even if they are the owner or have a legal tenancy agreement or not.
16(3)(a)	Right of victim to stay in the family home	A person who has a FVO against them may be required to vacate premises whether or not they have a legal tenancy agreement or an equitable interest in the premises.
17	Termination and replacement of residential tenancy agreement	Allows the court to make an order to terminate a residential tenancy agreement and establish a new tenancy agreement for the benefit of the person affected by family violence. Other parties with an interest in the property (principally the owner) will be given the opportunity to put their views to the court before it decides the application.
18	Matters to be considered in making a FVO	Compels the court to consider the safety and interests of the person affected by family violence and any affected child as paramount. Compels the court to consider any relevant Family Court orders in place.
19	Period of FVO	Allows for a FVO to be in place for a period considered to be necessary "to ensure the safety and interests" of those affected; or "until an order is made revoking the FVO".
20	Variation, extension and revocation of FVO	Allows for either the person making the application for a FVO or the person against whom the FVO has been made to apply for a variation, extension or revocation of the FVO. The application may only be made with the court's permission, which cannot be given unless there has been a substantial change in the relevant circumstances.
33	Orders are subject to Family Court orders	Confirms that a Family Court Order will override any inconsistent part of an FVO, interim FVO or PFVO.
37	Sharing of personal information	Allows for the sharing of person information between professionals and agencies involved in family violence cases, in order to promote the safety of those affected by family violence.

38	Informing of concern of family violence	This provision is not yet in operation, but if it were to come into operation would compel “prescribed persons,” usually professionals involved in family violence cases, to inform a police officer where they suspect that family violence involving the use of a weapon, sexual or physical violence, or where a child is affected, has occurred or is likely to occur. Failure to comply would be an offence and is subject to a penalty of a fine (current maximum \$2400).
----	---	--