SUBMISSION TO LAW REFORM COMMISSION OF WA PROJECT 104: ENHANCING FAMILY AND DOMESTIC VIOLENCE LAWS

WOMEN'S COUNCIL
FOR DOMESTIC & FAMILY VIOLENCE SERVICES (WA)

DOMESTIC VIOLENCE LEGAL WORKERS NETWORK

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This submission is endorsed in whole or part by the following agencies:

Armadale Domestic Violence Intervention Project

Fremantle Community Legal Centre

Geraldton Resource Centre

Gosnells Community Legal Centre

Kimberley Community Legal Services

Northern Suburbs Community Legal Centre

Pat Giles Centre

Peel Community Legal Services

Pilbara Community Legal Service

Relationships Australia WA

Salvation Army Graceville Centre

SCALES Community Legal Centre

Women's Law Centre

Introduction and Executive background

This is a joint submission between the Women's Council for Domestic and Family Violence Services (the Council) and the Domestic violence Legal Workers' Network (the Network).

The Network and Council have been advocating for reforms to laws concerning family and domestic violence for some time now. We commend the government on its commitment to examining the efficacy and justice of current family and domestic violence legislation and welcome this opportunity to provide input.

ABOUT THE DOMESTIC VIOLENCE LEGAL WORKERS NETWORK

The Domestic Violence Legal Workers Network is a collaborative support model of a network of West Australian based legal and other professionals working in the field of family and domestic violence (FDV). The Network promotes and advocates the rights of victims of FDV by providing support to workers and organisations (members) by way education and information, policy and law reform advocacy, and capacity-building of members. We provide training and educational opportunities, regular policy, program and legislative updates, networking opportunities, workshops and other resources to legal practitioners and others members to assist with their capacity to advocate for victim's legal rights and safety. Members of the Network include community legal centres, family dispute resolution centres, refuges, family violence services amongst other FDV related agencies and groups of both a government and non-government disposition.

The principles of the Network are that:

- Individuals exposed to family and domestic violence have suffered a breach of basic human rights
- Family and domestic violence is a global and community issue
- Family and domestic violence:
    - is about abuse of power and control

- can manifest in forms of physical, psychological, emotional, social and financial abuse
- is unacceptable

The Network is committed to assisting victims realise their legal rights and options, and to raising awareness of legal services available to persons exposed to FDV. The Network is also committed to community legal education that raises awareness about the legal rights of victims, as well as community awareness of FDV issues. Further, the Network provides strong leadership and representation for victims of FDV in relation to program, policy and legislative planning, development, implementation, monitoring and evaluation. We also work in strong partnership with other agencies that work towards the prevention and intervention of family and domestic violence.

The Network regularly undertakes policy and law reform advocacy in the area of family and domestic violence and is committed to continuing dialogue with both governmental and non-governmental stakeholders about the structure and content of any legislation that affects the issue of family and domestic violence.

ABOUT THE WOMEN'S COUNCIL FOR DOMESTIC AND FAMILY VIOLENCE SERVICES

The WCDFVS is the peak non-government body in Western Australia committed to improving the lives of women and children in society, and ensuring they live free from family and domestic violence. The organisation provides a voice on domestic and family violence issues to help facilitate and promote policy, legislative and programmatic responses relevant to women and children who have experienced domestic and family violence.

The organisation has five core functions: promoting the protection of women and children through representing their needs to policy and decision makers; representation and advocacy on a range of national committees and advisory bodies; community education; research and training on emerging issues and trends related to FDV; and information and referrals to sections of the community that would provide appropriate help to women and children.

The WCDFVS has a few key goals:

- To strengthen their unified voice on domestic and family violence issues.
- To maintain the Women's Council for Domestic and Family Violence Services (WA) as an independent viable and credible organisation.
- To improve the access of women and children to Women's Refuges and services who are experiencing domestic and family violence.
- To provide leadership in the area of domestic and family violence issues to key stakeholders and the community.
- To increase the community awareness of the incidence, effects and responses to domestic and family violence.
- To collaborate with key stakeholders in the development of policies, legislation and programs which impact on women and children experiencing domestic and family violence.
- To ensure access and equity for all members in remote/rural locations.

The organisation has conducted numerous projects in pursuit of these goals such as the 'Safety and Security for Women' project that assists women and children in Western Australia to remain safely in their own home after separating from their violent partner/family member by providing funding of up to $550.00 per client (GST Inc.) to enhance their security; and the 'Keeping Kids Safe' project that aims to provide support, training and resources to Refuge staff, enabling them to best support children and young people escaping family and domestic violence with their mother/caregiver.

Further, the WFDVS provides major support to family and domestic violence accommodation and support services. They aim to help facilitate early intervention and prevention; to break the cycle of FDV and homelessness and to strengthen the FDV homelessness service system.

Both the Network and the Council have a keen interest in the WA law reform discussion paper, and a substantial stake in its outcomes. The organisations have for many years found themselves dealing with and advocating for some of the key concerns raised in the paper, such as issues surrounding victim's rights, the intersection of child protection and family and domestic violence, the expansion of

special witness protection and the debate around criminal injuries compensation, amongst others. They have been well placed, through their work, to observe the positives and negatives of FDV laws and the structures that work within the FDV system.

The organisations thus welcome the opportunity to provide comments and feedback on the paper. Both organisations commend the government for its continued focus on the issue of family and domestic violence in our society, and its decision to open discussion about the current state of FDV legislation.

Police response to family and domestic violence

PROPOSAL 1 (page 49)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person reports an act of family and domestic violence to a member of the Western Australia Police (or a person employed by the Western Australia Police) the person who receives the report is required to formally record the report and provide the person reporting the act of family and domestic violence with a report number.

RESPONSE:

The Network and Women's Council strongly support legislation specifically requiring police to formally record reports of violence (and to provide the person reporting with a report number). Requiring police to record reports of violence and provide a report number will increase police accountability and ensure standardised and consistent responses to incidents of family and domestic violence. It will help establish a pattern of evidence that will assist in obtaining VROS, and could potentially save lives.

QUESTION 1 (page 49)

Are there any problems with the current practice of the Western Australia Police in regard to seeking corroborating evidence in relation to an alleged incident of family and domestic violence? If so, please provide examples.

RESPONSE:

According to the UN Handbook for Legislation on Violence Against Women (2010), police generally have a duty to:

(a) effectively investigate all alleged incidents of violence against women;

(b) conduct all investigations in a manner that respects the rights and needs of each woman without needlessly adding to the existing burden experienced by the victim;

(c) take action to support and protect all victims of crime;

(d) prevent crime, maintain public order and enforce laws

Unfortunately, it is our experience is that there is no standard response in relation to how Police initially respond and investigate incidences of FDV. Whilst the WA Police have policies and procedures about responding to FDV incidents and collecting evidence, it is our experience that the Police are not implementing them consistently.

Examples of Police responses when victims attend at a Police Station after an incident include:

1. Refusing to investigate, including refusing to take a statement, on the basis that the perpetrator will just deny it and it will be her word against his. For example:

Lavern has finally managed to separate from her violent partner David. She has suffered years of horrific physical, sexual and emotional abuse from David and has now been encouraged by advocates to report the abuse to the police. Lavern goes to the police to tell her story. The police tell Lavern that there is nothing they can do about it and that she should have reported it at the time. Lavern tells the

police that she did try to report it at the time, but didn't press charges due to extreme violence and death threats if she ever called the police again. Lavern notifies the police that they would have this information on record. She has also brought dated photos which she says would correspond with hospital records. She also brought the police a hand written letter in which David admits to some of the offences he committed against her. The police tell Lavern that legally they cannot take a statement from her.

2. Not even considering the matter and telling the victim to go and get a restraining order. For example, Clients have commonly reported the following responses from police when trying to report family and domestic violence:

"There's nothing we can do." – reported quote from police

"It's your word against his." –reported quote from police

"Go and get a restraining order." –reported quote from police

In addition to not being taken seriously by police, it is also typical for our clients to not be provided with referrals to support agencies. These kind of responses are highly inappropriate and are particularly concerning for a number of reasons:

- given the often cyclic and patterned nature of FDV, FDV-related crimes/acts of abuse are likely to be repeated by the perpetrator, meaning the victim is at further risk of abuse and likely to need protection; failing to take a statement prevents us from collecting data that will demonstrate a larger picture of the ongoing violence and enable us to prioritise safety and accountability

- when victims of violence display help-seeking behaviours, it may not be the first time they have tried to report the violence; failing to take a statement and provide referrals for support is a form of secondary victimisation as it puts the victim at risk of further harm and increases the likelihood that the victim will not report a future offence, because they will not receive help or be taken seriously. It is also important to note that if a victim receives a negative

social response when they report domestic and family violence to the authorities they tend to experience more intense and lasting distress, are less likely to report violence a second time, are more likely to blame flaws in their own character for the violence; and may become at imminent risk of homicide if not monitored through a reporting process

- The fact that an assault can be considered aggravated where the offender is in an familial or domestic relationship with the victim, is a policy stance that FDV related offences are more serious than stranger to stranger crime or crimes where there is no familial or domestic relationship between the victim and the offender. These types of victims are also more vulnerable as people are often more affected by offences committed by people with whom they are in a relationship of trust. This is particularly the case where offences are committed in front of children or the children have been exposed in some way to the violence. The behavioural, emotional, cognitive and physical effects of exposure to FDV on children is now widely recognised as detrimental to the wellbeing and development of children.

An example of Police response at the time of the incident:

Susan called OOO at around 1:00am for Police assistance when the father of her child ("the perpetrator") was at her house threatening to slit her throat with a knife, and in a highly agitated, drug altered state. The perpetrator left just prior to the Police attending. The Police refused to look for him, instead insisting there was nothing they could do until the victim attended at the Police Station to make a written statement. When Susan asked the Police why they were unable to look for the perpetrator, and reduce any risk of him coming back, Susan was told too many women in family relationships refuse to provide a statement and make it difficult for the Police to charge the perpetrator.

Had the Police spent some time looking for the perpetrator, it was likely they would have both reduced any potential risk to Susan and gathered some relevant evidence including: locating the perpetrator in the vicinity; being able to observe his drug-affected state; locating a weapon and being able to question him and perhaps get some admissions.

It is quite commonplace for charges not to be made where it is quite obvious an assault has occurred.

Understandably, in some circumstances, it may be the case that the victim is unwilling at the time to provide a full account of events; victims of FDV are often unable to provide evidence for a number of reasons including but not limited to being subjected to threats or coercion (being held psychologically captive by the perpetrator), suffering from post-traumatic stress disorder, or fear of retaliation by the perpetrator. However, an offence is a crime against the State and therefore the Police have an obligation to fully investigate and collect evidence.

It is often our experience that where police do charge, they may over rely on the victim's statements as the sole source of evidence, rather than conducting a full investigation, and where they do not charge (and it is obvious an assault has occurred) they have not sought corroborative evidence from available witnesses. For example:

Sally called the police out during a violent DV incident perpetrated against her by her husband. The police tell Sally that they cannot charge her husband with an assault because it is her word against his and it is unlikely to get a conviction in court. The police issue Sally's husband a Police order instead. The police do not interview the neighbours or available witnesses.

Poor investigation also creates issues with DV Incident Reports. In our experience it is common for these reports to often not contain complete information.

The UN Handbook for Legislation on Violence Against Women sets out that the requirements in relation to police investigations into acts of violence against women (such as family and domestic violence), be set out transparently in legislation.

3.8. Investigation: Duties of police officers

Recommendation:

Legislation should provide that police officers should:

- respond promptly to every request for assistance and protection in cases of violence against women, even when the person who reports such violence is not the complainant/survivor;

- assign the same priority to calls concerning cases of violence against women as to calls concerning other acts of violence, and assign the same priority to calls concerning domestic violence as to calls relating to any other form of violence against women; and
- upon receiving a complaint, conduct a coordinated risk assessment of the crime scene and respond accordingly in a language understood by the complainant/survivor, including by:
    - interviewing the parties and **witnesses**, including children, in separate rooms to ensure there is an opportunity to speak freely;
    - recording the complaint in detail;
    - advising the complainant/survivor of her rights;
    - filling out and filing an official report on the complaint;
    - providing or arranging transport for the complainant/survivor to the nearest hospital or medical facility for treatment, if it is required or requested;
    - providing or arranging transport for the complainant/survivor and the complainant/survivor's children or dependents, if it is required or requested; and
    - providing protection to the reporter of the violence.

In our experience the practice of police in relation to responding to family and domestic violence is often inconsistent with police policy and procedures. Police accountability and victim safety would be increased if minimum standards of investigation for all incidents of FDV were introduced and legislated. Alternatively, police policies and procedures in relation to family and domestic violence should be made publicly available on the West Australian Police website to improve transparency.

The UN Handbook for Legislation on Violence Against Women additionally recommends:

3.2.8. Penalties for non-compliance by relevant authorities

Recommendation:

Legislation should provide for effective sanctions against relevant authorities who do not comply with its provisions.

The commentary provides that in order to ensure officials charged with implementing legislation fully adhere to their responsibilities; there is a need for legislation to provide for penalties for non-compliance. For example:

Article 5 of the Costa Rican *Criminalization of Violence against Women Law* (2007) states that public officials who deal with violence against women "must act swiftly and effectively, while respecting procedures and the human rights of women affected" or risk being charged with the crime of dereliction of duty.

Articles 22, 23 and 24 of the Venezuelan *Law About Violence Against Women and the Family* (1998) provide penalties for authorities in centres of employment, education and other activities, health professionals, and justice system officials who do not undertake relevant actions within the required time frame.

Given the high level of secondary victimisation that our clients are often subjected to due to inappropriate responses from officials within the legal system, coupled with the fact that it is international best practice, we would like the Commission to consider recommending some sanctions for non-compliance with any legislated requirements for responding to FDV incidents. Furthermore, we submit that a legislated complaints mechanism also be implemented, to ensure accountability.

The Network and the Women's Council also endorse the many recommendations made by the Australian Law Reform Commission in conjunction with the New South Wales Law Reform Commission including those dealing with training, codes of practice and operational guidelines. We therefor submit that the following recommendations be implemented.

Recommendation 12–2, Family Violence- A National Legal Response (ALRC Report 114)

Federal, state and territory police, and directors of public prosecution should train or ensure that police and prosecutors respectively receive training on how the dynamics of family violence might affect the decisions of victims to negate the existence of family violence or to withdraw previous allegations of violence.

Recommendation 12–6, Family Violence- A National Legal Response (ALRC Report 114)

State and territory police guidelines or codes of practice should provide guidance to police about charging an offender with breach of a protection order and any underlying criminal offence constituting the breach. In particular, such guidance should address the issue of perceived duplication of charges and how that issue is properly addressed by a court in sentencing an offender for multiple offences based on the totality principle and principles relating to concurrent and cumulative sentences.

Recommendation 12–9, Family Violence- A National Legal Response (ALRC Report 114)

Police operational guidelines—reinforced by training—should require police, when preparing witness statements in relation to breach of protection order proceedings, to ask victims about the impact of the breach, and advise them that they may wish to make a victim impact statement and about the use that can be made of such a statement.

PROPOSAL 2 (page 50)

That where an accused is charged with breaching a violence restraining order by making contact with the person protected by the order via electronic means, the Western Australia Police ensure that sufficient information to demonstrate the content of that communication is included in the police brief for prosecution as early as possible.

RESPONSE:

We strongly support this proposal. Unfortunately it is often the experience of our clients that breaches of VROs are not taken seriously by police. This is particularly the case in relation to breaches via text message. In a scenario where a respondent breached his VRO via text message, one of our solicitors reported that the police told her client something to the effect of:

"Anyone could have used his mobile; we don't know that the text is from him, so we can't charge him."

Besides the fact that if someone else had used the respondent's mobile, it would be a third-party breach (which advocates for the argument that police require better training), if there was an onus for police to record the content of the communication in the police brief, it would ensure that the seriousness of the breach is decided by the court and not the individual officer, and could also be used as evidence (and be summonsed) for a final order hearing.

This would also assist in situations (in which many of our clients find themselves) where the person bound is permitted to contact the applicant for the purpose of making arrangements to spend time with or communicate with the child, but contacts the applicant either outside of these parameters or is abusive or intimidating in the communication to arrange for contact or communication with the child. It is our experience that police often refer to these types of breaches as "technical" breaches and may be reluctant to charge because the message "concerns" the children.

Although Mark is permitted to text Clara in regards to making arrangements to spend time with or contact the children, he uses every opportunity to be abusive towards Clara. Clara and Mark have no parenting plan or parenting orders in place, but Clara did not want to prevent Mark from communicating with the children. Clara is feeling intimidated by Mark's abusive messages and has reported them to the police as a breach. She feels that if Mark is charged with a breach his behaviour may improve and the abuse may stop. The police note that the text messages are indeed abusive, but because Mark mentions the children in the messages, they inform Clara that they cannot charge him.

Please see attached Breaching Safety Research Report-auspiced by the Women's Council. The exploratory study has provided some detailed insights into how men understand VROs and the associated processes and more importantly why they have breached them, and consequences of this. Findings from interviews with ten men who have breached a VRO and a focus group with policy makers and

practitioners who work with perpetrators of domestic and family violence indicate the need for a greater emphasis on the fact that VROs are for the protection of victims.

QUESTION 2 (page 52)

Are any changes to legislation and/or policy required to ensure that, for the most part, accused charged with an offence that includes an act of family and domestic violence as defined under the *Restraining Orders Act 1997* (WA), or an offence of breaching a violence restraining order or a police order, are arrested rather than summonsed? For example, should there be a legislative presumption that when an accused has been charged with an offence that includes an act of family and domestic violence or an offence of breaching a violence restraining order or a police order the accused must be arrested for the offence unless there are exceptional circumstances?

RESPONSE:

In addition to Commission's proposal that s 16A(3) of the *Bail Act 1981* (WA) be repealed (proposal 32) in hopes of reducing the number of accused summonsed for breaching VROs, we additionally submit that the definition of serious offence in s 142 of the *Criminal Investigation Act (2006)* (arrested suspects, charging and releasing) be amended to match the definition of serious offence in s 128 of the Act (arrest power for offences), which includes breaches of VROs and POs as well as most acts of family and domestic violence set out in s 6(1) of the *Restraining Orders Act* (1997). The scope provided by aligning these definitions will positively contribute to perpetrator accountability as well as ensuring that untrained police aren't unnecessarily minimising the breach by making a judgement that that the breach is minor without taking into account the larger context of the abuse and the effect on the victim.

PROPOSAL 3 (page 52)

That the definition of a senior officer under s 62D(8) of the *Restraining Orders Act 1997* (WA) be amended to provide that a senior officer is a police officer who is

senior in rank to the officer making the application and is of or above the rank of sergeant.

RESPONSE:

The Network and Women's Council have no issue with this recommendation.

QUESTION 3 (page 53)

Should authorisation from a police officer of or above the rank of Inspector be required if it is considered necessary to remain on the premises for an extended period and, if so, what period should be specified for this purpose?

RESPONSE:

Question 3 is posed in light of the suggestion that the general entry requirement of seeking approval from an officer of the rank of inspector or above to enter premises where family violence is suspected, be altered to allow for approval to be granted by an officer of the rank of sergeant or above. The suggestion is that were such an alteration made, the rank of inspector ought to still be sought where officers wish to remain on the premises for an "extended period" to investigate if an act of family violence has occurred, to ensure there is no imminent danger and to provide any assistance necessary. This suggestion takes into account the further inconvenience of police remaining for extended periods without a warrant.

We would support an alteration of this nature. Permitting a sergeant, as opposed to an inspector, to authorise remaining on premises for extended periods can take into account the immediacy faced in many family violence situations and the necessity for police to take fast action while still respecting the rights of the parties involved. However, where officers must remain in attendance, a second authorisation granted by an inspector would be appropriate to ensure transparency for the police and prevent claims of an abuse of power on their part. It would also function as internal review to ensure officers do not overstep their authority.

Where police intend to remain on the premises for an "extended period" to protect from imminent danger of family violence, we would suggest that such a period

ought not to exceed the length of time required for an investigation to take place. Leaving police officers in the home would have the dual effect of placing an undue strain on police resources, and create an atmosphere wherein the victim becomes the person restricted or subject to police scrutiny.

The term "extended period" however must be specified. If the period the police remain is intended only to allow for an investigation to take place, a period of 2 hours may be appropriate, however this will always be difficult to quantify to precise length of time police will need to conclude an investigation. It will also depend on the level of cooperation granted by the victim, any need for forensic evidence to be obtained and protected, if criminal charges are to be pursued and, if so, if a warrant ought to be more appropriately obtained.

PROPOSAL 4 (page 53)

That s 62D(3) of the *Restraining Orders Act 1997* (WA) be amended to provide that:

A police officer making the application for approval to a senior officer must –

(a) give the address, or describe the premises, to which it relates, and, if known, the person to whom it relates; and

(b) state the grounds on which the police officer suspects that –

(i) a person is on the premises; and

(ii) a person has committed, or is committing, an act of family and domestic violence against another person.

RESPONSE:

Proposal 4 would result in the alteration of a single word in section 62D(3) of the RO Act. The police purport that the current wording of section 62D(3) only allows police to enter premises where they suspect an act of family or domestic violence has taken place and where they suspect the person responsible is still on the premises. The Police would seek an alteration to allow them to enter the premises even if the person responsible is not on the premises, to allow them to ensure the health and welfare of those in the premises.

Our concern with this alteration is that where it is read in light of section 62 as a whole, which concerns police powers to enter the premises, remain for extended periods and undertake investigations, that such an amendment may infringe on victims' rights. Where an individual does not wish to make a police complaint or a report, and the police enter their premises, they may find themselves placed under undue pressure to speak to police. If the person responsible is not there, but finds out the police have attended the premises, this may result in increased victimisation for the victim of family violence. Further, where a false report has been made by a neighbour or similar and police attend and enter the premises, to ascertain the safety of those inside, this may constitute a breach of the privacy of the residents of the home.

However, the importance for the police of ensuring the safety of the individuals in the house, as well as the ability of the police to obtain information as quickly as possible that may allow them to arrest the perpetrator must also be considered. This must be weighed against the risk of increasing police powers to the extent where it infringes on the freedoms enjoyed by ordinary people who have not, and are not suspected of having, committed a criminal offence.

As such, we would oppose the change as it stands. However, we may support the alteration if the section were altered to allow for police to enter the premises where they believe that, in the last 2 hours, an act of family and domestic violence has occurred, and permission for such entry must be granted by a senior officer of the rank of inspector or higher and the entry onto the premises be for the exclusive purpose of securing the safety of the individuals inside.

PROPOSAL 5 (page 55)

That the Western Australia Police provide more regular training to all police officers in relation to family and domestic violence and that this training be delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities.

RESPONSE:

As you will see in relation to a number of our responses including examples and/or feedback, adequate police training continues to be a core concern for us. Our clients consistently come up against a number of issues that could be resolved or at least minimised by regular and adequate training, including but not limited to:

- failure to properly investigate;
- failure to charge where it is obvious an assault has occurred;
- failure to identify a single POI (primary aggressor) instead of minimising the unilateral violence that has occurred by including the victim as a POI;
- failure to record reports of violence and failure to understand how this evidence will assist in seeing the overall context and abuse patterns;
- failure to correctly read FDV dynamics (i.e. the person who has called for help may appear to be aggressive, while the alleged perpetrator may seem together, calm, collected and reasonable, so judgements are made based on how they present);
- failure to understand why a victim may not want to make a statement and failure to collect other available evidence that will assist; and
- other examples contained throughout this submission.

We also note that a number of the ALRC Family Violence recommendations acknowledge such issues. For example:

Recommendation 9–5 , Family Violence- A National Legal Response (ALRC Report 114)

Police should be trained to better identify persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other. Guidance should also be included in police codes of practice and guidelines.

We therefore vigorously support this proposal and further submit that it be specifically legislated to ensure compliance and accountability. A stakeholder's committee consisting of government and non-government agencies working with clients affected by FDV, should be established to oversee outcomes and provide feedback into training areas, etc to support the Police in undertaking such training.

Restraining orders

PROPOSAL 6 (page 58)

That the *Restraining Orders Act 1997* (WA) (or any new family and domestic violence legislation dealing with violence restraining orders) include an objects clause in relation to family and domestic violence restraining orders providing that the objects of the relevant part of the *Restraining Orders Act 1997* (or of any legislation) are:

a. to maximise safety for children and adults who have experienced family violence;

b. to prevent and reduce family violence to the greatest extent possible; and

c. to promote the accountability of perpetrators of family violence for their actions.

RESPONSE:

We are supportive of this recommendation in principle as it largely reflects recommendation 7-4 of the ALRC Family Violence Inquiry.

Recommendation 7–4, Family Violence- A National Legal Response (ALRC Report 114)

State and territory family violence legislation should articulate the following common set of core purposes:

a. to ensure or maximise the safety and protection of persons who fear or experience family violence;

b. to prevent or reduce family violence and the exposure of children to family violence; and

c. to ensure that persons who use family violence are made accountable for their conduct.

However, while we understand and agree that the Victorian provision is preferred because it uses phrases such as "maximise safety" and "promote accountability" (reflecting that legislation alone cannot guarantee safety or accountability), we

are concerned that the scope to maximise safety has been limited to not include the fear of family violence. We realise that anyone who is fearful of family violence has most likely already been subjected to some form of violence (i.e. victim may be fearful of their physical safety because they have been threatened which already constitutes FDV), but we feel that by including fear in the objects, educative value is supported in legislation to both the public and professionals. We often find that many victims of FDV are unaware they are victims of FDV until there is a physical assault. Unfortunately some professionals often share this view.

We also have concerns about preventing and reducing the exposure of children to family violence not being included (as is recommended by the ALRC/NSWLRC). We do note that the proposed objects include maximising safety for children where they are victims of FDV, our concern however, arises if it is to be the case that exposure of children to FDV is not encompassed in the statutory definition of FDV. It is too often in our experience that children are not protected by VROs when they ought to be. We also note that including exposure to FDV in the objects will more closely align the proposed objects with the proposed principles and more importantly- with the agenda of the National Plan of Action to Reduce Violence against Women and their Children.

We therefore propose that the objects of the Act be as follows:

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

PROPOSAL 7 (page 61)

That the *Restraining Orders Act 1997* (WA) (or any other legislation dealing with family and domestic violence restraining orders) include guiding principles covering the following areas:

a. that the safety of victims of family and domestic violence and children who are exposed to family and domestic violence should be the paramount consideration;

b. that family and domestic violence is a violation of human rights and unacceptable in any community or culture;

c. that while anyone can be a victim of family and domestic violence and family and domestic violence occurs in all sectors of society, family and domestic violence is predominantly committed by men against women and children;

d. that family and domestic violence extends beyond physical and sexual violence and may involve other coercive behaviour including emotional, psychological and economic abuse;

e. that family and domestic violence typically involves power imbalances and may involve ongoing patterns of abuse;

f. that family and domestic violence may escalate in frequency and severity after separation;

g. that family and domestic violence is underreported and that there are a number of different barriers for victims of family and domestic violence to report the violence and/or to leave the relationship;

h. that not all victims of family and domestic violence wish to end their relationships, some simply want the violence to stop;

i. that the impact on children from being exposed to family and domestic violence is very detrimental;

j. that particular vulnerable groups may experience and understand family and domestic violence differently from other groups and may have additional or different barriers to reporting family and domestic violence or seeking assistance. Such vulnerable groups include Aboriginal people; people from culturally and linguistically diverse backgrounds; gay, lesbian, bisexual, transgender and intersex people; elderly persons; and people with disabilities;

k. that perpetrators should be held accountable and encouraged and assisted to change their behaviour;

l. that where both persons in a relationship are committing acts of violence, including for their self-protection, where possible the person who is most in need of protection should be identified; and

m. that victims should be treated with respect by the justice system in order to encourage victims to report acts of family and domestic violence and seek help.

RESPONSE:

The Network and Women' Council strongly support the adoption of guiding principles that cover the suggested areas. Additionally we recommend:

- recognising people from rural, remote and regional (RRR) communities as a vulnerable group to recognise the unique barriers to safety and justice faced by victims from such communities (i.e. access to support services and alternative accommodation, access to timely VRO applications, etc).
- including as a principle "that victims and their children should not be subjected to secondary victimisation arising as a result of inappropriate/ineffective responses to family violence"
- including as a principle "that victims and their children should not be put at risk of further harm due to inappropriate/ineffective responses to FDV"
- including as a principle "that violence against women is a form of discrimination, a manifestation of historically unequal power relations between men and women, and a violation of women's human rights"
- amend (e) to "that family and domestic violence typically involves **exploitation of** power imbalances and may involve ongoing patterns of abuse"

We also suggest that some of these principles could potentially be included in s12 of the *Restraining Orders Act 1997* as issues that must be considered by a Magistrate when making an order.

PROPOSAL 8 (page 65)

That the *Restraining Orders Act 1997* (WA) (or any new family and domestic violence restraining order legislation) be amended to provide for a new expanded definition of 'family and domestic violence'.

RESPONSE:

The Network and Women's Council strongly support this proposal.

QUESTION 4 (page 65)

1. In addition to the current behaviour covered by the existing definition of an 'act of family and domestic violence' under the *Restraining Orders Act 1997* (WA) should the definition expressly include:
   a. psychological abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing;
   b. economic abuse and, if so, what meaning should the definition attribute to psychological abuse and must it be ongoing; and/or
   c. any other behaviour that coerces or controls a person and could reasonably be expected to cause that person to fear for his or her safety or wellbeing, and must it be ongoing?
2. Should the legislation provide specific examples of what constitutes family and domestic violence and, if so, should these examples include:
   a. examples of the conduct referred to 1(a) – (c) above and, if so, what;
   b. threatening to commit suicide or self-harm with intent to torment, intimidate or frighten the person; unauthorised surveillance, and, if so, what meaning should the definition attribute to unauthorised surveillance; and/or
   c. any other examples of conduct which is to be included or excluded?
3. Are there any other forms of behaviour that should be included or excluded in the definition of family and domestic violence or included or excluded in a list of examples of family and domestic violence?
4. Should the *Restraining Orders Act 1997* (WA) provide for a separate definition of emotionally abusive conduct and, if so:
   a. what meaning should the definition attribute to such conduct;
   b. must it be ongoing; and
   c. should the definition include a non-exhaustive list of examples of behaviour that may constitute such abuse?

5. Should the definition of family and domestic violence include exposing a child to family and domestic violence?

RESPONSE:

In line with international best practice (as per the UN Handbook for Legislation on Violence against Women) as well as recommendations from the Commonwealth Family Violence Inquiry, the definition of family violence should be broadened to address the various ways violence may be perpetrated including physical, psychological, economic, sexual, and other coercive and controlling behaviour:

3.4.2. Defining domestic violence: *Comprehensive definition of types of domestic violence*

Recommendation

Legislation should include a comprehensive definition of domestic violence, including physical, sexual, psychological and economic violence.

Recommendation 5–1, Family Violence- A National Legal Response (ALRC Report 114)

State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

a. physical violence;
b. sexual assault and other sexually abusive behaviour;
c. economic abuse;
d. emotional or psychological abuse;
e. stalking;
f. kidnapping or deprivation of liberty;
g. damage to property, irrespective of whether the victim owns the property;
h. causing injury or death to an animal irrespective of whether the victim owns the animal; and
i. behaviour by the person using violence that causes a child to be exposed to

the effects of behaviour referred to in (a)–(h) above.

We do not recommend that the definition require the abuse to be ongoing (s11A of the *Restraining Orders Act 1997*/ Proposal 10 should suffice), as that requirement could leave victims at risk, in fear and without protection. We also submit that the types of abuse referred to need not be expressly defined as this could have the consequence of putting the onus on the applicant to prove effects that demonstrate the abuse (i.e. client needing report from psych to prove psychological damage). Rather, we believe the focus should be on the behaviours that are perpetrated and where necessary, a non-exhaustive list of examples of behaviour constituting the type of violence, be given as per section 4AB of the Family Law Act 1975:

For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Additionally we also submit that examples of conduct that would affect certain vulnerable groups as per the recommendation below be included.

Recommendation 5–2, Family Violence- A National Legal Response (ALRC Report 114)

State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect—although not necessarily exclusively—certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian,

bisexual, transgender and intersex communities. In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.

By way of examples, we include some behaviour that would illustrate how family violence can affect certain vulnerable groups differently:

- Where a person with a disability, preventing or forbidding access to the applicant's wheelchair could be an example, or
- Where a person is same-sex attracted, threatening to out the person to friends and family would be another example), or
- Where a person is transitioning from one gender to another, hiding or preventing the person from accessing their medication could be an example, or
- Where a person is from Aboriginal or Torres Strait Island descent, threatening to call authorities as a way to control or coerce the person, could be an example, or
- Where the person is culturally or linguistically diverse, threats of disclosing personal information or creating rumours to community groups or leaders could be used as an example.

Given that exposure to family and domestic violence is widely recognised to have detrimental consequences on the development and well-being of children, we submit that exposure to family violence be included in the definition of family violence and non-exhaustive list of examples provided, in line with s 4AB (3) & (4) of the *Family Law Act 1975* (refer to above).

PROPOSAL 9 (page 66)

That the definition of a family and domestic relationship under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be expanded to include the former spouse or former de facto partner of a person's current spouse or current de facto partner.

RESPONSE:

We have no objections to this proposal.

PROPOSAL 10 (page 68)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that the grounds for making a violence restraining order are:

a. the respondent has committed family and domestic violence against the person seeking to be protected and the respondent is likely to again commit family and domestic violence against the person; or

b. a person seeking to be protected, or a person who has applied for an order on behalf of that person, has reasonable grounds to apprehend that the respondent will commit family and domestic violence against the person seeking to be protected.

RESPONSE:

We support this proposal as it is consistent with the recommendation made in the Commonwealth Family Violence Inquiry:

Recommendation 7–5, Family Violence- A National Legal Response (ALRC Report 114)

State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:

a. the person seeking protection has reasonable grounds to fear family violence; or

b. the person he or she is seeking protection from has used family violence and is likely to do so again.

QUESTION 5 (page 68)

Should the additional requirement under s 11A of the *Restraining Orders Act 1997* (WA) that the court is satisfied that a violence restraining order is appropriate in the

circumstances be removed from the grounds for making a violence restraining order?

RESPONSE:

Yes; this provision is not included in the ALRC recommendations from the Family Violence Inquiry and is too broad and does not actively assist decision making. If a mechanism was devised that put the onus on the respondent to demonstrate exceptional circumstances that would make the VRO inappropriate, we would consider supporting its inclusion.

PROPOSAL 11 (page 69)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that exposure to family and domestic violence means seeing, hearing or otherwise experiencing the effects of family and domestic violence, and a non-exhaustive list of examples that constitute exposure to family and domestic violence be included in the legislation.

RESPONSE:

We support this proposal as per our response to question 4 (that exposure to FDV be included in the definition of FDV).

QUESTION 6 (page 71)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) specify different grounds for making an interim violence restraining order than making a final violence restraining order and, if so, what grounds should be specified?

RESPONSE:

The Network and Women's Council do not support this proposal without an evidence-based approach that it would not negatively impact on the safety of victims and their children.

QUESTION 7 (page 73)

1. Should any changes be made to the criteria for making a police order under the *Restraining Orders Act 1997* (WA)?
2. Should a police order serve as an application for a violence restraining order and, if so, should the order only serve as an application if the person protected consents?

RESPONSE:

1. No. We do not see any benefit of this.
2. Yes. It should be legislated that a police order should serve as an application for a VRO and the application should be conducted by the Police on behalf of the victim. This would bring WA in line with the best practice of other jurisdictions, would enshrine WAPOL policy (which is rarely followed at present) into the law, would be consistent with Recommendation 9-1 from the ALRC, and would make a clear statement to the community that FDV is a community problem and a crime against the state. Where the victim does not want the police order to serve as an application, they would have the right to opt out.

   If police orders are not to be considered as applications for VROs, then the length of a police order must be extended. Validity of 3 weeks to a month (where appropriate) would be practical particularly in regional areas where the Court doesn't sit every day, or where the victim does not have transportation to make an application for the order.

   Either of these options must be combined with appropriate police training. At present some victims are issued police orders for 12 hours when, if you look at the context of their case, this clearly is not enough time to allow them to seek a VRO. Although we note that it may be appropriate in some circumstances to issue such an order, proper training is required in order to ensure victims are not put at risk.

Also, any such initiative must include a provision for data collection and must be closely monitored to minimise any unintended consequences.

PROPOSAL 12 (page 74)

That s 30E(4) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person to whom an explanation is to be given in relation to a police order does not readily understand English, or the police officer is not satisfied that the person understood the explanation, the officer is, as far as practicable, to arrange for a trained interpreter to provide the explanation. If, after reasonable inquiries have been made by the police officer, a trained interpreter is not available another person may give the explanation to the person in a way that the person can understand.

RESPONSE:

We are supportive of this proposal. Ensuring respondents are aware of their rights, responsibilities and consequences, can mitigate the potential for breaches to occur in the first instance.

PROPOSAL 13 (page 75)

That s 30E(1) of the *Restraining Orders Act 1997* (WA) be amended to provide that a police officer who makes a police order is to prepare and serve, or arrange for another police officer to serve, the order.

RESPONSE:

The Network and Women's Council do not oppose this proposal.

QUESTION 8 (page 76)

Should additional persons such as victims support workers (eg, persons who are employed by the Family Violence Service or Victims Support Service of the Department of the Attorney General and workers employed by non-government agencies) be prescribed as authorised persons for the purpose of telephone

applications under the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders)?

RESPONSE:

The Network and Women's Council disagree with additional persons being prescribed as authorised persons for the purpose of telephone applications, in principle because we inherently feel this is and should be the role of the police. However, we recognise that by authorising other persons under the act, the use of telephone applications may increase and thus enhance the safety of victims. Our concern however is that this provision will place undue pressure and reliance on community services to undertake actions that should be demonstrated by police. We feel that the current situation could be improved with adequate and regular police training, transparent and publically available police family violence policies and accessible and transparent complaints mechanisms which hold police accountable, and therefore recommend the above as a course of action.

PROPOSAL 14 (page 77)

That s 68(1) of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when making a restraining order a court may extend the order to operate for the benefit of a person named in the order in addition to the person protected by the order and, further, that the power to extend the order for the benefit of a named person can be exercised without the named person having first lodged an application to the court in the prescribed form.

RESPONSE:

The Network and Women's Council strongly support this proposal to ensure statutory clarity. As stated in the paper, our solicitors often experience inconsistencies in relation to which Magistrates will require separate applications under s 68 and which will not. Our experience is also that Magistrates in the regions are of the view that the s68 only applies to children and therefore require separate applications for say two

cousins or husband and wife who are both victims of the same person. We also agree for the need of data to be collected in relation to the use of s68.

PROPOSAL 15 (page 79)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that 'authorised persons' be permitted to make an application for a violence restraining order on behalf of a person seeking to be protected.

RESPONSE:

This proposal arises out of the following observations in the LRC Report:

1) According to police policy a police officer must make a VRO if the officer is satisfied there has been or will be an act of FDV that constitutes a criminal offence or puts the safety of the person at risk (this is envisaged to include obtaining a statement or alternatively an affidavit if the applicant is unable to attend court).
2) Police are authorised under s 62G to conduct proceedings on behalf of an applicant if requested to do so.
3) Police do not undertake either of these roles frequently (0.5% in 2012).

We recognise the barriers that victims face in relation to initiating applications as well as the number of benefits of police-assisted applications (as demonstrated in other states), and agree with the Commission that ideally police officers should be more actively and directly involved in the application process to assist victims of FDV and we query why current police policy would be so disconnected and inconsistent with policing resources.

Legislatively authorising other persons to apply for a VRO on behalf of another is of concern to us. Firstly, there is a risk that if the definition of "authorised persons" is too broad, there is the potential for people to be pressured or coerced into obtaining VROs when they do not want them. We submit that if this proposal is to be recommended, that prescribed people only include adequately trained professionals such as Family Violence Service staff. Secondly, this proposal does not

address the underlying issue of why applicants for VROs are not being assisted by police when generally police are in the best position to do so. If the reason is indeed a lack of resources, broadening the authority of persons to assist will only put more pressure on other under-resourced organisations without regard to the core issue of adequate resources to reduce family and domestic violence.

In principle we do not support this proposal as it is our view that police should actively assist with obtaining restraining orders in accordance with the legislation and their policies. However, we submit that if it is to be considered that the definition of authorised persons be broadened, that the definition is restricted to trained professionals. Additionally, international best practice (as per the UN Handbook) is to ensure that legislation mandates a budget for its implementation:

3.2.2. Budget

Recommendation

Legislation should mandate the allocation of a budget for its implementation by:

- creating a general obligation on Government to provide an adequate budget for the implementation of the relevant activities; and/or
- requesting the allocation of funding for a specific activity, for example, the creation of a specialized prosecutor's office; and/or
- allocating a specific budget to non-governmental organizations for a specified range of activities related to its implementation.

We therefore submit that the State Government prioritise responding to and addressing violence against women by ensuring adequate funding is available (and ideally legislated) to do so.

QUESTION 9 (page 79)

Should 'an authorised person' be defined as a person who has the written consent of the person seeking to be protected or should a range of persons be prescribed for this purpose (eg, Family Violence Service staff, Victim Support Service staff, victim advocates from non-government agencies)?

RESPONSE:

As per our response to the above proposal, we are generally opposed, but if it is to be so, we encourage the broadened definition to be limited to prescribed persons.

PROPOSAL 16 (page 80)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that the Western Australia Police are required to notify the person protected by the order in person or by telephone, fax, SMS, email or other electronic means as soon as practicable after the violence restraining order has been served.

RESPONSE:

The Network and Women's Council strongly support this proposal as it will potentially provide victims with peace of mind in knowing they have legal remedies if any unwanted contact or behaviour is to occur from the time of receiving notification.

QUESTION 10 (page 80)

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that at the time of making a violence restraining order the court is to specify a period of time after which oral service is authorised?
2. Should the legislation provide that oral service is only authorised after the specified period of time if police have been unable to locate the respondent in person within that period?

RESPONSE:

Our concerns in relation to the above are in regards to:

- The procedural requirements of service may not be able to be completed over the phone by the police officer.
- Offenders charged with a breach may attempt to defend matters on the basis that the order was not properly explained.

- Evidentiary issues at trial if it is the Police officer's word against the offenders.

We suggest that the Act should specify a period of time after which the police must then make an application for alternative service. This would ensure that Police make every effort possible to serve in person as required because once served a further application to the court for alternative service would not be necessary.

PROPOSAL 17 (page 81)

That the application form and form of affidavit for applications for violence restraining orders be revised to incorporate a broader range of questions or headings based upon any new definition of family and domestic violence as proposed by Proposal 8.

RESPONSE:

The Network supports this proposal, as it is representative a Recommendation 18-1 of the Commonwealth Family Violence Inquiry, but additionally submits that application forms also set out clearer information regarding the types conditions that can be sought to be imposed as per the recommendation below.

Recommendation 11–7, Family Violence- A National Legal Response (ALRC Report 114)

Application forms for protection orders in each state and territory should clearly set out the types of conditions that a court may attach to a protection order, allowing for the possibility of tailored conditions. The forms should be drafted to enable applicants to indicate the types of conditions that they seek to be imposed.

Recommendation 18–1, Family Violence- A National Legal Response (ALRC Report 114)

State and territory courts should ensure that application forms for protection orders include information about the kinds of conduct that constitute family violence.

PROPOSAL 18 (page 82)

1. That s 33 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that as soon as the registrar receives the respondent's endorsed copy of an interim violence restraining order indicating that the respondent objects to the final order, the registrar is to fix a mention date that is within seven days of receipt of the endorsement copy of the order.
2. That the forms required to be given to the person bound by an interim violence restraining order include that the person bound may apply to a court for variation of the order.

RESPONSE:

1. Although we note there are both negative and positive consequences to call-over dates, we are inclined to agree with this proposal. We are concerned, however, that 7 days is too short of a time-frame for parties to obtain legal advice within, and would recommend extending it to 14 days. We also encourage any such initiative to include data collection and be carefully monitored.

2. We agree an additionally suggest that such forms should provide a range of information and perhaps be included in the Regs of the act to ensure consistency across courts.

PROPOSAL 19 (page 82)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that, as far as is practicable and just, ex parte applications for violence restraining orders be heard first in the morning before other court proceedings are commenced and otherwise, as far as is practicable, be given priority in the court list.

RESPONSE:

We are supportive of this proposal as it recognises the potential urgency and risk associated with such applications not being prioritised.

PROPOSAL 20 (page 84)

1. That the Western Australia Police and the Department of the Attorney General develop a system that enables a court, where an application for a violence restraining order has been lodged, to provide the judicial officer hearing an ex parte application with a copy of or access to the criminal history of the applicant and the respondent and any record of past applications for violence restraining orders or violence restraining orders made involving either or both of the parties.
2. That the Department of the Attorney General develop an IT process enabling the Magistrates Court and the Family Court of Western Australia to have access to each other's records to determine if named parties are subject to orders in the other jurisdiction.
3. Any information provided or obtained under 1 and 2 above must be disclosed to all parties to the proceedings.

RESPONSE:

1. We agree to this proposal and would further suggest that it would be appropriate for police orders to also be included as our solicitors have indeed seen cases where a perpetrator takes out a VRO against a victim, where access to a history of police orders would have assisted the magistrate.

2. We agree with this proposal and have hope that it may encourage Magistrates to include children on VROs.

3. We agree with this where it does not put victims and their children at risk of harm.

QUESTION 11 (page 85)

1. Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide

that the court has the power to request from relevant agencies the following information to be provided in the form of a certificate:

a. The criminal record for both the applicant and the respondent.

b. Existing and past violence restraining orders made against or in favour of each party or the person seeking to be protected.

c. Whether a police order has been made against either party and, if so, the terms of the police order.

d. Any current charges for both the applicant and the respondent.

e. Whether the Department for Child Protection and Family Support has had previous involvement with the applicant or respondent in relation to child protection concerns arising out of family and domestic violence.

f. Existing Family Court orders and current proceedings in the Family Court.

g. The details of any Western Australia Police Domestic Violence Incident Reports concerning either the applicant or the respondent.

2. Are any modifications to the rules of evidence required to facilitate the provision and use of the information set out above in 1?

RESPONSE:

We agree to this proposal in principle, particularly if the information is admissible in court without having to call a police officer as a witness to admit it (similar to the ss 12(5) and 12(6) provisions).

We do raise concerns however, about information sharing in relation to the information that can be contained in these certificates (particularly where findings of fact have not been made). Without the ability for counsel to cross-examine in relation to the specifics of the information (which may have been generalised, omitted, etc), this provision could create prejudice.

As previously discussed we also have concerns about narrative (or lack of) in police incident reports, which could lead to vastly different decisions being made, particularly in instances where both parties are identified as POIs.

We would encourage specific guidelines regarding what information should be included in the certificates. We would also encourage a through review of the Police DV incident report template.

PROPOSAL 21 (page 86)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a final violence restraining order remains in force for the period specified in the order or, if no period is specified, for two years.
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a violence restraining order may be made for a period of more than two years if the court is satisfied that there are reasons for doing so.

RESPONSE:

The Network and Women's Council strongly support the above proposal as it will hopefully make the legislation clearer that this provision exists and minimise the burden often faced by some of our clients of having to continuously apply to vary their order for the purposes of having it extended, or where they haven't vigilantly been occupied with the expiry date, having to re-apply after the order has lapsed. We view this as an unnecessary burden for victims to bare and see no reason why it shouldn't be expressly legislated that if the court is satisfied that there are reasons to provide for a longer order, that it make the order.

PROPOSAL 22 (page 88)

1. That s 12 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that when considering the conditions to be imposed by a violence restraining order the court is to have regard to the circumstances of the relationship between the applicant and the respondent (including whether the parties intend to remain living together or remain in contact).

2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide, in addition to the current provisions in relation to the conditions that may be imposed, that every family and domestic related violence restraining order is to include the following conditions:

   a. That the person bound is not to commit family and domestic violence against the person protected by the order; and

   b. That the person bound is not to expose a child to family and domestic violence.

RESPONSE:

1. The Network and Women's Council are supportive of this proposal, with caution, as we note in some jurisdictions it is the default to simply provide non-molestation orders and can be quite difficult for victims to obtain "exclusion orders" where the person bound is excluded from the home and we think victims should be supported to stay at home and have the violence leave, rather than having an additional burden of also having to flee the home.

   Our experience is that in the metropolitan area it is quite rare to have a VRO that permits the parties to live in the same dwelling. In rural and remote areas it is perhaps more common, particularly for our clients who are of Aboriginal or Torres Strait Islander descent. Our experience is that some women just want the violence to end, but not necessarily the relationship to end. Due to close kinship ties and other cultural factors, there can in some situations also be additional barriers to leaving a violent relationship. It is therefore important for victims to have such protections in place where appropriate and requested.

2. We support this proposal. It is our opinion that specifically setting out in the orders that the person bound is restrained from committing acts of FDV including exposing children to FDV is a very valuable tool as it leaves little room for confusion or ignorance about the law if it is expressly included in the

order. It is also commonly noted that this approach 'puts the offender on notice' that the behaviour is not acceptable.

QUESTION 12 (page 88)

Is any reform required to enable a court (and, if so, which court) to remove the name of a person bound by a family and domestic violence restraining order from a tenancy agreement?

RESPONSE:

As per our 2011 Submission in relation to amendments to the *Residential Tenancies Act 1987*, we recommend that provisions similar to those of s 71 (changes of locks and other security devices), s 79 (tenants after an AVO) and s 100 (early termination without compensation to landlord) of the *Residential Tenancies Act 2010* (NSW) be incorporated into the *Residential Tenancies Act 1987* (WA).

PROPOSAL 23 (page 90)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that if the person protected applies for a violence restraining order to be cancelled, the court is not to cancel the order immediately unless satisfied that there is no substantial risk to the safety of person protected.
2. Upon hearing an application to cancel a violence restraining order by the person protected by the order the court is to obtain from Western Australia Police, Family Violence Services and the Department for Child Protection and Family Support information relevant to the application since the violence restraining order was made.
3. Before a violence restraining order is cancelled or varied, the court is to ensure that the person protected has spoken with a victim support worker from the Family Violence Service, the Victim Support Service or a prescribed non-government agency.

RESPONSE:

1. In our view, a VRO should not be cancelled unless there is no substantial risk to the person protected in so doing. However, there are practical and ethical issues associated with this ideal, which must be considered.

   Firstly, what would constitute "substantial risk" and how this would be ascertained? Would this be a reference to future risk, or risk present whilst the VRO is in place? For example, if an individual was charged twice with breaching a VRO and the person protected sought to remove the VRO, would the breaches mean that there was a substantial risk to the person protected? However, what if the case were that the parties had reconciled and the breaches came about because they were together in a consensual manner, and the person protected sought to remove the VRO to facilitate their relationship? Would this then be a case where the Magistrates Court should intervene?

   Secondly, further questions that arise are in relation to whether the "substantial risk" would be limited to cases of physical harm, excluding cases of ongoing emotional risk to the parties. How will a Court be satisfied that the person protected has not been put under pressure to request such a cancellation?

   Furthermore, how the amendment is specifically worded would need to be considered. That is, is the Magistrate required to conduct an investigation to determine substantial risk? What would the form of such an investigation be? How would such a determination be reached? Would it place considerable strain on the Court and on the Magistrate, or would it be that the Magistrate makes that determination of "substantial risk" on the evidence before him or her on the day, without conducting further inquiry and potentially not achieving the goal of the proposed amendment?

   Additionally, we are concerned that an amendment preventing a Magistrate from cancelling a VRO if a "substantial risk" is identified would also not provide adequate support to a person protected. For example, if a woman

sought to cancel a VRO because she was homeless and her violent former partner had the children, and the Magistrate refused to cancel the order, that woman would be left in a very difficult position, particularly if she was not provided with any support at court. The Court, whilst addressing the risk factor it had identified would fail to address the real problem that she had attended court with.

Finally, such a change would significantly impact on victims' rights. Although a VRO is a court order, as individuals, it should be up to the person protected if they wish to be protected by a VRO (as the Court would not have made an order in the first instance, if not for the victim's application). It should not be the role of courts, intended to be impartial, to determine an adult's best interests where they are capable of making decisions for themselves. It would tread dangerously on the freedoms enjoyed by individuals to make decisions, whether those decisions are good or bad and potentially disempower victims and make them distrustful of the system and the supports offered. We are also concerned that it may see victims become reluctant to take out VROs or report breaches. We would also be concerned about the potential in some cases for the violence to escalate where the Court decides not to cancel the VRO.

We instead suggest that rather than removing the power from individuals to make decisions regarding their own lives, it may be more appropriate to empower victims to make informed decisions and that where a protected person wishes to cancel an order they must first be provided with legal advice regarding the effect of doing so and alternative options available (such as varying the order) which may address the reasons for wishing to cancel an order, without leaving the victim entirely unprotected.

2. An amendment which requires the court to obtain evidence and make value judgments based upon that evidence would require the Court to take on an inquisitorial role where it perhaps ought not to. In the Family Court, when such information is gathered, it is ordinarily at the request of an Independent Children's Lawyer, a party, or in the child's best interests (the child not being a

party). In the Magistrates Court, were a Magistrate to request such information, it would place the Magistrate in the position of making a determination as to the best interests of a party who, having capacity to give instructions and make legal decisions, had provided a request to the Court to cancel the VRO.

Further, such an amendment would place further strain on agencies with already limited resources and create the necessity for 2 hearings at a minimum to vary or cancel a VRO, with a turn-around rate of some months, between the time necessary to obtain the reports from the agencies and the time necessary to obtain another court date. Once received, it would again place a Magistrate in the position of an investigator, seeking to determine interests based on only the facts of the agencies. Further, where the agencies had no interaction with the parties, it would be en excessive delay with only limited usefulness.

In summary, such an amendment would do little to deal with the reasons that may have motivated an individual to seek a cancellation or variation of a VRO, such as returning to a violent relationship, and would further act to disempower victims of domestic violence. Finally, it may cause some individuals to become (perhaps even further) disenfranchised with a system that removes decision making power from them and act to alienate people from making applications in the first place.

3. This is an amendment which, in our view, would be in keeping with victim's rights and ensure that people applying were empowered and not place the court in the position of investigator and decision maker. We would support an amendment of this nature as it would ensure that women who were seeking to return to violent relationships would be able to obtain assistance and referrals to agencies that could help them, and be empowered to reach decisions in their own best interests, rather than having a court dictate them to them. We would also recommend including the Applicant receiving independent legal advice as a prerequisite for the court to hear an application to cancel a VRO.

QUESTION 13 (page 90)

Should the legislation provide that if the hearing has to be adjourned to enable this information to be obtained, the court is to consider varying the conditions of the violence restraining order and the order should only be varied if the court is satisfied that to do so would not cause substantial risk to the safety of the person protected by the order?

RESPONSE:

Such a variation would be dependent on the circumstances and the minimum period of time an adjournment will be for. For example, if an adjournment could be for as much as 3 months and the parties have reconciled, it may be necessary to vary the VRO to ensure a situation does not arise where a person bound is subject to unnecessary criminal proceedings. However, such a variation may not be mindful of victim's rights, and may create a situation where a person suffers violence or abuse as a result of a VRO not being cancelled. The reasons for the variation sought would need to be carefully examined, together with the effects of the potential variations.

It further raises the issues discussed above, as to what a "substantial risk" will be identified as and how the Magistrate will be enabled to determine a "substantial risk" to the person protected.

PROPOSAL 24 (page 91)

1. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that a court may vary or cancel a violence restraining order on its own initiative.
2. That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that a court may only vary or cancel a violence restraining order on its own initiative if the person protected by the order has been given an opportunity to be heard.

RESPONSE:

1. This question arises out of section 61B(4) of the RO Act, which allows for the court, at the time of sentencing, to vary or cancel an order as though it were hearing to vary or cancel where the court is satisfied that the person protected aided in the breach. The suggestion was made that, where the Court has ample evidence of a person protected has continued contact with the person bound, they may vary or cancel the order without hearing the person protected and without waiting for an application from the person bound. The scenario envisaged by the Commission was where the Court was considering relaxing protective bail.

   In our view, such an amendment would not be appropriate. First, it suggests that the Court is penalising a person protected by removing the VRO designed to protect them, rather than placing the onus on the person bound of ensuring contact is cut off. It also places the Court in the position of making the application on behalf of the person bound. In our view, a more appropriate amendment would be to stipulate the provision for referrals to victim counselling and other support services or to provide both parties with information regarding an application to vary or cancel an order.

2. Should any amendment be made whereby the Court is empowered to alter a VRO of it's own initiative, it would be necessary to hear from the person protected to determine the reasons behind the breach and the potential of any ongoing risk. In cases where the Court is made aware of breaches of the VRO on the part of the person protected through criminal proceedings for breaches of VROs, it is undoubted that the information given to the Court will be provided by the person bound and will inevitably be slanted by their view. As such, it would be necessary for the Court to determine the full factual scenario before making a determination, to ensure procedural fairness to both parties.

   Any amendments whereby the Courts have the power to vary or cancel VROs should, in our view, be treated cautiously. It would create increased strain on the Magistrates Courts and would increase pressure on Magistrates

themselves. It would also create a de facto appeals process whereby Magistrates would review the decisions other Magistrates had made at a final order hearing as to the necessity and appropriateness of a VRO.

QUESTION 14 (page 92)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) include provisions that enable a court to include a condition that a person bound by a violence restraining order attend a treatment program, and if so, in what circumstances should this occur?

RESPONSE:

The Network and Women's Council would not support imposing conditions to attend treatment programs on VROs. As it is not an offence to be bound by VRO, we consider it to be inappropriate for the courts to impose what is in effect, a sentence. In addition, if orders are made at an ex parte hearing, the respondent wouldn't have had the opportunity to respond to any allegations and treatment may not be necessary or appropriate.

The Network and Women's Council are also concerned regarding penalties if the person bound has not complied with the condition to enter into a program, as it could amount to a breach of the order (and would be against the intent of the recommendation from the National Family Violence Inquiry that this question arises from). If not attending the program does not constitute a breach, then it would send an inconsistent message to perpetrators about the importance of not breaching a court order and could potentially lead to other breaches.

We would therefore suggest mandating that referrals to either information sessions about treatment programs, or treatment program intake assessments be made instead. If it is to be the case that treatment programs can be made as a term to a VRO, this should not be done without research into the effectiveness and potential consequences thereof in jurisdictions that have such provisions.

QUESTION 15 (page 95)

1. Should s 61A of the *Restraining Orders Act 1997* (WA) be amended?
2. Should s 61A of the *Restraining Orders Act 1997* continue to apply equally to breaches of police orders and breaches of violence restraining orders?

RESPONSE:

1. No. Given that there is currently no mechanism for ascertaining a serious breach from a less serious breach and that some potentially less serious breaches may be easier to prove than more serious breaches, we believe it is essential not to take away judicial discretion and we do not advocate for mandatory sentencing. We feel that such a scheme could result in situations where victims are further traumatised by the system as it is often our experience that due to inadequate Police training, a victim may be also named as a POI. Due to the failure of establishing a fact-pattern of the whole context and instead, just looking at a particular incident where a victim may have retaliated or used self-defence, etc we raise concern that this could lead to situations where without judicial discretion, victims may be penalised.

   We further submit that adequate Police training could substantially resolve some of these current issues.

2. Yes. We do not see reason to distinguish between the breaches.

PROPOSAL 25 (page 96)

That the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to enable circumstances where the person protected by a violence restraining order or police order has actively invited or encouraged the person bound to breach the order to be considered a mitigating factor in sentencing (but only where there is no other conduct on the part of the person bound by the order that would amount to family and domestic violence).

RESPONSE:

The Network and Women's Council see no issue with this proposal where there is no other conduct on the part of the person bound by the order that would amount to family and domestic violence

PROPOSAL 26 (page 97)

That s 62 of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that any contact between the person bound and the person protected by an order that occurs by reason of a person complying with obligations in relation to any court proceedings (including the obligation to attend court) is a defence to a charge of breaching a restraining order.

RESPONSE:

The Network and Women's Council support this proposal there is no other conduct on the part of the person bound by the order that would amount to family and domestic violence or breach any other terms of the order. We raise the issue however regarding adequate training for court security staff including employees of contractors. It has been the experience of some of our clients that they are caused great distress when they are unnecessarily placed in the same area as the respondent, when sensitivity for their situation has not been demonstrated.

PROPOSAL 27 (page 97)

That the Department of the Attorney General investigate and consider options for providing information sessions and access to legal advice to respondents to violence restraining order applications at all court locations across the state.

RESPONSE:

At the Rockingham Magistrates Court such info sessions are already provided to respondents by SCALES CLC. The aim of these sessions is to provide respondents with information regarding the VRO application process, what options they have to resolve their matters and what will happen if it cannot be resolved. Among other things, the sessions cover what a VRO is (including that it is a civil matter), what

breaches are (including that a breach is a criminal matter), how to read a VRO, the application process, options at the mention, etc.

We therefore generally are supportive of this initiative and in line with our response to Question 14, recommend that information and warm referrals to treatment programs and other services be included in the information sessions. We also caution that any funding or resources in relation to legal aid for respondents should not outweigh or take away from legal aid available to victims.

QUESTION 16 (page 98)

1. Should the *Restraining Orders Act 1997* (WA) be amended to provide that a misconduct restraining order can be imposed where the applicant and the respondent are in a family and domestic relationship so long as the court is satisfied that there has not been and there is unlikely to be any family and domestic violence committed against the person seeking to be protected?
2. Further, if the *Restraining Orders Act 1997* (WA) is amended as suggested in 1, above, should the legislation also provide that the making of a misconduct restraining order between the parties does not prevent the person protected by the order from applying for a violence restraining order at any time?

RESPONSE:

1. The example given in the Discussion paper is where someone needs a restraining order for a family member who is in a different State and who is sending them harassing phone calls. In such a situation, owing to a family relationship, the submission is that the individual would be best served by having a Misconduct Restraining Order ("MRO") but they would be unable to obtain one as a family relationship exists.

   Section 34 of the RO Act states:

> *A court may make a misconduct restraining order if it is satisfied that —*
>
> *(a) unless restrained, the respondent is likely to —*
>
> *(i) behave in a manner that could reasonably be expected to be intimidating or offensive to the person seeking to be protected and that*

would, in fact, intimidate or offend the person seeking to be protected;

(ii) cause damage to property owned by, or in the possession of, the person seeking to be protected; or

(iii) behave in a manner that is, or is likely to lead to, a breach of the peace;

and

(b) granting a misconduct restraining order is appropriate in the circumstances.

In cases where a person is in a family and domestic relationship with someone, the Magistrates Court must determine that there has been an act of family or domestic violence and that, unless restrained, it is likely to occur again. It is worth noting that the definition of *family and domestic violence* in the RO Act includes (at section 6(1)) "…(c) damaging the person's property… (d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive." Whilst it does not include acting in a manner likely to cause a breach of the peace, this is often included on VROs themselves as prohibited behavior.

It is clear then that the prerequisites for a MRO include some of the prerequisites for a VRO. What this suggests is that, with the exception of a breach of the peace, if a Magistrate determines that an act under section 34(a) has occurred then a finding must be made that an act of family and domestic violence has taken place. Therefore, the question is wrong- there cannot be a finding that an MRO can be granted as no act of family and domestic violence has occurred, because to find a reason for an MRO under section 34 will mean finding an act of family and domestic violence where the parties are in a family and domestic relationship. That is, if a Magistrate determines on the facts that a person has behaved in an intimidating manner towards someone in a family or domestic relationship, can they then find that no act of family or domestic violence has occurred and prefer a MRO?

The behavior outlined in the example is where an Aunt makes harassing phone calls to someone interstate, and the suggestion is that this is not family or domestic violence. However, if it falls within section 34(a), it must also fall within section 6(1)(d), as it is considered threatening or intimidating behavior.

It is our submission then that the same elements of section 34 exist in the definition of family and domestic violence in section 6. The only difference existing now is the question of a family or domestic relationship- where one exists, a VRO is preferred, where one does not exist, a MRO is preferred. This is a recognition, in our view, of the increased risk in family and domestic violence of escalation of violence.

The second limb of the section 34 test for an MRO is contained in section 34(b) which refers to the appropriateness in all the circumstances. If any alterations are to be made to the provision of MROs to people in family and domestic violence relationships, it must be based on this. Cases where it may be appropriate in all the circumstances may need to be more clearly specified to include, for example, where the parties are geographically isolated form one another, where the relationship is not one wherein the parties are current or former partners or where there is a minimal risk of physical or direct domestic or family violence.

The potential benefits of this alteration would largely result in those who breach MROs facing smaller penalties than if they had breached a VRO.

It is unclear if this alteration would have any practical difference to the pressures placed on courts, as MROs are as likely to be carried through to a final order hearing as VROs. It would also mean that parties were unable to obtain an interim order as MROs do not provide for interim orders to be made.

Another issue to be rectified will be in the provision of costs. If, at the conclusion of a final order hearing for a VRO, a Magistrate makes a MRO, what will be the potential costs implications of this? Will either party be in a

position to make an application? This would need to be altered to reflect what will be required to take place.

A further issue will be inequitable distribution of the changes. For example, some Magistrates may be more likely to make an MRO at a final order hearing for a VRO matter- this may be in light of the usual significant gap in time between an application and a final order hearing. The determination may be made that a VRO is no longer necessary when in fact it may be the more stringent penalties that have prevented a breach from occurring.

Finally, there is a significant possibility of abuse. It may have the result of people who should have the protection of a VRO having the protection of an MRO, which does not carry the same exhaustive restrictions, and the result may be people coming back to the Court to obtain a VRO because their MRO is not providing the required protection. Further, an MRO is generally viewed as a less serious matter, and prosecution may not be pursued in the same manner as breaches of a VRO. There are no mandatory sentencing laws surrounding MROs, and there may become issues with serial offenders.

Whilst this exception may be created, it should be used only stringently in circumstances that do not call for a VRO. This will, ultimately, be a discretionary issue for Magistrates. Where clients are faced with the possibility of an MRO or nothing, because the magistrate is not satisfied that a VRO is appropriate in all the circumstances, an MRO will be the preferable outcome. However, the alteration must be accompanied with caveats. In particular, it may be appropriate to include a penalty that where parties are in a family or domestic relationship, a breach of an MRO will include the option for the Magistrate to alter the order into a VRO. It should also be clearly stated that a MRO may only be used where parties are in a family or domestic relationship but have not, in the past 2 years, resided in the same home.

In such circumstances, we would support such an alteration to the legislation.

2. Should any such change be made, pursuant to subsection 1, it should include within it an allowance for parties to apply for a VRO at any time. It may not be necessary to include such an alteration, however it may increase clarity in the implementation of the legislation, and so ought to be included in any legislative changes to MROs.

QUESTION 17 (pages 100)

Should the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide for 'consent orders' as an alternative to the current process of undertakings with the following characteristics:

a. A consent order is an order of the court and is to be specifically registered.
b. A consent order may include conditions to be complied with by the respondent to an application for a violence restraining order only or by both the respondent and the applicant.
c. The court making the consent order is to provide a copy of the order to the Western Australia Police.
d. Failure to comply with the conditions of a consent order can be enforced on the application of the person aggrieved by the non-compliance (or by a police officer, child welfare officer or other authorised person on their behalf) and can attract specified sanctions such as a monetary bond, a requirement to participate in an intervention program or a fine.
e. A court is to be satisfied that a person has failed to comply with the conditions of consent order on the balance of probabilities.
f. A finding that a person has failed to comply with the conditions of a consent order is sufficient evidence to satisfy a court that there are grounds for a violence restraining order to be made out unless there are exceptional circumstances to decide otherwise.

RESPONSE:

As per the discussion paper, although an undertaking can be a useful tool to later use in obtaining a VRO (if breached) where an applicant does not have enough

evidence to initially obtain a VRO, our clients are often pressured into undertakings and often in scenarios where they do have grounds to obtain a VRO and often they are not aware that undertakings are unenforceable. We therefore appreciate what this proposal is trying to achieve. We are concerned however, about the practical effect such provisions might have. For example, is it likely that specified persons will enforce such orders, or is it more likely that an applicant would just go and apply for a VRO based on the new circumstances? Also, is it likely that a potential consequence could be a rise in these types of orders where an applicant actually has grounds and would be better protected by a VRO? We propose that any such provision be carefully monitored and adequate data collected to ensure victim safety is not being compromised.

QUESTION 18 (page 100)

1. Are there any practical issues concerning the registration of interstate violence restraining orders under the *Restraining Orders Act 1997* (WA)?
2. Does the *Restraining Orders Act 1997* (WA) require any reform in relation to interstate orders?

RESPONSE:

As part of the National Plan to Reduce Violence Against Women and their Children, Strategy 5.3 *Justice systems work better together and with other systems* requires further work to continue the development of a national scheme for domestic and family violence orders. This move would improve cross-jurisdiction mechanisms to protect women and their children through a national approach to domestic and family violence orders.

Criminal offences

PROPOSAL 28 (paged 108)

1. That the definition of 'violent personal offence' in s 63B of the *Restraining Orders Act 1997* (WA) be expanded to include criminal damage by fire (s 444), disabling by means of violence in order to commit an indictable offence (s 292); stupefying in order to commit an indictable offence (s 293); acts with omission to cause bodily harm with intent to harm (s 304); and acts intended to cause grievous bodily harm (s 294).
2. That the *Criminal Code* (WA) be amended to provide for a higher statutory penalty for the offences of criminal damage under s 444 (other than criminal damage by fire), deprivation of liberty under s 333, threats under ss338A–C, and assault causing death under s 281 if the offence is committed in circumstances of aggravation as defined under s 221.
3. That if 2 above is implemented, s 63B of the *Restraining Orders Act 1997* (WA) should, for the sake of clarity, be amended to remove the offences of deprivation of liberty under s 333 and threats under ss338A–338C of the *Criminal Code*.

RESPONSE:

1. In terms of ensuring consistency and accountability we believe s63B should apply to all FDV-related offences.

2. As per our comments made previously, we would support this because it recognises the seriousness and damaging consequences of family and domestic violence related offences in comparison to crimes not committed in this context.

3. We see no reason not to support this.

QUESTION 19 (page 108)

Should the proposed amended s 63B of the *Restraining Orders Act 1997* (WA) be transferred into the *Sentencing Act 1995* (WA) or the *Criminal Code* (WA) or remain in the *Restraining Orders Act 1997* (WA)?

RESPONSE:

Yes. This section should be transferred as it not related to restraining orders.

QUESTION 20 (page 109)

Should the Western Australia Police be required to record, as a circumstance of aggravation alleged in relation to a particular offence as part of the offence description, whether the victim and the accused were in a family and domestic relationship? If so, should this be recorded:

a. in the statement of material facts;

b. in the prosecution notice; or

c. elsewhere?

RESPONSE:

Yes. This proposal reflects recommendation 12-7 of the Commonwealth Family Violence Inquiry:

Recommendation 12–7, Family Violence- A National Legal Response (ALRC Report 114)

To the extent that state and territory courts record and maintain statistics about criminal matters lodged or criminal offences proven in their jurisdiction, they should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context. In every other case, state and territory governments should ensure the separate capture of statistics of criminal matters and offences in their jurisdictions that occur in a family-violence related context.

We submit that the FDV offence description should be recorded in both the prosecution notice and the statement of material facts. Duty lawyers will often not

get a copy of the prosecution notice in the first instance, so including FDV in the statement of material facts will be helpful. Inclusion on the prosecution notice will also be helpful because it will ensure it appears on the criminal record. The prosecution notice is also the charge the court relies on in terms of making a conviction and sentence so it will also be helpful in this aspect.

Wording for the prosecution notice could be placed in the description of the offence – e.g. "x unlawfully assaulted Y in circumstances of aggravation, namely that the persons were in a family and domestic relationship at the time of the offence".

Wording for the statement of material facts could simply be placed at the beginning. For example, "X and the victim have been married for Z years".

QUESTION 21 (page 111)

Should the maximum penalty for the offence of assault causing death under s 281 of the *Criminal Code* (WA) committed in circumstances of aggravation be 20 years' imprisonment?

RESPONSE:

Yes. We agree with this proposal as it reflects the difference between one-punch type offences which occur between virtual strangers, and assaults causing death where the victim has a familial or domestic relationship with the offender.

PROPOSAL 29 (page 112)

That the Western Australian government conduct a review into the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of abusive or threatening behaviour undertaken by electronic means.

RESPONSE:

The Network and Women's Council are supportive of this proposal as it is our experience that the application of laws to technology-facilitated stalking and breaches of privacy are not comprehensive. For specific examples of the types of issues typically affecting our clients we direct the Commission to the following resources:

- http://smartsafe.org.au/: a Victorian resource regarding issues of safety and technology facilitated stalking, and
- http://www.alrc.gov.au/publications/invasions-privacy-ip43: The issues paper in relation to the ALRC "Invasions of Privacy in the Digital Era" Inquiry.

We also can provide copies of submissions focussing specifically on the context of FDV to the above inquiry from community legal centres, upon request.

Criminal practice and procedure

PROPOSAL 30 (page 116)

That clause 2(2a) of Part D, Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that on a grant of bail for a purpose set out in subclause (2)(c) or (d) a judicial officer or authorised officer must consider whether that purpose might be better served or assisted by a violence restraining order, or protective bail conditions, or both.

RESPONSE:

Due to the potential for unnecessary duplication, we think it would be unlikely that Magistrates would impose both a VRO and PBC. We feel that training for the judiciary and Prosecutors around the power to make VROs at the time of considering bail, or provisions for IVROs to be automatic upon any FDV-related criminal charge, would be more appropriate.

PROPOSAL 31 (page 116)

That before setting or amending protective bail conditions for an offence involving family and domestic violence, the judicial officer or authorised officer must consider whether there is an existing interim or final violence restraining order between the accused and the victim of the offence and, if so, the court is to ensure that the conditions of bail and the conditions of the violence restraining order are compatible unless to do so would pose a risk to the safety of the victim.

RESPONSE:

The Network and Women's Council support this proposal as it is our experience that people may often not understand the way VROs, PBC and Family Court Orders interact. This proposal would minimise breaches arising from confusion around these matters.

Additionally we note and endorse:

Recommendation 10–3, Family Violence- A National Legal Response (ALRC Report 114)

State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of:

a. decisions to grant or refuse bail; and
b. the conditions of release, where bail is granted.

Victims should also be given or sent a copy of the bail conditions. Where there are bail conditions and a protection order, police and prosecutors should explain how they interact.

Police codes of practice or operating procedures, prosecutorial guidelines or policies, and education and training programs should reflect these obligations. These should also note when it would be appropriate to send bail conditions to family violence legal and service providers with whom a victim is known to have regular contact.

PROPOSAL 32 (page 116)

That s 16A(3) of the *Bail Act 1981* (WA) be repealed.

RESPONSE:

The Network and Women's Council agree with this proposal. At present there is an inconsistency in police powers in terms of bail. For example, police have discretion to consider bail for charges such as sex offences, assaults, etc, but not for breach of VROs. There is also currently the danger that a police officer will choose not the charge (particularly for low-end of the scale offences), because of the inability to consider bail pursuant to s16A(3), once they arrest. Where an offender is charged, it can mean that they may spend up to 2 nights in custody for an offence they may or may not get a jail term for. The consequences of this include impact on penalty (which may not reflect the seriousness of the offence), potentially less charges being laid, sending the wrong message to offenders that breaches aren't serious and the law is just 'unreasonable' and victims can be hesitant to report if they know it will mean the OP has to spend a night in custody.

In addition to police orders, there are appropriate bail conditions available that can be put in place to protect victims. If there are breaches of these conditions then offenders will need to go before a court and will be charged with a Sch II in any event.

PROPOSAL 33 (page 118)

That funding be provided to the Family Violence Service (and other relevant agencies such as Victim Support Services) to enable bail risk assessment reports to be prepared for the purpose of considering bail conditions for all cases involving specified family and domestic violence offences unless the accused does not object to the inclusion of full protective bail conditions being imposed (ie, that no contact at all is permitted between the accused and the victim).

RESPONSE:

The Network and Women's Council are supportive of this proposal. Such a standard must be adequately resourced, carried out by adequately trained professionals and attended to expeditiously.

QUESTION 22 (page 118)

Should the *Bail Act 1981* (WA) explicitly provide that a court hearing a bail application in relation to an accused who has been charged with specified family and domestic violence related offences can request a bail risk assessment report to be prepared?

RESPONSE:

It is our experience that many Magistrates are unaware that these reports exist. This provision would also assist in time delays. Currently, Magistrates will have to adjourn a person to the next available FVC day, order the report in that court, then return for assessment. If the report could be ordered immediately, much time would be saved.

As we consider these reports to be invaluable for courts to have at their disposal when making bail decisions, we feel that these reports should not be ordered on a discretionary basis, but rather as outlined in the proposal above.Formal legislative recognition of these reports could also potentially assist with encouraging greater funding towards this initiative.

PROPOSAL 34 (page 118)

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every family and domestic violence related offence includes the accused's national criminal record as soon as is practicable after the person is charged.

RESPONSE:

We support this.

PROPOSAL 35 (page 120)

That the Department of the Attorney General and the Department of Corrective Services jointly undertake an audit and a review of the outcomes of all existing Western Australian treatment programs for family and domestic violence offenders.

RESPONSE:

The Network and Women's Council agree with this proposal.

At present we recognise there are significant gaps in perpetrator programs and limited evidence-based data to support their effectiveness. There is also a tendency for programs to rely on a 8 -12 week course or program rather than an emphasis on long-term treatment and management of offenders. For some offenders it may be a life-long pursuit in behavioural change. Investment in identifying, monitoring and treating FDV offenders is vital to ensuring the safety of women and children.

Other noted limitations include the fact that FIFO workers and linguistically diverse people may be ineligible for programs available and there is a lack of available services for individually tailored programs. Many programs rely on group work and there is little emphasis on individual therapy.

PROPOSAL 36 (page 121)

That when responding to the review of the *Sentencing Act 1995* (WA) the Western Australia government specifically consider whether any proposed reforms provide adequate options for family and domestic offenders and whether any additional reforms are required to ensure that the available sentencing options are appropriate.

RESPONSE:

We support this proposal.

PROPOSAL 37 (page 122)

That the Department of the Attorney General develop an IT process that enables all family and domestic violence restraining orders to be included in one database and accessible by the Prisoners Review Board.

RESPONSE:

The Network and Women's Council are supportive of this proposal as it addresses similar issues noted in our response to Proposal 31 above, and will assist in reducing breaches arising from confusion between the interaction of VROs and Parole Conditions.

PROPOSAL 38 (page 124)

That after two years has elapsed since the GPS tracking system for dangerous sexual offenders under the *Dangerous Sexual Offenders Act 2006* (WA) commenced, the Department for Corrective Services undertake a review of the effectiveness of GPS tracking including consideration of:

a. The number of offenders subject to GPS tracking;
b. The cost of GPS tracking per offender;
c. The number of offenders who interfered with the device;
d. The circumstances in which alerts were received by the monitoring unit and the effectiveness of the responses to these alerts; and
e. Whether GPS tracking should be expanded to other persons including family and domestic violence offenders and persons bound by violence restraining orders and, if so, in what circumstances.

RESPONSE:

The Network and Women's Council are supportive of the Review, provided any proposals to introduce such a scheme in this context are open for public consultation. Our concerns largely arise in relation to including conditions on VROs ordering respondents to wear such a device where there has been no breach or offence. However, we would support the use of GPS being introduced as part of a

12 month trial period (within nominated metropolitan region) in high risk cases where it is known by authorities and/or the victim's report that they have threatened to kill and there has been sufficient evidence in regard to a number of factors such as:the seriousness of the abuse;

- the appropriateness of electronic monitoring to protect the applicant;
- welfare of the children
- past criminal history of the respondent;
- the applicant's consent to electronic monitoring; and
- any other matter the Court considers relevant.

The use of GPS tracking could be appropriate as a condition of bail, parole conditions if related to a FDV offence and/or as a form of diversion from incarceration. In the event that respondents do interfere with the device, this must be a red flag and a further breach whereby intervention strategies to respond to this by authorities can be put in place to ensure victim safety.

PROPOSAL 39 (page 125)

That s 63A of the *Restraining Orders Act 1997* (WA) be amended to include the offences of acts intended to cause grievous bodily harm or prevent arrest under s 294 of the *Criminal Code* (WA) and kidnapping under s 332 of the *Criminal Code* (WA).

RESPONSE:

The Network and Women's Council agree with this proposal. We also submit that there are other FDV-related offences that should also be included (i.e. sexual offences and indecent offences, etc).

PROPOSAL 40 (pages 126-127)

That ss 63 and 63A of the *Restraining Orders Act 1997* (WA) (or any new legislation dealing with family and domestic violence restraining orders) be amended to provide that:

a. If a person is charged with a specified offence, the court is to make an interim violence restraining order and the determination of whether the interim order should be made into a final order is to occur at the time of the determination of the charge.

b. If a person is convicted of a specified offence, the court is to make a final violence restraining order.

    i. If the offence is a violent personal offence as currently defined under s 63A (or as defined under Proposal 39 above) the violence restraining order is to be imposed for life.

    ii. In any other case, the court has discretion to determine the duration of the violence restraining order; however, the court is required to consider the length of any sentence imposed for the offence including the time the offender will spend in custody serving a sentence of imprisonment.

c. That before making an interim or final violence restraining order under (a) or (b) above the court is to provide the person who would be bound by the order and the person who would be protected by the order with a reasonable opportunity to be heard in relation to the making of the order.

d. The court is not to make an order under (a) or (b) above if it is satisfied that the order is unnecessary for the protection of the person who would be protected by the order.

RESPONSE:

In relation to the use of section 63A and 63, prosecutors often neglect to request VRO and in most cases where a guilty plea is taken, there is no voice from the victim. We therefore agree with this proposal in principle but query whether the provisions set out in the NSW Crimes (Domestic and Personal Violence) Act 2007, would be a better model. We support the notion that there should be a presumption for a VRO where guilty pleas are made in certain offences and for charges of certain offences. It is our experience that the discretion to make a VRO during criminal and other proceedings is vastly underutilised and contributes to the duplication outlined in the discussion paper.

QUESTION 23 (page 127)

In addition to the offences currently covered by s 63A of the *Restraining Orders Act 1997* (WA), what other offences should be specified for the purposes of the above proposal?

RESPONSE:

Section 63A only applies to 283 (attempted murder), 297 (GBH)and levels of unlawful sexual penetration 325-28 in the Criminal Code, in no way does it include all violent personal offences that are included in the definition of ***act of personal violence*** in section 6 or **violent personal offence** in s63B. We therefor argue that in addition to s63B offences being included, offences outlined in s6 also be included (i.e. stalking/pursuing), as well as any indecency or sexual offences (often our clients have to seek VROs separately) and any FDV-related offence that results in a prison-term.

QUESTION 24 (page 128)

Are there any difficulties in practice for victims of family and domestic violence being declared as special witnesses under s 106R of the *Evidence Act 1906* (WA) and having access to the special arrangements for giving evidence provided for special witnesses?

RESPONSE:

The difficulties arising in practice of this provision is that it is not practiced. It is our experience that this provision is rarely used. We support the expansion of s 106R to declare victims of family and domestic witnesses prima facie as special witnesses. Whilst there might not be issues in practice, and though it falls to the prosecution to apply for the order, legislative enshrinement offers an extra level of protection free from practice errors. We consider that it should be up to the victim to waive this protection if they choose to do so.

Many victims are still under the control of perpetrators through the court process, and many perpetrators use the court process to further intimidate and control

victims – who might not feel able to speak out about this. Removing uncertainty about special witness status through legislation also articulates the message that the dimensions of family and domestic violence are being taken seriously, and that the court process is attuned to factors that might impede the efficient carrying out of justice.

This issue is also related to the current ability of family and domestic violence perpetrators to represent themselves in court. In cases where special witness protection is not prevailed upon for instance, perhaps because it is not considered a more serious sort of incident, this could potentially cause further trauma to the victim and prevent the case from running smoothly. Indeed, lawyers have observed that self-represented litigants often use their day in court to continue or create control and intimidation. What might not have been considered worthy of applying for an order of s106 R, might escalate to be as such – especially with the threat of official action such as a court case.

QUESTION 25 (page 129)

Should the *Evidence Act 1906* (WA) be amended to provide that a prior inconsistent statement made by an alleged victim of a family and domestic violence related offence is admissible to establish the truth of its contents and, if so, in what circumstances should this be permitted?

RESPONSE:

We do not have a definitive position in relation to this question but encourage any such provision to be based on evaluations or research in relation to similar provisions in other jurisdictions.

Specialist Family Violence Courts

PROPOSAL 41 (page 132)

1. That the Western Australia Police policy on family and domestic violence stipulate that an accused who has been charged with a family and domestic violence related offence and who is not in custody must, as far as is practicable, be required to attend court for the first appearance at the next available sitting of the relevant Family Violence Court in the metropolitan area.
2. That the Western Australia Police ensure that police officers are informed of this requirement as part of their regular training in relation to family and domestic violence.

RESPONSE:

The Network and Women's Council support both tiers of this proposal.

PROPOSAL 42 (page 133)

That the Department for Child Protection and Family Support enable the officer who is part of the Family Violence Court case management team to attend court (one day per week) in each court location.

RESPONSE:

We support this recommendation, as DCPFS are an integral part of the Triage model that assesses family violence incident reports and has a key role within the case management team at the Family Violence Courts. Their input into the case management team will particularly be beneficial in relation to risk issues for children

PROPOSAL 43 (page 135)

That s 16(2) of the *Sentencing Act 1995* (WA) be amended to provide that the sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

RESPONSE:

The Network and Women's Council agrees with this proposal.

PROPOSAL 44 (page 136)

That the Family Violence Courts operating at Midland, Joondalup, Perth, Rockingham, Armadale and Fremantle and the Barndimalgu Court in Geraldton be prescribed as speciality courts under the *Sentencing Act 1995* (WA).

RESPONSE:

The Network and Women's Council are supportive of this proposal. It is our view that the Family Violence Courts need to be further resourced and legislatively recognising the Courts may facilitate this. Additionally, this proposal would align closely to international standards as per the UN Handbook for Legislation on Violence against Women:

3.2.5. Specialized courts

Recommendation

Legislation should:

• provide for the creation of specialized courts or special court proceedings guaranteeing
timely and efficient handling of cases of violence against women; and

• ensure that officers assigned to specialized courts receive specialized training and that
measures are in place to minimize stress and fatigue of such officers

QUESTION 26 (page 137)

Should a pilot integrated specialist Family Violence Court be established in Fremantle Magistrates Court to deal with all family and domestic violence related criminal offences (including bail, sentencing and trials) and all family and domestic violence related violence restraining order applications (including ex parte applications and contested hearings)?

RESPONSE:

We agree to this in principle as a goal is to create a collaborative and seamless response to FDV and would ensure VROS are provided by specialist magistrates. However, any such trial should be well thought out and include adequate consultation of stakeholders and should include or consider the following:

- Evaluation reports of the existing Family Violence Courts (which should be made publically available);
- Managing the potential for conflicts of interest to arise (i.e. the DVLU would be unable to assist a victim where Legal Aid Fremantle is assisting a perpetrator- adequate resources would need to be provided to alternative service providers, etc to overcome this);
- Any potential issues arising in relation to info-sharing as a result of defence duty lawyers sitting in on case management meetings, which could place victims at risk;
- Adequate funding, evaluation and consultation; and
- Any other matters that should be considered.

Interaction of violence restraining order proceedings with the Family Court

PROPOSAL 45 (page 144)

1. That the Department of the Attorney General develop an IT process that enables the Children's Court to access the records of the Magistrates Court and the Family Court of Western Australia.
2. That the parties to the *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in Matters Involving Family Violence* (2009) review and revise the protocols to ensure that they adequately enable appropriate and effective information sharing; include the Children's Court of Western Australia; and

ensure adequate information and training is provided to staff to properly request and provide the information provided for in the protocols.

RESPONSE:

We support this proposal.

Victim Rights

PROPOSAL 46 (page 150)

That the definition of a victim under s 2 of the *Victims of Crime Act 1994* (WA) be expanded to include a wider range of persons who may be harmed as a result of an offence (in particular, parents and guardians of children).

RESPONSE:

We agree with this proposal in the circumstances detailed in Question 27.

QUESTION 27 (page 150)

1. Which categories of persons should be included in the expanded definition of a victim under the *Victims of Crime Act 1994* (WA)?
2. Should the *Victims of Crime Act 1994* (WA) include a complaints mechanism to enable a victim to lodge a complaint about his or her treatment by the legal system and other relevant agencies and, if so, how should such complaints be dealt with?

RESPONSE:

1. There are a few categories of person that should be included in an expanded definition of victim under the *Victims of Crimes Act* 1994 ('the Act').

   Firstly, considering the expansion of categories under s 2 (a). Currently the definition of 'victim' in s 2 (a) of the Act only encompasses persons who have experienced loss, injury or damage as a direct result of an offence. The network is concerned that this definition does not recognise two pertinent categories of victim:

   a) children who are exposed to domestic or family violence. Section 11B the *Restraining Orders Act* 1997, provides that restraining orders may be made if a child is exposed to family and domestic violence and is likely to be so again; or if it is reasonably suspected that the child will be exposed to such a situation AND if it reasonable in the circumstances to do so.

   However, this does not allow for the child to be construed as a victim in the strict term of experiencing the offence directly. Children who are exposed to domestic and family violence potentially suffer great damage. Research indicates that depression, anxiety, decreased cognitive functioning, increased aggression, and alcohol and drug dependence are among the possible outcomes for children depending on the type and length of exposure. Children in such situations who are exhibiting signs of injury can thus form a kind of secondary victim, who would, for instance, require and benefit in the short and long term from support services the legislation affords to victims.[1]

   b) Parents, guardians or figures who are not legally specified as such, but equate to parents or guardians in certain familial arrangements when a child (a person under 18) is the primary victim of an offence and the parental figure is not the offender. This will ensure access to

1 http://www.wdvcs.org.au/files/D72814041.pdf, pp. 3 – 4. 'Children's Exposure to domestic violence in Australia' *Trends and Issues in Crime and Criminal Justice*, no. 419, June 2011. The Australian Insitute of Criminology

information about the offender is provided to the parent/guardian. This could include figures such as step-parents, certain persons who occupy the parental or guardian role towards a child according to customary law or tradition in Aboriginal communities or near relatives who might occupy such a role towards a child in the absence of a closer figure - such as a grandparent. This would take into account the reality and diversity of familial arrangements.

It should be noted that the Inter-agency working group (IAWG) established after the 2005 review into *Victims of Crimes Act 1994* to look into amendments also recommended that 'victim' be expanded to include the parent or guardian of a child, if an offence is committed against a child and the parent or guardian is not the offender.[2] Indeed, the IAWG advocated that application of the Act should reflect the original spirit of the Act as expressed in a second reading speech – that the definition of victim is intended to encompass not just the primary victim but secondary victims who suffer genuine harm as a consequence of the offence. [3]

The DPP also approved IAWG's recommendation and noted that complex parenting arrangements would have to be considered.[4] These recommendations were articulated and endorsed in the 2011 Review of the Act, but have not been put into force.

We support the spirit of the IAWG recommendations. We recognise that opening up the Act to secondary victims for all offences would potentially create a much wider net of victims and require an increase in resources. However, such a change would bring WA legislation in line with other jurisdictions such as Victoria[5] and NSW[6]

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2 http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3911146aa11e9d001603ace448257c2200174801/$file/1146.pdf, p. 8

5 s 9, *Victims of Crime Assistance Act* 1996 (VIC)

that have mirroring provisions, and also reflect more the contemporary understanding in the justice system of the effects of violence on persons and communities. It would also be possible to limit the categories of second victim by restricting it to offences that involve children in family situations, whilst still managing to capture the categories that we endorse above.

Secondly, the definition and categories of victim under s. 2 b) also requires expansion. Section 2b) creates a category of secondary victims out of 'immediate family' in the event of a primary victim's death due to an offence. The IAWG proposal suggested firstly that the Act be amended to include 'incapacity' in addition to 'death', with the DPP supporting this proposal. It also suggested that 'immediate family' should be defined in the Act in a way that takes into account today's realities, multicultural notions of family and Aboriginal concepts of family. It also found in consultation that making a decision as to what constitutes appropriate immediate family was preferred to be left to internal guidelines of an agency and not court determinations.[7] The 2011 report that responded to IAWG's proposals suggested a 'hierarchy of family' be developed similar to s 3 of the *Guardianship and Administration Act* 1990. [8]

We support the expansion of victims in s 2(b) to include incapacity as well as a more nuanced understanding of 'immediate family' under the Act, similar to the expansion of 'parental' role suggested with regards to 2 (a) above. We no disagreement with internal guidelines being developed to guide agencies in this matter but stress that the potentially different notions of immediate family should guide this process on a case by case basis, and note that a too strict hierarchy could hinder a nuanced approach. We additionally note a legislative definition of immediate family (similar for instance to the s 22 (3) of the *Victims Rights and Support Act* 2013 (NSW)) that explicitly mentions a certain flexibility in a strict definition of family,

[6] s 21, *Victims Rights and Support Act* 2013 (NSW)

particularly with regards to Aboriginal customary law relations, could provide a safeguard to guidelines being challenged too easily.

2. Yes. This would be in line with several other Australian jurisdictions. We suggest a staged process that requires the person aggrieved to first contact the agency, court or person with whom the complaint is concerned. If matters are not resolved there, the person should then be able to write to Victims Services or DoTAG to have the matter addressed in writing within 20 business days. All data from complaints to agencies/courts and DoTAG should be used to find trends in the treatment of victims by agencies.

PROPOSAL 47 (page 151)

That the Supreme Court, District Court, Magistrates Court and Children's Court of Western Australia update or develop their practice directions to ensure that, absent directions to the contrary, all copies of written victim impact statements are returned to the judge's associate (or judicial support officer) immediately after the sentencing proceedings are concluded. Furthermore, the practice directions should specify that any electronic copies that have been provided to the prosecution or defence are to be deleted at the completion of the sentencing hearing.

RESPONSE:

The Network and Women's Council agree with this proposal at it potentially prevents further abuse to the victim and will also ensure procedural consistency.

PROPOSAL 48 (page 151)

That the Department of Corrective Services expand its eligibility criteria for the Victims Notification Register to include a person against whom a family and domestic violence related offence has been committed by the prisoner (at any time) and a person who has a current family and domestic violence restraining order against the prisoner.

RESPONSE:

The Network and Women's Council agree with this proposal.

Criminal injuries compensation

RELATIONSHIPS CLAUSE

This clause refers to section 36 of the Act which bars an award where there is a continued relationship or connection between the victim and the perpetrator. At paragraph two of the response in this section, the Commission has noted that Western Australia and Northern Territory are the only states that have yet to abolish this clause. The data that is relied upon by the Commission tends to suggest that the section is rarely used and that there have been few awards barred in the past five years. The Commission has also noted, at paragraph three, that the section does not provide clarity for the Office.

We submit that it would be preferable, in light of the section's rare use and application, that the Western Australian Act prefer the abolishment of the relationship clause in other states, and consider this to be a national best practice worth following.

CONTRIBUTORY CONDUCT – s41

The Network submitted to the Commission during the consultation that s41 lacks guidance for the Assessor to take into account conduct where FDV is present. The Commission has responded that there appears to be a lack of evidence to demonstrate that the section is an issue in practice. The Commission has also stated that there was only one claim refused because of this section in the past five years. We submit that as s41 provides the assessor with the discretion to either 'refuse or reduce' an award, and therefore it would be prudent to consider claims that have received a significant reduction for conduct which was deemed to be contributory. For example:

- In 2009 an applicant received a reduced award because she hit the perpetrator on the leg with a hammer. This was between being hit on the head with that hammer, and followed with being sprayed with pepper spray.

The Assessor felt that it was just to reduce the award because of this behaviour.[9]

- In 2010, an applicant received an award reduced by $4000 for behaviour which was 'inconsistent with the (post-traumatic stress) symptoms suffered', including her maintenance of a relationship with the perpetrator, to whom she eventually fell pregnant.[10]

- In 2011, an award was reduced to $37, 583 where the applicant allowed her partner to 'stay with her', despite knowledge of the 'offender's propensity to be violent towards her'.[11] While the assault was considered to be of a 'grater ferocity and savagery than any assault previously', it was held that the applicant has contributed to her injuries by allowing the perpetrator to stay. It is noteworthy that, on appeal, the award was increased to the maximum $75, 000.[12]

These cases demonstrate that there is a degree of unfairness present in the current application and first instance interpretation of section 41. The section fails to take into consideration the fear of reprisal that is present in many victims of FDV, and the sense of hopelessness that comes with being caught up in perceived 'less than reliable criminal justice system'.[13] The section does not encourage Assessors to consider that the victim will often be isolated from friends, family or assistance, and instead encourages the use of an objective person test, without consideration being made based on the private occurrences where 'the victim is peculiarly vulnerable' due to 'undue pressure and intimidation...power, and...control'.[14]

Reform of the section would encourage an Assessor to have regard to the present FDV, allowing a consideration of the context of any apparent behaviour, condition,

9 "I" [2009] WACIC 26.
10 *Southworth* [2010] WACIC 3.
11
12
13 Lillian Artz, ' Fear or Failure?' (2011) *SA Crime Quarterly* 37, 9.
14 Community Law Reform Committee, ACT Legislative Assembly, *Domestic Violence: Civil Issues Report 11,* 1996 (Speaking: Ms Tucker) 2036.

attitude, or disposition, which may guide the Assessor's understanding of the victim's life.[15]

A reformed section 41 would read as:

> 41. Behaviour etc. of victim to be considered
>
> In deciding whether or not to make a compensation award, or the amount of a compensation award, in favour of a victim, or a close relative of a deceased victim, an Assessor—
>
> (1) must have regard to any behaviour, condition, attitude, or disposition of the victim that contributed, directly or indirectly, to the victim's injury or death; and may, if he or she thinks it is just to do so —
>
> (a) refuse to make a compensation award because of that contribution; or
>
> (b) reduce the amount that the Assessor would otherwise have awarded.
>
> (2) The term 'just' in (1) must include reference to -
>
> (a) the nature of the relationship between victim and offender, including the presence of
>
> (i) fear;
>
> (ii) power and control;
>
> (iii) intimidation or;
>
> (iv) any other significant pressure.

REPORTING OFFENCES AND ASSISTING INVESTIGATIONS

The Network has asserted to the Commission the need for legislative guidance for Assessors, and has referenced the application of comparative sections in other States. The Commission has responded in the Discussion Paper that there have been no complaints made by Assessors, and the case of *CME* [2004] WACIC 9 is referred to by way of evidence. The LRCWA has also referenced the availability of sufficient appellate law.

15 J Mouzos & T Makkai 'Women's experiences of male violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS)' (2004) Research and Public Policy Series Number 56 for the Australian Institute of Criminology, Canberra, 13.

In response: while no complaints have been made to the Commission about the section, there have been several examples of cases requiring an appeal to receive an appropriate award. This demonstrates that there is an issue with the interpretation of the Act at first instance, and suggests that a complete reliance on appellate law is not appropriate.

The Commission has referred to the case of *CME* which overturned the Assessor's decision at first instance because there had not been an appropriate consideration of the offender's threat to her safety. The District Court held that the section should be interpreted as 'not immediately exclusionary'.[16]

Much of the problem with this section lies with the expectation of communication by the victim with the Police. However, much of a victim's communication will often depend much upon previous experience with the Police force, and therefore impact upon the willingness of a victim of crime to cooperate. Where the victim has interacted with Police previously and there has been an inappropriate response or a failure to react empathetically toward the victim, it can create difficulties for that victim. Rather, use of the section should include reference to the particular circumstances of the victim and the impact that these have upon their willingness to cooperate with Police.

A suggested reform to the section would read as follows:

> 38. No award if Applicant did not assist investigators
>
> An Assessor may not make a compensation award in favour of a victim, or a close relative of a deceased victim, if the Assessor is of the opinion that the victim or close relative did not do any act or thing which he or she ought reasonably to have done to assist in the identification, apprehension or prosecution of the person who committed the offence.
>
> (1) What the victim ought reasonably to have done must be considered with reference to --
>
> (a) the nature of the injury;
>
> (b) the age of the victim at the time of the offence;
>
> (c) the nature of the relationship between the offender and the victim;

16 Ibid, 68.

(d) any influence of power, influence or domination was present, and;

(e) whether the victim was fearful of retaliation, being intimidated or threatened.[17]

TIME LIMITATIONS ON CLAIMS

In response to this proposal, we are happy for the Office of Criminal Injuries Compensation continue to be lenient in their application of section 9 for late applications.

REASONS FOR DECISIONS – s27

The Network submitted that applicants are often not provided with an Assessor's reasons in time to make an appeal. The Comission has replied that a legislative change is unnecessary as an extension may be allowed where the district court holds that it is 'just', or that an applicant is able to be made before the reasons are received.

By way of explanation - when a decision is made to deny or allow an award for compensation under the Act, the applicant will be notified by the Office of Criminal Injury Compensation. Under section 27, an interested party may ask the Assessor, in writing, for reasons for the decision. To appeal the Assessor's decision, an application to appeal must then be filed within 28 days of the making of that decision. Unfortunately, there exists a lengthy backlog of applications for reason and claims generally, and so many victims wishing to appeal will need to make an appeal without reasons and risk running a case without merit, or to wait upon the receipt of reasons and request permission to make a late application to appeal.

Due to the backlog of assessments referenced in the Commission's response, a possible alternative would be to extend the period allowed for appeal, or to allow for a delay in appeal where the applicant was unable to receive their reasons in time.

17 Domestic Violence Legal Network, 'Report on the limitations of the *Criminal Injuries Compensation Act (2003)* in relation to victims of sexual offences and domestic violence' (2010) 14.

The Commissions suggests that an appeal should be lodged before the reasons are received, however this option may only be available where the applicant possesses the finances. At the time of writing, seeking leave to appeal costs $237, the appeal's filing fee is $356 and both trial allocation and the trial will cost $552 per day, according to the District Court website.

We therefore submit that the possibility of making an application to appeal without receipt of reasons would not be cost-effective for the appellant. There can be no way to assess the merit of the appeal and no possibility to determine the appropriate basis for an appeal to be made.

Another potential reform would be to allow for a listing date to be set for each matter. This would allow clients to have a general idea when their claim will be assessed. It may also overcome the perception that exists regarding the more difficult claims being put aside and therefore experiencing an extended delay and ensure that each matter is dealt with in the order of being lodged.

AWARENESS OF THE RIGHT TO CLAIM

PROPOSAL 49 (page 156)

That the websites of the Office of Criminal Injuries Compensation and Victims of Crime be augmented with more detailed information about the requirements and processes for applications for criminal injuries compensation to assist unrepresented applicants.

RESPONSE:

We agree and submit that this would include an online application that would lessen the number of pages and sections that are not applicable to all applicants, as this can be confusing. We also suggest that the forms available online, which currently exist only in PDF, be also available in a Word format, which is often more user friendly.

QUESTION 28 (page 156)

Should police provide victims of crime with an information pack about criminal injuries compensation at the time they make their statement?

RESPONSE:

This would be beneficial to introduce a victim to the existence of the scheme. It may be that minimal information should be provided, allowing any interested persons to contact a community legal centre for further assistance. It is also possible that a small pack could be provided, along with information that will allow the victim to seek further information elsewhere.

PROPOSAL 50 (page 157)

That the Office of Criminal Injuries Compensation publish in its annual report data about awards and refusals of compensation claims in circumstances of family and domestic violence.

RESPONSE:

The Network supports this proposal.

ADDITIONAL PROPOSALS – section 39

In addition to the submissions above, we also recommend that changes be made to section 39.

Section 39 is made up of two elements preventing compensation for applicants injured while committing an offence.[18] This creates a problem for victims of FDV, as illegal drug use developed as a self-destructive coping mechanism may be enough to bar an award.[19]

18 39. No award if victim was engaged in criminal conduct - (1) If an Assessor is satisfied — (a) that a person was injured as a consequence of the commission of an offence; and (b) that the injury was suffered when the person was committing a separate offence, the Assessor must not make a compensation award in favour of the person.

19 Patricia Esteal, 'Battered Women who Kill: A Plea of Self-Defence' (1993) *Australian Institute of Criminology* 38

An award may also be barred where a victim has violently retaliated or resisted an assault. A case in 2013 involved an applicant slapping the respondent to the face.[20] The Assessor considered the action of the victim to have contributed to her injuries. The events may be summarised as follows: the victim has awoken to her partner speaking on the phone about her and her children. Enraged by his negative comments, the victim has slapped the offender, who responded by punching the victim six times to the head, telling her that this assault 'was a long time coming'.[21] The Assessor found that it was 'just' to reduce the amount of compensation awarded to the victim of this incident because she had initiated the assault by slapping the offender.[22] The appeal Court did not agree with the reduction and so overturned this decision.

We would submit that section 39 should consider the context of any alleged criminal behaviour by the Applicant to allow for an appropriate comprehension of the causal factors behind any violence.
Consideration of context would prevent the isolation of events, and ensure that an assault that would otherwise have been considered provocation or retaliation would not limit an application from being compensated. Logically, it cannot be expected that an assault would not involve retaliation at least some of the time. Studies indicate that women with a long-term history of FDV will often retaliate with violence, whether out of self-defence or as a reaction to the assault.[23] Research into the issue of women's violence in relationships tends to show that violence is not for the purpose of 'coercive controlling tactics, systematic threats' or 'to exert power, induce fear or control their male partners'.[24] Often, the use of violence is more likely to be an attempt to resist the violence, rather than continue it.

It is therefore important that an Assessor be aware that each act of physical violence is not the limit of FDV. At present, an Assessor will consider an application by dividing the physical violence into parts - an example being where A attacks B, who

20 *McDavitt v McDavitt* [2013] WADC 22.
21 *McDavitt v McDavitt* [2013] WADC 22, 6.
22 *McDavitt v McDavitt* [2013] WADC 22, 140.
23 M Chesney-Lind, 'Response to Domestic Violence:Wynnum Pilot Project' (2002) 2 *Criminology and Public Policy* 2, 1.
24 S Osthoff, 'But Gertrude, I beg to differ, a hit is not a hit is not a hit: When battered women are arrested for assaulting their partners' (2002) *Violence Against Women* 8, 15.

then hits A, who is then hit once more. This back-and-forth or 'retaliatory violence' is then broken into three events by the Assessor. However, there is no element in the Act that considers threats of violence or intimidation, and so single acts of physical violence are often considered out of the context of the long-term build-up and cyclical nature of violence.25

An appropriate reform of section 39 would appear as follows:

39. No award if the victim was engaged in criminal conduct

(1) If an Assessor is satisfied—

(a) that a person was injured as a consequence of the commission of an offence; and

(b) that the injury was suffered when the person was committing a separate offence

the Assessor must not make a compensation award in favour of the person.

(2) Subsection (1) will not apply where the Assessor is satisfied --

(a) the Applicant may, on the balance of probabilities, have a reasonable defence.

(3) An Assessor must consider the crime in its context, having regard to:

(a) whether the violence is merely retaliatory or resistant;

(b) any threats of violence or intimidation;

(c) the nature of the relationship between the parties, or;

(d) any other matters relevant to the Assessor.

25 Fiona Manning & Gareth Griffith, 'Victims Rights and Victims Compensation: Commentary on the Legislative Reform Package' (Briefing Paper No 12/96, NSW Parliamentary Library, Research Service, 1997) 76, 19-20.

Other matters

PROPOSAL 51 (page 158)

1. That the heads of jurisdiction in each Western Australian court ensure that regular training delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be provided for judicial officers in Western Australia who deal with matters involving domestic and family violence.
2. That judicial officers and others working in existing or new specialist family violence courts be involved in the development of training programs for judicial officers in relation to family and domestic violence.

RESPONSE:

1. We support this much needed proposal. Unfortunately it is often our experience that Magistrates are uneducated about the social science and the evidence base that understands risks associated with violence and abuse in families. They are also held unaccountable for judgements that then impact on victims and children (i.e. homicide whilst on bail, VROs not being granted or poor sentencing for VRO breaches). Courts continue to be a context of re-traumatisation and re-victimisation for women and their children. Not having an up to date understanding of family and domestic violence effects how Magistrates interpret the legislation. Duplication was noted as a common theme during the consultations. The legislation actually already provides quite a few provisions or mechanisms intended at promoting victim safety and court efficiency, but unfortunately are misinterpreted, not known about or rarely used in practice, which leads to duplication issues.

   Regular legislated training from relevant experts, combined with minimum selection criteria for specialist FDV Magistrates and a WA Bench Book on FDV

Cases, will go some way to ensure victims are safe and do not continue to be secondary victims of the courts, that perpetrators are held accountable and that a clear message is sent about the Court's stance that FDV is unacceptable.

2. We support this, but would further argue that a consultative stakeholder and steering committee consisting of professionals in both the NGO and Government sectors should be charged with supporting and directing such a project. This will also further support multidisciplinary and multi-sector collaboration in responding to FDV.

PROPOSAL 52 (page 158)

That the Law Society of Western Australia ensure that there are Continuing Professional Development programs delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be made available to lawyers on a regular basis.

RESPONSE:

We support this proposal.

QUESTION 29 (page 160)

1. Should Western Australia consider the development of a family and domestic violence public disclosure scheme whereby members of the public can request information from the Western Australia Police about a named person and/or where government agencies can request that the Western Australia Police disclose information to another person?
2. If so, in what circumstances should a decision about disclosure be triggered (eg, by application only) and when should disclosure be permitted?

RESPONSE:

1. Yes – we consider that such a scheme would be beneficial overall. We note that this proposed scheme mirrors 'Clare's Law' legislation in the UK which underwent a pilot period and is set to be rolled out as a national scheme (the Domestic Abuse Disclosure scheme) from March 2014[26].

   We also note that debate on the scheme has been ongoing in Australia, and that there are some potential concerns. As the WA law reform report observes, the pilot scheme in the UK was assessed on the basis of process rather than outcome, and with a limited sample size.

   The report also raises the issue that the scheme may contribute to 'a false sense of security when there is no information to disclose', as a lack of reported incidents or a record do not preclude the possibility of domestic violence. This concern was also recently echoed by Janet Loughman, principal solicitor of Women's Legal Services NSW who further wondered whether disclosure could make any difference given that:

   > 'the cyclical nature of violence may mean that women stay with men they know to be violent, believing it won't happen again.'[27]

   On a similar note, in the UK, Polly Neale – chief executive of charity Women's Aid had raised concerns that many perpetrators might not have previous convictions and further warned that the scheme was not a solution to the issue, stressing that:

   > "The most important thing is to spread awareness of the early signs of domestic violence which we often mistake for excessive affection or romantic attitudes, which actually are the beginnings of coercive control."[28]

[26] https://www.gov.uk/government/news/clares-law-to-become-a-national-scheme, Accessed 27th February 2014

[27] http://www.smh.com.au/national/clares-law-should-abuse-history-be-revealed-to-new-partners-20110721-1hqhc.html , accessed 27th February 2014

[28] http://www.bbc.com/news/uk-england-manchester-23432676, accessed 27th February 2014

The charity had also articulated a concern that the scheme could lead to a culture of 'victim blaming' if the victim chose not to leave after disclosure, and expressed that the scheme was no substitute for education and funding for support services.[29]

The Commission's report further notes the nature of the information disclosed could be an issue, as – for instance - disclosure regarding an incident of family violence might not necessarily relate to intimate partner violence. Privacy concerns, and the fact that the alleged offender might have undertaken treatment programs or that the incident might be well in the past were also raised in the report. Similar concerns were also raised recently by the NSW Council for Civil Liberties, particularly that such a law could undermine the 'concept of rehabilitation' and might encourage vigilantism. [30]

While acknowledging these concerns and the limitations of the pilot scheme's process based assessment, we consider that these concerns are easily addressed; especially with an 'educational' feature added to the scheme and that the scheme retains its potential to do substantial good.

If the scheme is modelled closely on the UK scheme, there will be a significant checks and balances approach to revealing information, and a careful selection of the type of information revealed. The UK scheme requires police to ascertain the relationship of the person asking for information to the potential victim; to make a decision if they are well placed to help the person and as to whether they are likely to be able to keep information private. The police may choose not to disclose to the person requesting the information. In addition, the police can be selective about information, making an assessment as to whether certain offences or incidents on a record are likely to be relevant in the current situation. The scheme also contemplates that the police will help the person concerned put in place strategies as to how they may best help the potential victim. Further, before making disclosures to the

[29] http://www.sofeminine.co.uk/personal-life/understanding-clare-s-law-can-it-protect-women-from-domestic-violence-s231328.html
[30] As above

potential victim, a multi-agency decision making process must be held and the disclosure will only be made if it is legal and proportionate to do so.[31]

We consider that this structure presents a strong answer to concerns about the scheme. adds However, we would add that any request for disclosure, whether from concerned party or potential victim, must trigger educational obligations from the police. Education should be particularly focussed on the signs of the cycle of violence, sensitive scenarios that may trigger more violence, educate that a lack of record does not indicate a lack of possible FDV, and focus on developing an effective and easy plan at the ready should the situation escalate. These measures will of course, never completely inoculate against the cycle of violence. However they present a strong educational opportunity at a crucial moment in the FDV cycle. In conjunction with the existing suspicions that might cause a person to request disclosure, the compulsory education will likely encourage a greater scrutiny of FDV in the applicant. This has the potential to decrease the probability of harmful situations arising.

The issue of 'blame culture' is something that we consider should be dealt with intensively in police training, and indeed this has been highlighted elsewhere in the submission as an issue already identified by the community. The existence and need to combat such attitudes should not form a barrier to a potentially useful scheme. Thus we encourage that a public disclosure scheme should be seriously looked into in Western Australia - at least on the level of a pilot scheme if not more.

2. We consider that the UK scheme's application procedures are sufficient, with a 'right to ask' and a 'right to know' triggering the assessment process and potential disclosure.

[31]http://www.gmp.police.uk/content/WebAttachments/88A190F67550078780257A71002E5DC8/$File/claire's%20law%20other%20people%20booklet.pdf

Separate legislation

PROPOSAL 53 (page 168)

1. That a new Act, to be called the Family and Domestic Violence Protection Order Act, be enacted in Western Australia and include (among other things):
   a. Objects and general principles.
   b. A definition of family and domestic violence, a family and domestic relationship (and any other relevant terms).
   c. The grounds for making a family and domestic violence protection order.
   d. All court processes dealing with applications for and hearings of family and domestic violence protection orders.
   e. Police powers of investigation in relation to family and domestic violence.
   f. Police orders.
   g. Provisions dealing with the making of family and domestic violence or protection orders during other proceedings.
   h. Provisions dealing with information sharing between relevant government agencies dealing with family and domestic violence in the legal system.
2. That the provisions of the *Criminal Code* (WA) that refer to the definition of a family and domestic relationship for the purposes of the definition of circumstances of aggravation be amended to refer to the new definition under the newly enacted Family and Domestic Violence Protection Order Act.

RESPONSE:

1. The Network and Women 's Council wholeheartedly support this proposal. It will bring Australia in line with other States and with international best-practice. We submit that such an Act must also include provisions that address or include
   - Legislative preamble
   - Implementation :

    - Linking and referring to the National Plan of Action to Reduce Violence against Women and their Children and legislating minimum terms and standards for the State Plan
    - the allocation of a budget for implementation
    - regular institutionalised adequate and appropriate training for officials
    - mandating specialised police and prosecutorial units
    - provide for protocols, guidelines, standards, regulations
    - penalties for non-compliance by officials
- Monitoring and evaluation of the legislation and the plans in an open, transparent and broadly consulted process:
    - Specific institutional mechanism to monitor implementation
    - Collection of data statistics (lack of available data was a running theme throughout this paper and is of great concern in terms of operating within a continual improvement framework)
- Prevention
- Protection, support and assistance to victims/survivors
- Minimum investigation standards
- Transparent FDV police policies

As is international best practice (recommended in the the UN Handbook for Violence against Women Legislation), we advocate for largely incorporating the following recommendations into the Act and or other Acts intersecting with family and domestic violence:

3.2.1 National action plan or strategy

Recommendation

Legislation should:

• where a current national action plan or strategy on violence against women does not

already exist, mandate the formulation of a plan, which should contain

a set of activities
with benchmarks and indicators, to ensure a framework exists for a comprehensive and
coordinated approach to the implementation of the legislation; or
• where a current national action plan or strategy exists, reference the plan as the comprehensive and coordinated implementation of the legislation

3.2.2 Training and capacity building for public officials

Recommendation

Legislation should mandate:
• regular and institutionalized gender-sensitivity training and capacity-building on violence
against women for public officials;
• specific training and capacity-building for relevant public officials when new legislation is
enacted, to ensure that they are aware of and competent to use their new duties; and
• that such training and capacity-building be developed and carried out in close consultation
with non-governmental organizations and service providers for complainants/survivors of
violence against women

3.2.6. Protocols, guidelines, standards and regulations

Recommendation

Legislation should:
• require that the relevant Minister(s), in collaboration with police, prosecutors, judges, the
health sector and the education sector, develop regulations, protocols, guidelines, instructions,

directives and standards, including standardized forms, for the comprehensive and
timely implementation of the legislation; and
• provide that such regulations, protocols, guidelines and standards be developed within a
limited number of months following the entry into force of the legislation.

3.3.1. Specific institutional mechanism to monitor implementation

Recommendation

Legislation should:
• provide for the creation of a specific, multisectoral mechanism to oversee implementation
of the legislation and report back to Parliament on a regular basis. The functions of such a
mechanism should include:

- information gathering and analysis;
- interviews with complainants/survivors, advocates, attorneys, police, prosecutors, judges, probation officers and service providers regarding complainants/survivors' access to the legal system and the effectiveness of remedies, including obstacles faced by particular groups of women; and
- the proposal of amendments to legislation if necessary; and

• mandate adequate funding for the mechanism.

3.3.2. Collection of statistical data

Recommendation

Legislation should:
• require that statistical data be gathered at regular intervals on the causes, consequences
and frequency of all forms of violence against women, and on the effectiveness of measures

to prevent, punish and eradicate violence against women and protect and support
complainants/survivors; and
• require that such statistical data be disaggregated by sex, race, age, ethnicity and other
relevant characteristics.

3.6.1. Comprehensive and integrated support services

Recommendation

Legislation should:
• oblige the State to provide funding for, and/or contribute to establishing, comprehensive
and integrated support services to assist survivors of violence;
• state that all services for women survivors of violence should also provide adequate support
to the women's children;
• state that the location of such services should allow equitable access to the services, in
particular by urban and rural populations; and
• where possible, establish at least the following minimum standards of availability of support
services for complainants/survivors:

- one national women's phone hotline where all complainants/survivors of violence may get assistance by phone around the clock and free of cost and from where they may be referred to other service providers;
- one shelter/refuge place for every 10, 000 inhabitants, providing safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation;
- one women's advocacy and counselling centre for every 50, 000 women, which provides proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for

complainants/survivors, and
specialized services for particular groups of women (such as specialized services for
immigrant survivors of violence, for survivors of trafficking in women or for women who have suffered sexual harassment at the workplace), where appropriate;

- one rape crisis centre for every 200,000 women; and
- access to health care, including reproductive health care and HIV prophylaxis.

3.6.4. Housing rights of the survivor

Recommendation

Legislation should:

• prohibit discrimination in housing against survivors of violence, including by prohibiting
landlords from evicting a tenant, or refusing to rent to a prospective tenant, because she is
a survivor of violence; and

• permit a survivor to break her lease without penalty in order to seek new housing.

3.8.2. Duties of prosecutors

Recommendation

Legislation should:

• establish that responsibility for prosecuting violence against women lies with prosecution
authorities and not with complainants/survivors of violence, regardless of the level or type
of injury;

• require that complainants/survivors, at all relevant stages of the legal process, be promptly
and adequately informed, in a language they understand, of:

- their rights;
- the details of relevant legal proceedings;
- available services, support mechanisms and protective measures;
- opportunities for obtaining restitution and compensation through the legal system;
- details of events in relation to their case, including specific places and times of hearings; and
- release of the perpetrator from pre-trial detention or from jail; and

• require that any prosecutor who discontinues a case of violence against women explain to
the complainant/survivor why the case was dropped.

3.8.3. Pro-arrest and pro-prosecution policies

Recommendation

Legislation should:

• provide for the application of pro-arrest and pro-prosecution policies in cases of violence
against women where there is probable cause to believe that a crime has occurred.

3.9.2. Encouraging timely and expedited proceedings

Recommendation

Legislation should:

• provide for timely and expeditious legal proceedings and encourage fast-tracking of cases
of violence against women, where appropriate.

3.9.3. Free legal aid, interpretation, and court support, including independent legal counsel and intermediaries

Recommendation

Legislation should ensure that complainants/survivors have the right to:

• free legal aid in all legal proceedings, especially criminal proceedings, in order to ensure access to justice and avoid secondary victimization;

• free court support, including the right to be accompanied and represented in court by a specialized complainants/survivors' service and/or intermediary, free of charge, and without prejudice to their case, and access to service centres in the courthouse to receive guidance and assistance in navigating the legal system; and

• free access to a qualified and impartial interpreter and the translation of legal documents, where requested or required.

3.9.4. Rights of the complainant/survivor during legal proceedings

Recommendation

Legislation should:

• guarantee, throughout the legal process, the complainant/survivor's right to:

- decide whether or not to appear in court or to submit evidence by alternative means, including drafting a sworn statement/affidavit, requesting that the prosecutor present relevant information on her behalf, and/or submitting taped testimony;
- when appearing in court, give evidence in a manner that does not require the complainant/survivor to confront the defendant, including through the use of in-camera proceedings, witness protection boxes, closed circuit television, and video links;
- protection within the court structure, including separate waiting areas for complainants

- and defendants, separate entrances and exits, police escorts, and staggered arrival and departure times;
- testify only as many times as is necessary;
- request closure of the courtroom during proceedings, where constitutionally possible; and
- a gag on all publicity regarding individuals involved in the case, with applicable remedies for non-compliance; and

• cross-reference witness protection legislation, where it exists.

3.10.2. Relationship between protection orders and other legal proceedings

Recommendation

Legislation should:

• make protection orders available to complainants/survivors without any requirement that
the complainant/survivor institute other legal proceedings, such as criminal or divorce proceedings, against the defendant/offender;

• state that protection orders are to be issued in addition to and not in lieu of any other legal
proceedings;

• allow the issuance of a protection order to be introduced as a material fact in subsequent
legal proceedings.

3.10.7. Evidence of complainant/survivor sufficient for grant of protection order

Recommendation

Legislation should state:

• that live testimony or a sworn statement or affidavit of the complainant/survivor is sufficient
evidence for the issuance of a protection order; and

• no independent evidence—medical, police or otherwise—should be

required for the
issuance of a protection order following live testimony or a sworn statement or affidavit
of the complainant/survivor.

3.11.3. Enhanced sanctions for repeated/aggravated offence of domestic violence

Recommendation

Legislation should provide for:

• increasingly severe sanctions for repeated incidents of domestic violence, regardless of the
level of injury; and

• increased sanctions for multiple violations of protection orders.

3.11.6. Intervention programmes for perpetrators and alternative sentencing

Recommendation

Legislation should:

• provide that intervention programmes for perpetrators may be prescribed in sentencing
and mandate that the operators of such programmes work in close cooperation with
complainant/survivor service providers;

• clarify that the use of alternative sentencing, including sentences in which the perpetrator
is mandated to attend an intervention programme for perpetrators and no other penalty
is imposed, are to be approached with serious caution and only handed down in instances
where there will be continuous monitoring of the sentence by justice officials and women's
non-governmental organizations to ensure the complainant/survivor's safety and the effectiveness

of the sentence; and
• mandate careful review and monitoring of intervention programmes for perpetrators
and alternative sentencing involving women's non-governmental organizations and
complainants/survivors.

We also submit that an exposure draft of such an new Act or any amendments required to the Restraining Orders Act 1997, be circulated for feedback to minimise any unintended consequences from arising.

2. We agree and support this proposal as it promotes consistency.