



# FAMILY VIOLENCE AND HOMELESSNESS

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REMOVING THE PERPETRATOR FROM THE HOME

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## I. Introduction

### Background and Context

Women and children who are subjected to family violence are vulnerable to homelessness in two ways. First, family violence disrupts and violates the sense of safety and belonging that are culturally associated with the home and to this extent robs its victims of such a space.<sup>1</sup> Secondly, when women and children make the decision to leave a situation of family violence, this usually requires that they literally flee their homes. A protracted experience of insecure and inappropriate housing often follows, with ongoing disruption to employment and the schooling of children. Relationships with support networks and cultural or linguistic communities are often severed or disrupted in the process. Women can face isolation, emotional trauma and acute economic disadvantage as a result of their decision to leave. Mental illness, the development of substance dependencies and incarceration in correctional facilities have also been identified as consequences of exposure to family violence and homelessness. Women with physical, intellectual and psychiatric disabilities often face a whole realm of additional problems if they are forced from their homes. For some, it can mean long-term loss of independence and identity. Fear of such devastating loss and social disadvantage may imprison women in violent relationships.

In recent months, the Victorian government has released several important policy documents which articulate support for enabling women and children experiencing family violence to remain in their homes while the perpetrators of violence are removed.<sup>2</sup> Although this policy agenda is not new, its consistent articulation in strategic policy documents suggests a shift from, or a widening of the traditional focus of social policy responses to family violence. That focus has been on supporting women and children to *leave* situations of family violence, through funding a network of emergency and transitional accommodation and support services.

Interest in this policy direction is also reflected at a Commonwealth level, through the choice of research being commissioned by the Office of the Status of Women under the *Partnerships Against Domestic Violence* initiative. The *Home Safe Home*

<sup>1</sup> MacDonald 2001

<sup>2</sup> These include the *Victorian Homelessness Strategy*, the *Family and Domestic Violence Crisis Protection Framework* and *Key Directions in Women's Safety*, which is the policy framework for the forthcoming *Women's Safety Strategy*.

report, released in 2000, explored in detail the connection between women's experiences of family violence and homelessness. *Home Safe Home* 'identified strategies that challenge the continuation of the majority of women and children experiencing domestic violence being forced to leave their homes and seek alternative accommodation'. It called for 'a change in service orthodoxy and legal, judicial, police and housing responses to ensure women's and children's safety'.<sup>3</sup> This has been followed by a call for tenders for research to further explore 'ways of enabling women and children experiencing domestic violence to remain safely in their homes', with a particular focus on legal interventions and the re-orientation of support services.<sup>4</sup>

While the extent to which this agenda is receiving political attention is new, the idea that women and children have a right to be safe in their own homes, and should be supported to assert this right, is by no means a new addition to policy discourse. Throughout the 1970s and 1980s, feminists across industrialised societies argued that women's experiences of family violence – and their diminished access to safe and appropriate housing on account of such violence – undermine their capacity for citizenship and self-determination, and as such constitute significant social justice and gender-equity issues. Feminists demanded that male violence against women and children in the home become the subject of Criminal Law and social policy. Over the last few decades, arguably in response to feminist agitation and the women's refuge movement, there has been a gradual shift in community attitudes concerning the acceptability and criminality of family violence, as well as a growing awareness of the diverse nature and enormous personal and social costs of this violence.<sup>5</sup> By the end of the 1980s, this cultural shift had culminated in the enactment of family violence protection legislation in all Australian States and Territories. Family violence legislation was designed to provide more explicit, comprehensive and immediate protection to victims of family violence than was previously available under existing legislation such as the Commonwealth *Family Law Act 1975* and the *Victorian Crimes Act 1958*.

In Victoria, the view that women and children have a right to be safe in their homes through removal of the perpetrator was central to the 1985 report of the Women's Policy

<sup>3</sup> Chung et al 2000: 1

<sup>4</sup> Partnerships web site:  
[http://www.padv.dpmc.gov.  
au/imp\\_safety2.html](http://www.padv.dpmc.gov.au/imp_safety2.html)

<sup>5</sup> Office of the Status of  
Women 1995

Coordination Unit, *Criminal Assault in the Home*.<sup>6</sup> This report laid the foundation for the enactment of the *Crimes (Family Violence) Act 1987* (hereafter CFV Act). The CFV Act gave victims of family violence the option of applying for an intervention order to protect themselves from family violence, even to the extent of having the perpetrator excluded from the family home. The gradual funding of domestic violence outreach services from the late 1980s was designed to complement this legislative development, providing flexible support and advocacy to women outside the refuge system – including those who remained in or returned to their homes.<sup>7</sup>

While the focus of social policy responses to family violence has remained largely on assisting women and children to leave their homes, the presence of this alternative policy agenda has continued to challenge two important cultural assumptions: first, that women and children *should* leave the family home to escape violence; and second, that ‘women [are foremost] victims who need protection and seclusion rather than . . . citizens with rights which can and should be asserted and enforced’.<sup>8</sup> Culturally and historically, women’s citizenship rights have stopped well short of equal entitlement to family property. The provisions of the CFV Act allow for women’s property rights to be prioritised *over* those of other family members in the interests of ensuring their protection as citizens.<sup>9</sup> It implies that perpetrators of family violence should rightfully be expected to wear the material consequences of their actions. To this extent, it denotes or heralds a significant shift in cultural attitudes towards women and about the acceptability of male violence in the family.

Yet despite the emergence of this policy agenda, the passage of progressive legislation, and the funding of outreach support services, the flight of women and children from their homes since the 1980s has continued seemingly unchallenged. In Victoria in 1998/99, over 40 per cent of women who gained access to the Supported Accommodation Assistance Program (SAAP) – the major policy response of State and federal governments in Australia to homelessness – cited family violence as their reason for seeking assistance. Over 20 per cent of SAAP support periods in that year were provided by agencies whose target group is women escaping family violence.<sup>10</sup> While this is clearly an insight into the seriousness of the situation, it is estimated that the vast

**6** Women’s Policy Coordination Unit 1985

**7** Victorian Community Council Against Violence 1992

**8** Chung et al 2000: 2

**9** Under protection order legislation in Australia, prioritising women’s property rights over those of men is not intended as a punitive sanction, but rather to ensure the safety of those who are affected by violence.

**10** Australian Institute of Health and Welfare 2000



majority of women experiencing family violence do not use SAAP or other domestic violence services. According to the Women's Safety Survey undertaken by the Australian Bureau of Statistics, only 4.5 per cent of women who have experienced violence have used crisis services.<sup>11</sup> This signals that the extent of the problem is far greater than is currently known.

Research and anecdotal evidence provided by those working with survivors of family violence indicate that – despite the availability of legal mechanisms to remove perpetrators – women and children face significant obstacles in engaging legal protection and subsequently sustaining their housing. Two of these obstacles are that magistrates are extremely reluctant to make orders that exclude men from their homes, and police are resistant to arresting, removing and prosecuting men for breaching such orders. In practice, arguably, the extent to which 'justice for women and children [has been] . . . represented in terms of reducing men's rights and entitlements',<sup>12</sup> would seem to denote the extent to which it has been viewed as negotiable. As Stubbs has noted, women's inferior economic position and vulnerability to poverty have collaborated with a range of other obstacles to further ensure that 'women most able to mobilise legal protection are those women who are most informed, most financially privileged, those in urban settings, and those who belong to the dominant cultural group'.<sup>13</sup>

### The Purpose of this Paper

The Victorian government has recently announced a decision to review the CFV Act. This provides a tremendous opportunity to re-think the purpose, scope and construction of the legislation that, together with the relevant criminal codes, forms the foundation of legal and social policy responses to family violence. Nunn and D'Arcy note that the 'approach [in Victoria] to date has been to introduce piecemeal changes to legislation and court and police procedures without undertaking substantive research into problems which appear endemic within the legal system, and which form part of a broader social and legal context'.<sup>14</sup> It is critical that the Victorian government does not approach the review of the Act in a piecemeal way and without effective engagement with the implementation and

<sup>11</sup> Australian Bureau of Statistics 1996, Keys Young 1998, Department of Human Services 2001

<sup>12</sup> Cumberland 2001: 37

<sup>13</sup> Stubbs 1994: 4

<sup>14</sup> Nunn and D'Arcy 2001:15

enforcement issues that have consistently and forcefully eroded the progressive potential of the existing legislation.

In light of this concern, and in the context of renewed policy interest in supporting victims of family violence to be safe in their own homes, we at DVIRC feel the need for a clearer and more comprehensive understanding of the legal and other systemic obstacles faced by women who seek to have a perpetrator of family violence removed from the family home. How women negotiate these obstacles, the type of support that is most effective in assisting them, and the nature of social change that may be required to ensure that 'removing the perpetrator' is a genuine option for women, are also of critical interest. The requirement for systemic change to overcome these barriers does not appear, in our view, to be well understood or adequately acknowledged in the strategic policy being generated at present by the State government.<sup>15</sup> A future in which women continue to flee their homes at great cost to themselves, their children and the broader society is the likely outcome of a failure to deal with this issues systemically. It is also possible, and of much concern, that policy which is poorly informed or developed in this area may result in women being encouraged to remain in the home without the necessary structures and safeguards in place to ensure they are not exposed to unconscionable risk.

This Paper therefore aims to contribute to better understanding of the systemic obstacles women face in having perpetrators removed from family homes, and it presents suggestions as to how policy could be directed to address these issues. The Paper has been developed by combining the insights of existing research and commentary with the practice knowledge of those working in the family violence field. A diverse group of workers from the sector participated in focus groups held at DVIRC in May 2002 and completed questionnaires for this purpose. We gratefully acknowledge the time, energy and insights they have contributed in this way. While this Paper contains various recommendations for the direction of policy, it is not our intention to present a hard and fast position on a complex issue. Rather, we hope that by raising issues, posing questions, making observations and restating points that have been made by others, this Paper will generate further discussion, in the community and in government, about the objectives and appropriateness of our social and legal responses to family violence.

<sup>15</sup> Two of the government's policy documents, the *Family and Domestic Violence Crisis Protection Framework* and the *Key Directions in Women's Safety*, go so far as to name some of the obstacles. However neither document acknowledges the systemic change that will be required to address these issues. Nor do they present a strategy for achieving such change. The strategic response to this issue in both documents appears to focus on improving the extent and flexibility of support options available to women.

The Paper is divided into three main parts. Section II outlines and evaluates the two main legal interventions that exist in Victoria to enable victims of family violence to have perpetrators removed from their homes. This section emphasises that there is a significant deviation between the intention of legislators and the interpretation that is brought to bear on the statutes. It also problematises the way these interventions have been named (or *not* named) in legislation and legal processes, such that survivors of family violence and their advocates alike find it difficult to clearly identify what it is they are claiming or what they are entitled to claim. This section concludes with the argument that, in effect, neither legal option is particularly visible, accessible or effective as an intervention into women's family violence-related homelessness.

Section III brings together what is known about other obstacles typically faced by women and children who pursue these legal interventions. While some of the issues raised are not new to public knowledge, they have been included because of their conspicuous absence from public policy discourse at this time.

Finally, Section IV explores some of the strategies and initiatives that have emerged locally and elsewhere to address a number of the identified problems. There is a strong focus on law reform, in light of the forthcoming review of the CFV Act.

It is hoped that these ideas will inspire policy makers and activists alike in reshaping and refining our approaches in this area. We hope that this Paper will contribute to reflective and creative policy development by stimulating discussion and debate in the community and in government about the direction and nature of our social responses to family violence. DVIRC welcomes your feedback on the ideas presented here, and invites you to involve us in your conversations on this important issue.

### Note on Terminology and Focus

The term 'family violence' will be used throughout this Paper to refer to the diverse forms of violence – both criminal and non-criminal – that may be enacted in relationships between intimate partners, parents, children, extended family and other household members. Family violence 'includes any behaviour which causes damage to another person (the damage

may be physical, sexual, emotional, financial) or which causes someone to live in fear. It includes damage to property and threats to damage a person, pets or property'.<sup>16</sup>

I have chosen to use the term 'family violence' over other terms commonly used to name such violence, like 'domestic violence' and 'violence against women' because of its inclusiveness of violence in a wider range of intimate relationships.<sup>17</sup> Simultaneously, I acknowledge the limitations of the term to adequately convey the gendered nature of much familial violence. In view of the fact that family violence is overwhelmingly behaviour perpetrated by men against women and children, I will generally refer to perpetrators with the masculine personal pronoun. This use of language – particularly in the context of this specific discussion – is also pragmatic. It is not intended to deny or dismiss violence perpetrated by women or violence experienced by men in these relationships.<sup>18</sup>

Likewise, while the focus of the discussion is on women's homelessness resulting from male violence in heterosexual relationships, this is not intended to minimise the existence or seriousness of violence in same-sex relationships, or homelessness that may be experienced on account of that violence. There is negligible research on issues surrounding the removal of same-sex perpetrators from the home, although anecdotal evidence suggests there is a whole set of other problems encountered by victims of violence in this context. Undoubtedly there is a need for more research in this area.

## II. Legal Options for Removing Perpetrators from the Home

### Exclusion and Sole Occupancy Orders

**A**t this historical moment, many jurisdictions around the world have provisions under Family Law, Criminal Law or dedicated Family Violence legislation for making orders that remove or exclude perpetrators of family violence from the home. 'Exclusion' or 'sole occupancy' orders, as they are often called, are typically short- to medium-term court orders that give the other household members the right to exclusively use and occupy the premises for the duration of the order, or until a property settlement is achieved.<sup>19</sup> Beyond prohibiting the

<sup>16</sup> Definition used in DVIRC pamphlet, cited in MacDonald 1998: 9

<sup>17</sup> See MacDonald 1998 for a good discussion of this issue.

<sup>18</sup> On this subject, see Atmore 2001

<sup>19</sup> Other common names or legislatively-defined terms for this type of court order include 'occupation order', 'ouster order', 'sole use and occupation order', 'exclusive possession order' and 'stay-away order'.

**20** There will be exceptions to this rule. There are also jurisdictions (such as New Jersey, USA and South Africa) in which the relevant legislation has much greater or more transparent power to impose responsibility on the defendant to continue paying the rent or mortgage of the property from which he has been excluded. See South African Government's Department of Justice web site [http://www.doj.gov.za/brochure/domestic\\_violence.htm](http://www.doj.gov.za/brochure/domestic_violence.htm) and, in New Jersey, the web site of law firm Kenneth Vercammen and Associates [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm).

In Queensland, there is provision under residential tenancy legislation for victims of family violence to have the perpetrator's name removed from the lease agreement or replaced with that of the remaining household members. While this removes the perpetrator's liability for rent payments, it extinguishes his rights in relation to the property, such as his right to end the tenancy.

**21** This understanding of the nature and purpose of exclusion orders has been developed by surveying legal commentary and legislation in numerous countries via the internet, such as that by Morley and Mullender 1994.

It is also informed by Australian Law Reform Commission 1986, chapters 7 and 10.

**22** From a limited survey of family violence agencies which support women seeking exclusion orders, conducted to inform the writing of this Paper, we noted the vast majority of applicants had primary responsibility for dependant children.

**23** McDonald (ed.) 1986: 159-162. In fact it was 'rare' for a party who had left the home to regain occupancy at this later stage.

perpetrator from the property, exclusion orders do not generally alter the respective rights and responsibilities of the parties in relation to the property. That is, they do not change who owns or leases the property; and neither do they alter who is liable for rent or mortgage payments.<sup>20</sup> The purpose of exclusion orders is to provide a level of protection that is not achievable without the separation of the parties, and to address in a pre-emptive way the homelessness of those subjected to violence, should the perpetrator not be removed.<sup>21</sup>

These orders do not usually accord a victim an indefinite right to occupy a property over which the perpetrator has rights. However they can enable household members who are the victims of violence to circumvent the highly stressful and costly period of homelessness or unstable housing that is typically experienced by those who flee their homes. This provides a 'window of opportunity' to find alternative accommodation or initiate proceedings for a property settlement. Such proceedings may include an application to retain occupancy of the home, or to be paid alternative financial support from the perpetrator where this is justifiable. Exclusion orders also provide an opportunity for victims to maintain employment or seek income support and child support payments to improve future housing choices. These orders are particularly valuable for women with children, for whom the disruption of emergency accommodation and a series of subsequent relocations are especially traumatic.<sup>22</sup> Likewise, the orders are an essential requirement for those who cannot leave their homes due to financial dependency or reliance on disability-modified premises and proximity to support services.

Research conducted by the Australian Institute of Family Studies suggests a further reason why exclusion orders may be of value to some survivors of family violence. In investigating patterns of property division on divorce, it was noted that maintaining occupancy of the family home in the first three months of separation is associated with a greatly increased likelihood of that party retaining occupancy of the family home at the time of property settlement.<sup>23</sup> Women who are forced to flee their homes on account of family violence are systematically disadvantaged in this regard. For such women, the option of an exclusion order may provide a more 'level playing field' in which to negotiate the division of family property.

In Victoria, there are two main avenues by which victims of family violence can invoke the law to have the perpetrator removed from premises that are jointly occupied. One is to apply under the Commonwealth Family Law Act for a type of Family Court injunction which excludes the perpetrator from the matrimonial home. The second is to apply under the Victorian CFV Act for an intervention order that includes a particular restriction on the perpetrator: that he is prohibited from accessing the premises in which the 'aggrieved family members' (hereafter AFMs) live, work or frequent – irrespective of any financial or legal interest he may have in the premises.

The first part of this section outlines and compares these two types of exclusion orders, including analysing both the written statutes and the interpretation given to these by judges and magistrates. On the basis of this analysis, I argue that, while the CFV Act constitutes a tremendous development on Commonwealth Family Law with respect to its exclusion order provisions, neither legal option is adequately accessible to victims of family violence or an effective intervention into women's family violence-related homelessness. Further to this argument, the second half of this section looks at how the construction and naming of these interventions in legislation and other legal discourse serves to render invisible the option of removing perpetrators and with it, women's entitlement to pursue such intervention.

Before proceeding though, it is necessary to specify terminology. Neither of these legal interventions has a legislatively-defined name that distinguishes it from other Family Court injunctions or other intervention orders. The general tendency in policy and quasi-legal discourse is to refer to them by various common names such as 'exclusion', 'ouster' or 'sole occupancy' orders. One of the difficulties this presents, is that a single term may be used across two legal interventions that are subtly different, creating confusion and ambiguity about the particular features of the specific interventions.

It is particularly important to distinguish between exclusion orders that are available under Victorian and Commonwealth legislation, because these are quite distinct species, their respective parent legislation having very different historical rationales and development processes. The Family Law Act was constructed on the principle of 'no fault' divorce, and as such

has had tremendous difficulty responding decisively in situations of family violence.<sup>24</sup> Until reforms were made to this Act in 1995, the legislation was practically silent on the issue.<sup>25</sup> Moreover, Family Court injunctions, including exclusion orders, have not been constructed in the legislation, or viewed by the Court, as specific family violence interventions. Rather, they are available to address any number of issues arising from a 'matrimonial cause'.<sup>26</sup> On the other hand, the CFV Act, like other State-based family violence laws, developed as a response to widely perceived inadequacies in the capacity of the Family Law Act and relevant Criminal Law to provide comprehensive and effective protection to victims of family violence.<sup>27</sup>

In view of these and other differences, it is important to maintain a distinction in the terminology that is used to refer to these different legal interventions. To this end, I will refer to 'Family Court exclusion orders' and 'sole occupancy intervention orders' respectively.

## Family Court Exclusion Orders

### Who can Apply for Protection?

The Family Law Act allows the Family Court to make orders or injunctions to protect parties to a marriage (s.114 (1) and any children of a marriage (s.68B). These provisions are not used exclusively or specifically for intervening in situations of family violence or child abuse, but are available for these purposes. Applications for such orders can only be made by:

- parties to a marriage;
- parties to a *de facto* relationship with children;
- people entitled to custody of, guardianship of, or access to a child; and
- a child – but only where the Court considers the child is capable of understanding the nature of the proceedings and any possible consequences.<sup>28</sup>

Section 114(1) lists the types of orders that may be made to protect parties to the marriage. While this list is not intended to be exhaustive or to limit the creativity of the Court, it does include two orders that may serve to exclude a perpetrator of family violence from the family home:

<sup>24</sup> See Thacker and Coates 1991, Australian Law Reform Commission 1994b: 172ff for further discussion of this point.

<sup>25</sup> Alexander 1996, 1999

<sup>26</sup> For the extensive definition of what may constitute a 'matrimonial cause', see s4(1) of the Family Law Act.

<sup>27</sup> Women's Policy Coordination Unit 1985

<sup>28</sup> Family Violence Professional Education Taskforce 1991: 178

114(1)(b) *an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated; . . .*

114(1)(f) *an injunction relating to the use or occupancy of the matrimonial home.*

Similarly, section 68B(1) presents an open-ended list of orders the Court can make in relation to the protection of children. The order outlined in sub-clause (c) could be used to exclude a perpetrator from the home where this is considered 'appropriate for the welfare of the child'. According to this sub-clause, the Court can make:

- (c) *an injunction restraining a person from entering or remaining in:*
- (i) *a place of residence, employment or education of the child,*  
*or*
  - (ii) *a specified area that contains a place of a kind referred to in subparagraph (i).*

### **Factors Considered when Making an Order**

The Family Law Act does not specify the nature of the violence or harassment or other conditions that might lead the Court to consider it appropriate or legitimate to make an exclusion order. This is possibly because injunctions are designed as generic interventions that are not specifically for intervening in situations of family violence. In practice, the Family Court makes very few exclusion orders.<sup>29</sup> It views the eviction of a person from their home as a very grave matter 'not to be treated lightly'.<sup>30</sup>

To understand the basis on which the Court makes decisions about excluding a party from the home, it is necessary to refer to Family Court case law.<sup>31</sup> According to Fildes and Szabo, an examination of case law indicates that the Court will only make such orders under 'exceptional circumstances'.<sup>32</sup> Seddon's survey of the relevant case law leads him to the following conclusion.

<sup>29</sup> Egger and Stubbs 1993

<sup>30</sup> The full quote from the judge in *Nicolau and Nicolau* 1 March 1988, cited in Thacker and Coates 1991: 29, is: 'The removal of a person from their home is a most draconian measure . . . In my view it is almost the most serious order that this Court can make. It is a matter that ought not to be treated lightly'.

<sup>31</sup> This is the written body of judgments made by the Court that reflects its interpretation of the Statute and the principles of law on which its decisions are made.

<sup>32</sup> 2000: 438



*In deciding whether to make an ouster order, the court must decide according to the circumstance of the particular case. Such factors as the means and needs of the respective parties, the needs of the children, availability of alternative accommodation, the conduct of the party seeking the ouster order, the proprietary rights of the parties and whether or not a non-molestation order would suffice may be taken into account. It is not sufficient to show a 'balance of convenience': it must be necessary or reasonable to exclude the violent party.*<sup>33</sup>

Fildes's and Szabo's reading of the case law generates a similar list but includes the further consideration of 'the possible injustice of forcing a party to establish for her/himself another home, or otherwise accept inferior accommodation without just cause'.<sup>34</sup>

These interpretations of case law suggest that the safety needs of those who are subjected to family violence are not the Court's first priorities. Beyond the generic category 'needs of the respective parties', they are not explicitly referred to in these lists of standard considerations. They are also evaluated alongside such issues as property rights and the availability of alternative accommodation. While the conduct of the applicant/victim is subject to scrutiny, as is the possible injustice of the ousted party being forced to accept inferior accommodation, the injustice of being subjected to violence within one's own home, or the likely injustice of being forced to flee one's home on account of that violence, do not appear to be standard considerations.

### Property Rights

In the determination of an application for an exclusion order, the consideration given to property rights represents a deep-seated ambivalence in the Family Court (and the case law) about the nature of an exclusion order. Is it a temporary occupation order providing 'injunctive relief', which may 'affect' but does not 'alter' the respective proprietary rights of the parties? Or one that has more lasting impact on the division of matrimonial property?

Depending on where judges sit on this matter, an application for an exclusion order on the basis of family violence may be viewed as an attempt to jostle for a more favourable property settlement upon divorce. Faced with such an application, the

<sup>33</sup> Seddon 1993: 68-9

<sup>34</sup> Fildes and Szabo 2000: 439. Some relevant case law includes *Carson and Carson* (1999) FLC 92-835, *Merryman and Merryman* (1994) FLC 92-497, *Schwarzkopff and Schwarzkopff* (1992) FLC 92-303, *Sprinbett and Miles* (1990) FLC 92-177, *Fedele and Fedele* (1986) FLC 91-744, *Kemsley and Kemsley* (1984) FLC 91-567, *Hanset Pty Ltd and Hannes* (1984) FLC 91-557, *Page and Page* (1981) FLC 91-025, *O'Dea and O'Dea* (1980) FLC 90-896, *Rowe and Rowe* (1980) FLC 90-895, *Tansell and Tansell* (1977) FLC 90-307, *Davis and Davis* (1976) FLC 90-062, *Plowman and Plowman* (1970) 16 FLR 447.

Court may perceive itself as having a 'conflict of duties' in respect to its role as neutral arbiter in decisions about property division. Thacker and Coates argue that judges who tend towards this interpretation of exclusion orders are inclined 'to side step the facts of violence altogether or prioritise the factor of violence very low on their scale of considerations'.<sup>35</sup> The consequence of this, they argue, has been that the Court refrains from making an exclusion order pending an application for property settlement under section 79 (the section of the Act that deals specifically with property division on divorce).

In their submission to the Joint Select Committee on Aspects of the Operation and Interpretation of the Family Law Act, Thacker and Coates challenge this interpretation of the law. They point to precedents in the case law, such as *Mullane and Mullane* (1983) FLC 90-303. In this particular case, the High Court upheld the view that an exclusion order under section 114(1) does not alter any interests in property and does not preclude a subsequent application being made under section 79 for the division of assets.

*There is already clear authority for the Court to follow that sole use and occupation orders are not property orders affecting the rights of any party under section 79. Therefore, it is our submission that where there is any finding of violence (as described in our submission) the Court shall not hesitate to make a sole use and occupancy order . . . If the Family Court gave clear guidance in this regard, that is putting personal safety and protection rights ahead of property rights, the State Courts would be bound to follow in the application of its equivalent sole use powers under the various State Acts available.*

Thacker and Coates go on to argue that failure to make an order because of the possible inconvenience or inequity that might be suffered by the violent partner means, in practice, that:

*a woman and her children leave the matrimonial home and rely on Women's Refuges or whatever public assistance they can manage often with no belongings or money while the husband who is monied, not using the home for large portions of the day whilst he is at work and who has the capacity to pay by renting alternative accommodation stays in the home.*<sup>36</sup>

<sup>35</sup> Thacker and Coates 1991: 29

<sup>36</sup> Thacker and Coates 1991: 28

In other words, the Court's concern with property rights would seem to reflect a gender bias, in that an application for an exclusion order is more easily viewed as an imposition on men's property rights than a legitimate means of upholding women's safety and property rights in the face of men's violence. To the extent that the Court side steps the facts of men's violence, women's rights are rendered obscure or secondary.

**37** Family Violence Professional Education Taskforce 1991, Seddon 1993, Fildes and Szabo 2000. Many magistrates likewise refer applications for exclusion orders under State legislation to the Family Court, viewing such matters as more appropriate to that forum. See the following section on Sole Occupancy Intervention Orders.

**38** Egger and Stubbs 1993, Fildes and Szabo 2000 specify the documentation required: Marriage Certificate, Forms 7 & 8 (Family Law Rules), a comprehensive affidavit detailing the history of the matter and presenting information relevant to the considerations the Court is likely to make detailed above. These should be accompanied by supporting affidavits by appropriate people such as school teachers and doctors. Participants in the DVIRC focus groups (held in May 2002) stated that reports from child protection authorities can likewise assist in applications for exclusion orders.

**39** Seddon 1993

**40** See Egger and Stubbs 1993, Seddon 1993, Thacker and Coates 1991, Women's Policy Coordination Unit 1985, Family Violence Professional Education Taskforce 1991, Waters 1986, Australian Law Reform Commission 1986, 1987, chapters 13-14 and 1994b, to list a few examples.

### The Application Process

Applications for Family Court injunctions may be made to either the Family Court or a local Magistrate's Court. Despite their jurisdiction to hear these Family Law matters, many magistrates are reluctant to do so and will refer them to the Family Court despite the time delays involved.<sup>37</sup> Applying for an exclusion order under the Family Law Act is generally a slow and expensive process. Due to the Court's procedural and documentation requirements, and to assist in negotiating judicial ambivalence towards making such orders, it typically involves hiring a solicitor.<sup>38</sup>

While there is provision in the Act for making interim exclusion orders in emergency situations, the Court is extremely reluctant to make these, especially *ex parte* (in the absence of the respondent).<sup>39</sup> This inaction can obviously have significant implications for the safety and housing of those subjected to violence. For example, a domestic violence outreach worker who participated in a focus group discussion at DVIRC told the story of a client who had applied for a Family Court exclusion order. The woman was advised by her solicitor not to apply for an interim order because of the Court's strong disinclination to grant these. At the same time, she was also advised against seeking refuge accommodation because of the likely consequence that this would diminish her chances of regaining occupancy in the subsequent court hearing. This legal advice was based on knowledge of the Court's practices, and it resulted in the woman living in a highly unsafe situation for a number of months before the application could even be heard.

### Evaluating the Effectiveness of Family Court Injunctions

In addition to complaints about the slow, complicated and costly application process, and the reluctance of the Court to use the full extent of its power to protect victims of family violence, there has also been widespread criticism of the effectiveness of Family Court injunctions.<sup>40</sup> The most signifi-

cant of those which apply to exclusion orders concern the enforcement of injunctions by police and courts. There is evidence that a large proportion of injunctions is breached, often within a very short time of the order being made.<sup>41</sup> While a power of arrest is usually attached to Family Court injunctions, only breaches which involve causing or threatening bodily harm can result in legitimate arrest by police.<sup>42</sup> Other breaches are dealt with as contempt of court. But because of the 'private' nature of the offence and the exclusively civil jurisdiction of the Court, even where police arrest the offender, it is still the responsibility of the abused party – and not the state – to initiate breach proceedings. Typically, such proceedings are complicated, lengthy and costly.<sup>43</sup> Unlike breaches of family violence orders under State legislation, breaches of Family Court injunctions are not classified as criminal offences.<sup>44</sup> Nevertheless, a criminal level of proof (i.e. proof beyond reasonable doubt) is required to establish guilt. And while penalties available for breaches include significant fines and prison sentences, the Australian Law Reform Commission has found that these are very rarely used by Family Court judges.<sup>45</sup> Bonds and undertakings are the most common penalties.<sup>46</sup>

The acutely limited power of police to arrest offenders; the resistance of police to act on this power; the requirement on the abused party, rather than the state, to prosecute breaches; and the consistent refusal of Family Court judges to impose meaningful penalties on offenders, all arguably combine to render Family Court injunctions powerless to provide meaningful protection to women who remain in their homes where there is violence.

### Sole Occupancy Intervention Orders<sup>47</sup>

#### What the Law Says<sup>48</sup>

Unlike the Family Law Act, the CFV Act was created specifically to protect those subjected to family violence. This Act gives magistrates wide discretion in the prohibitions they can place on defendants to this end. One of these is to restrict or completely prohibit access to the family home or other premises in which the AFMs 'live, work or frequent', whether or not the defendant has a 'legal or equitable interest' in the property

**41** Australian Law Reform Commission 1987

**42** Moreover, many members of Victoria Police incorrectly believe they do not have the power to enforce Family Court injunctions because they pertain to federal law and are thus the jurisdiction of Federal Police. This problem was raised repeatedly by family violence refuge and outreach workers who shared their experiences to inform the writing of this Paper.

**43** Family Violence Professional Education Taskforce 1991

**44** Although if criminal assault has occurred, the defendant could be charged and prosecuted by police under Criminal Law.

**45** Family Violence Professional Education Taskforce 1991: 179

**46** Family Violence Professional Education Taskforce 1991, Australian Law Reform Commission 1987

**47** As mentioned, I am using this name for pragmatic reasons, to distinguish it from other intervention orders and to distinguish it from exclusion orders available under the Family Law Act. Despite this, it is only a common name that is not actually used in the legislation and is not consistently used or recognised by court staff, lawyers or family violence workers.

**48** This section needs to be read in conjunction with the following section, How the Law is Interpreted. There is considerable deviation between what is suggested as possible by the legislation, and what in practice magistrates allow.

(s.5(1)(b)). This provision is very broad in scope. Exclusion of the defendant from premises that are jointly occupied represents only a small subset of the possible orders that may be made. However, even the possibilities represented by this 'sole occupancy' subset are broader and more inclusive than equivalent options available under the Family Law Act, in so far as they enable the defendant to be excluded from homes that do not easily fit the definition of the 'matrimonial home', such as properties shared by a group of friends or extended kin. Moreover, pre-existing property rights are not grounds for discounting an application for exclusion. Conceivably, the home from which the defendant is excluded may be purchased or leased in his name, or partly in his name, or may be the location of his small business.

#### *Who may be Protected*

Provisions under the CFV Act to exclude or remove perpetrators from the home are available to a much wider group of people than are Family Court exclusion orders. The 'family members' who may be protected by such an order are:

- the spouse of the defendant;
- a person who has or has had an intimate personal relationship with the defendant;
- a person who is or has been a relative of the defendant;
- a child who normally or regularly resides with the defendant;
- a child of whom the defendant is a guardian; or
- another person who is or has been ordinarily a member of the household of the defendant.

On account of this broad characterisation of family member, the legislation could conceivably be used to protect people from many forms of family violence, including sibling and elder abuse and violence perpetrated in same-sex relationships or by extended family members or between unrelated house-mates. Neither is it inconceivable that a child could apply for the removal of a violent parent.

#### *Applications*

Applications (or 'complaints') for sole occupancy intervention orders may be made by either the AFM, police or any other person with the written consent of the AFM, if they are 17 years

or over. If the AFM is a child, police, a parent of the child or any other person (with the parent's written consent) can make the application. If the child is aged 14 years or over, s/he may apply independently if the Court is satisfied that the child understands the nature and consequences of an intervention order. Parents may also include children in their own applications 'if the complaints arise out of the same or similar circumstances' (s.7(4)). Applications can be made to any Magistrate's Court, or if the AFM or the defendant is under the age of 17, the Family Division of the Children's Court also has jurisdiction to hear the application.

The Act empowers magistrates to make interim *ex parte* orders (short-term orders in the absence of the defendant) in emergency situations in which the Court is satisfied that this is required to ensure the safety of the AFMs or to preserve their property (s.8). In making interim orders, the Act empowers magistrates to impose any restriction on the defendant they see fit, including prohibiting access to the family home. Final orders are then usually heard within a few weeks.

There is no formal requirement on an applicant to have legal representation, but sympathetic and appropriate legal advice and advocacy have been associated with improved outcomes for women approaching the legal system for protection from violence.<sup>49</sup>

#### *Grounds for Making a Sole Occupancy Intervention Order*

The Court can grant an intervention order if it is satisfied, on the balance of probabilities,<sup>50</sup> that the defendant did any one of the following:

- assaulted a family member or caused damage to the property of a family member and is likely to do so again;
- threatened to assault a family member or damage the property of a family member and is likely to carry out these threats;
- or
- harassed or molested a family member or behaved in an offensive manner towards a family member and is likely to do so again.

This is a relatively broad conception of family violence. It could conceivably extend to patterns of controlling or intimidating behaviour that fall short of physical or sexual assault, or threatened assault, which leave the family member feeling fearful.

**49** See Bradfield Nyland Group's (1998) evaluation of the NSW Women's Domestic Violence Court Assistance Program, and Gloury's (1994) evaluation of the Court Network Intervention Order Community Access Program. However legal aid is not generally available to applicants unless the matter is contested.

**50** This is a less onerous level of proof than that required for criminal matters, where a case must be proven 'beyond reasonable doubt'. It reflects the civil nature of the intervention and the difficulty of proving intimate violence.

The Act does not specify any additional or particular grounds that may be required to legitimate making a sole occupancy intervention order.<sup>51</sup> The Court is required, however, to take into account three issues when making such orders:

- the need to ensure that the AFM is protected from violence;
- the welfare of any children who may be affected by the order; and
- the accommodation needs of all persons who may be affected by the order (s.5(2)).

Of these three issues, the Court is obliged to give 'paramount' consideration to the first – the need to ensure the safety of those who have been subjected to violence.

While these grounds for excluding the perpetrator are more simple and transparent than those of Family Law, they indicate a residual preoccupation with the property rights of the defendant. The power of the legislation to protect those experiencing family violence from future abuse and homelessness will presumably be compromised to the extent that this provision generates a contest between the rights and needs of the perpetrator and those of his victims.

#### *Child Contact and Custody*

As mentioned above, parents may include children in their applications 'if the complaints arise out of the same or similar circumstances'. While this is a rather obscure proviso, it suggests an acknowledgement that children may be indirectly harmed by witnessing violence between other family members, a view which is now explicitly acknowledged in Family Law, following the enactment of the *Family Law Reform Act 1995* (hereafter Reform Act).<sup>52</sup> The authority of magistrates making family violence orders to protect children from the harm of direct or indirect violence is further clarified and strengthened in the Reform Act. Section 68T empowers magistrates making orders under State family violence legislation 'to make, revive, vary, suspend or discharge' a Family Court contact order where they are satisfied that 'a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of the order'.<sup>53</sup> 'Family violence' is defined inclusively in the Reform Act as:

*conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that cause that or any*

<sup>51</sup> In practice, there is often a requirement for 'strong' evidence of 'serious' violence and injury/property damage to have such an order made. See next section How the Law is Interpreted.

<sup>52</sup> In addition to exposure to physical violence or abuse, s68F(2) obliges the Family Court to protect children from psychological harm that may be caused by witnessing violence towards or abuse of another person.

<sup>53</sup> Section 68T(2) also obliges magistrates only to use this power with due consideration to the best interests of any relevant children (as outlined in s.68Q). Moreover, the Family Court can subsequently overturn any contact arrangements made by a Magistrate's Court, if it feels they are not justified or they unsatisfactorily impinge on the rights of children to have contact with both parents.

*other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.*<sup>54</sup>

Expanding the traditionally narrow view of what constitutes family violence, and extending the power of magistrates to protect children from such violence, are critically important developments in the law. They address the longstanding tendency of courts to overlook children as requiring protection from family violence and ignore the extent to which perpetrators use children as means by which to continue to control, gain access to and threaten women following separation. In other words, these reforms enable magistrates to avoid making orders that would otherwise be ineffectual in protecting women.

#### *When Orders are Breached*

An automatic power of arrest is attached to both interim and full orders. Defendants who breach orders may be arrested without a warrant. Unlike police powers to enforce Family Court injunctions, police may arrest someone for breach of an order regardless of whether the breach involved physical or sexual assault or property damage. To the extent that it is difficult, or impossible, to enforce a sole occupancy intervention order without according such power to police, this aspect of the legislation constitutes an unequivocal improvement on Family Law.

Another benefit of the State legislation is that a breach of any restriction in an intervention order constitutes a summary offence. This means it is deemed a public, criminal offence, regardless of whether criminal assault or damage took place, and so must be prosecuted by the state rather than – as under Family Law – by those who have been subjected to the violence.

#### **How the Law is Interpreted**

In the preceding pages, I have demonstrated that Victorian family violence legislation represents a significant development on Commonwealth Family Law with respect to its provisions for exclusion orders. Yet obtaining a sole occupancy intervention order in practice, and having it enforced satisfactorily, are almost as difficult or impossible as they are under Family Law, despite the greater accessibility and wider applicability of the

<sup>54</sup> Section 60D(1), my emphasis.



Victorian legislation.<sup>55</sup> There are many reasons for this. I will explore some of the most significant of them in Section III: Major Obstacles. In this section, however, I want to focus on the ways in which the CFV Act is interpreted by magistrates in the determination of sole occupancy applications, arguing that this renders ineffectual many of the progressive features of the legislation.

In writing this part of the Paper, I have drawn predominantly on research conducted by Rosemary Wearing.<sup>56</sup> Her 1992 study examining the impact of the CFV Act in Victoria still provides the most interesting and comprehensive insight into the operation and interpretation of the legislation. However it is likely that the practices and views of magistrates have undergone subtle transformations in the intervening years, in response to shifts in cultural attitudes towards family violence and the passage of various legal reforms, including the Reform Act. In view of these likely changes, it is regrettable that more recent research of equivalent quality, scope and depth is not available to inform the analysis undertaken here. The more contemporary evidence available on how the CFV Act is operating and being interpreted suggests, however, that there have been strong continuities over time in the patterns Wearing identified a decade ago. DVIRC's interviews with family violence professionals around the obstacles women face in achieving family violence exclusion orders indicate this very strongly. In view of this, the following analysis, which is based largely on Wearing's research, has contemporary validity and relevance. Where possible, the observations of focus group participants have been included to supplement previous research.

*Grounds for Making Interim and Sole Occupancy Orders*

Wearing's interviews with 40 magistrates from courts across the State confirm that, while the Act does not specify any additional or particular grounds required to legitimate making a sole occupancy intervention order, magistrates are extremely reluctant to make such orders unless they deem there to be an exceptional level of violence *and* the defendant is present to provide his half of the story. In fact, 21 of the 40 magistrates indicated that they 'would never' exclude the perpetrator from the home. The main reason given for this is that sole occupan-

<sup>55</sup> The Magistrates' Court does not keep statistics in relation to sole occupancy intervention orders, only for the broader group of orders available under s5(1)(b). The claim that such orders are very infrequently made is based on the testimony of those supporting women escaping family violence. It is also supported by the evidence magistrates gave in Wearing's interviews (1992).

<sup>56</sup> Wearing 1992, 1996

cy restrictions constitute too radical a denial of the defendant's property rights. One magistrate stated 'I think to order a person out of their own home is the most wrecking measure because it is a denial of the rules of natural justice to evict someone from his [sic] own home'.<sup>57</sup> This is particularly the view where the defendant has equity in the property or runs a business from the premises. In addition to concern about violation of the defendant's property rights, 'several Magistrates remarked that they felt there was a problem with evicting the male offender as he would not know how to manage or survive without his family's (usually meaning wife's) nurturance [sic] and support activities'.<sup>58</sup>

Most of the magistrates Wearing interviewed expressed considerable reluctance to make *ex parte* orders, especially without evidence of physical injury. This was particularly the view with respect to making interim intervention orders for sole occupancy, for which it was stated by half the magistrates interviewed that there would need to be 'strong evidence of serious injury and documented need for immediate protection'.<sup>59</sup> Two main reasons were given for this reticence. One was that *ex parte* orders deny defendants their civil right to answer the allegations made against them, before the Court makes a judgement that may have a significant impact on their liberty.<sup>60</sup> In view of this concern, 11 magistrates stated that, where a complainant was seeking an *ex parte* order prohibiting contact, the most appropriate action would be for the complainant to leave the property and seek refuge so as not to risk a 'grave injustice' to the perpetrator. Only eight of the magistrates believed that, if a decision had to be made on an *ex parte* basis for one of the parties to leave the home, then it should be the offending party. The second reason for not making *ex parte* orders (given by almost half the magistrates) was a belief based on the influential advice of Family Court judges that *ex parte* orders create greater hostility and violence between the parties. Cases where the order affects the defendant's right to occupy shared premises, or have contact with children, are considered particularly likely to cause increased hostility.

The views expressed in these insightful interviews raise a number of important questions about the capacity of the legislation to achieve its intended outcomes. There would seem to be an inherent contradiction between the purpose and nature

<sup>57</sup> Wearing 1992: 168

<sup>58</sup> Wearing 1992: 172

<sup>59</sup> Wearing 1992: 173

<sup>60</sup> Although the defendant will be given an opportunity shortly afterwards to bring his defence before the Court.

of the legislation, and the means by which it seeks to achieve its ends. On the one hand, the legislation purports to provide civil protection orders to victims of family violence, without the need to establish or prove beyond reasonable doubt the criminality of the behaviour perpetrated against them. On the other hand, the means by which victims are protected is the imposition of restrictions on the liberty of the alleged perpetrator – restrictions that in some instances may be difficult to justify without establishing criminal responsibility by the defendant. In other words, while the restrictions that may be imposed on defendants are not constructed in the legislation as a form of punishment for an offence committed, the imposition of sometimes quite substantial constraints on the liberty of the defendant implies a need for criminal conviction.

To the extent that an intervention order simply restricts the defendant from molesting or harassing the AFM, the contradiction in the nature and means of the legislation is not particularly apparent. There is no penalty imposed on the defendant for his actions; he is merely ordered by the Court to behave according to a code of conduct expected of any citizen. It is only in breaching this warning that the defendant may be charged and prosecuted for a criminal offence. When the restrictions on the defendant extend to constraining or suspending significant civil rights – such as the right to freedom of movement, the right to own property and not be arbitrarily deprived of that property, the right to parent children or the right to a livelihood – then tension appears in the legislation. Without being charged and convicted of criminal behaviour, criminal-like sanctions can be imposed on the defendant merely on the balance of probabilities that such behaviour did occur, or was threatened, against family members. Indeed, some of the sanctions or restrictions that may be imposed on defendants constitute considerably graver penalties than those given for the crime of breaching an order.

In view of this situation, when faced with applications for sole occupancy or exclusive custody of children, magistrates are understandably nervous about making interim *ex parte* orders or accepting evidence that falls short of the requirements for proving criminal acts. That someone facing criminal charges should have a right to due process, an assumption of innocence and a fair trial, are important grounding principles of our jus-

tice system and sit somewhat uncomfortably with provisions of the CFV Act.

The perverted interpretation of the legislation that results from this tension erodes the capacity of the law to provide immediate or substantial protection to victims of family violence, particularly those who live with a perpetrator or who have children with him. Progressively, the statute reflects recognition of the damage and danger posed by non-physical violence in the home, likewise that it can be difficult to prove intimate violence by virtue of its occurrence in private. But the common requirement of magistrates for 'strong evidence' (read: evidence beyond reasonable doubt) of 'serious injury' (read: physical and sexual assault) to justify making certain orders, results in the Court overlooking many of the actions through which perpetrators cause their victims to fear for their lives and flee their homes. To impose on the law an interpretation that ignores or denies the unique nature of violence against women and children in the home diminishes the legislation's power to protect victims. The frequent deviation between what the law *says* it can deliver on particular grounds and what, in practice, magistrates are *prepared* to deliver on those grounds, can lead to much frustration on the part of applicants.<sup>61</sup> Moreover, many are likely to be exposed to increased violence as a result of their decision to seek legal intervention.

This interpretation or implementation of the legislation constitutes gender and anti-victim bias that needs to be investigated and redressed. It is clear from the testimonies of magistrates recorded in Wearing's research that, when faced with a contest between the citizenship rights of men and those of women, the Court is inclined to privilege those of men, despite the construction of the legislation to enable the contrary. The violation of women's property rights, and their need for protection, all but blur into obscurity in the face of the Court's overwhelming concern for the rights of defendants whose liberty, access to private property and regular contact with children may be threatened with temporarily suspension.<sup>62</sup>

A dimension of this bias presumably resides in the structural tension between the provisions of the legislation and important grounding principles of the justice system. However it is clear that certain biases in the Court's implementation of the legis-

<sup>61</sup> While I do not support a watering down of the scope of the legislation, I feel it is important that applicants are not misled about the grounds on which their applications may be successful. If the Court is only going to make interim *ex parte* orders where it is satisfied that serious physical injury has occurred, this should be reflected in the legislation. In New Zealand, the relevant legislation specifies additional requirements for justifying an interim order. It stipulates that to make an interim *ex parte* order, the Court must be satisfied that physical or sexual abuse has occurred or that the delay in making a full order is likely to result in physical or sexual abuse. See s60, *Domestic Violence Act 1995* (New Zealand).

<sup>62</sup> It seems the 'right' of defendants to have a wife/nursemaid is also a consideration in the minds of some magistrates.

lation reside in the attitudes of magistrates and judges where family violence is concerned. A good example of this is the argument against making *ex parte* orders due to the claim that to do so would increase hostility between the parties. No court would be likely to defend, on such a basis, a decision against providing immediate and comprehensive protection to a victim of violence inflicted by a stranger. Arguably, magistrates view family violence and Family Court judges as different to other forms of violence: as a private relationship problem more appropriately served by therapeutic interventions than clumsy legal remedies. This privatised, gender-neutral construction of family violence obscures the existence of a 'victim' and a 'perpetrator', as well as the legitimacy of claims for meaningful legal protection, such as the exclusion of the perpetrator from the home.

It is a well-established fact that the violence women and children experience is likely to escalate at the point that they try to separate from the perpetrator or initiate legal action to obtain protection.<sup>63</sup> This is also the period in which women are most susceptible to being murdered by their partners.<sup>64</sup> Knowledge of women's and children's vulnerability in this period provides a strong basis for courts to prioritise their safety needs by providing comprehensive legal protection. And in view of such considerable risk, it should be reasonable to prioritise their safety above such considerations as the harm or discomfort that may be caused as a result of temporarily suspending some of a defendant's rights.<sup>65</sup>

#### *Victim Safety versus Perpetrator Accommodation Needs*

In light of the magistrates' views outlined above, it is not surprising that various researchers and observers have noted a tendency of courts to prioritise the accommodation needs of perpetrators over the accommodation and safety needs of victims.<sup>66</sup> The requirement on the Court to give consideration to the accommodation needs of the defendant may seem a fairly reasonable one, but in practice it provides a vehicle for the Court to exercise bias against victims of violence. The requirement provides the 'Catch-22' that allows the Court to justify disregard for the legitimacy or primacy of women's needs.<sup>67</sup>

The Catch-22 goes something like this.<sup>68</sup> If a woman applies for an interim order in the absence of the defendant, the

<sup>63</sup> Tracey 1997, Epstein 1999, Fritzler and Simon 2000

<sup>64</sup> Fritzler and Simon 2000: 32, Mouzos 1999, Rendell et al 2000

<sup>65</sup> This was certainly the argument put by the Women's Policy Coordination Unit (1985) in the discussion paper that led to the enactment of the legislation.

<sup>66</sup> Nunn 2001, Victorian Community Council Against Violence 1992, Boyle 2001, Babel 2002 and Wearing 1992

<sup>67</sup> *Catch-22* is the title of an anti-war novel written in 1961 by Joseph Heller. The term has come to denote a no-win dilemma.

<sup>68</sup> This analysis is largely based on information provided by focus groups with family violence service providers and commentary in Nunn 2001, Victorian Community Council Against Violence 1992, Boyle 2001, Babel 2002 and Wearing 1992.

Court will act with a caution akin to paralysis for the reasons outlined in the previous paragraphs. Usually, the woman will be asked to nominate alternative accommodation for the perpetrator in his absence. If she fails to do this, it is likely to further diminish her chances of success. If, instead of applying for an interim order, she seeks temporary shelter in a refuge and then applies for sole occupancy, the Court is still inclined to discount her application and prioritise the accommodation needs of the perpetrator, on account of its perception that she is now safely and adequately housed. In either case, if the defendant attends the hearing but contests the order on the grounds that he has nowhere else to live, relatively few magistrates will consider making the order.<sup>69</sup>

The inclusion of the provision to consider the accommodation needs of the defendant may be a reasonable gesture, if a double standard of citizenship for men and women was not deeply ingrained in our culture. This double standard ensures that the contest set up by this provision is very often unwinnable for women; and the result of losing the contest is, for many women, increased vulnerability to homelessness and violence. One woman interviewed by Wearing disturbingly illustrates this point. She describes her experience of trying to get an order, with the assistance of police, to exclude her husband from their home on learning that he had been sexually abusing her daughter:

*The Magistrate had the brief details in front of him and he said, 'are you the one who is being abused', and I said, 'no it's my daughter'. He said 'what do you propose we do with your husband, where is he to live?' I said, I really don't know. The Magistrate said that was a problem for him too, that we can't just take this man's home from him, deny it. And then proceeded to tell the police off for using Intervention Orders for keeping a guy from his home, so it was denied. We didn't get any Order at all, and the police were wild and I was shaking and my daughter was crying. He now could be free to come home that night and go through us for what we had done behind his back.<sup>70</sup>*

#### *Victim Safety versus Perpetrator Parenting Rights*

Despite the power given to magistrates under the CFV Act to include children on their mother's intervention orders, and under the Family Law Act to make, vary or suspend Family

<sup>69</sup> Victorian Community Council Against Violence 1992. There is no quantitative data to confirm the exact extent to which this is the case, but this claim is supported by a wealth of anecdotal evidence.

<sup>70</sup> Wearing 1992: 26

Court parenting orders, magistrates exercise extreme caution in restricting the parenting rights of alleged perpetrators.<sup>71</sup> The vulnerability of women and children to escalating violence on separation, or after the initiation of legal action, is well documented. So, too, are the ways child contact orders are used by perpetrators to continue to abuse, threaten, assault and even kill the subjects of their violence.<sup>72</sup> And yet sole occupancy and other intervention orders are typically made subject to a requirement for child contact by the perpetrator. To preclude or restrict contact by the defendant, or to include children on an order, magistrates typically expect to see strong evidence of exceptional violence and, moreover, violence directly inflicted on the child. A domestic violence outreach worker who participated in a focus group for this Discussion Paper commented:

*I think when you mention children, magistrates tend to question around that and say 'well how is this child being subject to violence?' because the impression you get is unless the child has personally been subjected to violence then magistrates don't consider that there is a need for protection – because there is nothing in the [State] legislation about children being affected by witnessing or anything like that. And I don't think that magistrates accept that children are in need of protection if they have witnessed [violence].*

The failure of magistrates to use the full extent of their power in this respect results in orders being made that are often ineffectual or compromised in terms of the protection they offer women and children. According to another domestic violence outreach worker interviewed:

*In my experience, an intervention order which allows the perpetrator to telephone and approach under the circumstances of child access is a completely redundant order. In most cases it just doesn't work. He can telephone her when he wants and it is very difficult to prove a breach of order. It's very difficult to prove whether he is talking about child access or he is threatening her.*

<sup>71</sup> According to WESNET, magistrates are not just cautious in making or varying pre-existing orders. They do not use these powers (Earle 1998, Alexander 1996).

<sup>72</sup> See Rendell et al 2000 for research on contact arrangements where there has been violence in the family.

This interpretation of the legislation by courts again points to the structural tension in the legislation, between the civil nature of the intervention offered and the means by which such intervention is provided. The legislation does not require applicants

to prove the criminal guilt of the defendant; but without such proof, courts are ambivalent about imposing constraints on the parenting rights of the defendants. Again, the Court's preoccupation with the rights of the defendant – its concern about the potential injustice that may result if he is restricted from contact with his children – obscures the needs and rights of women and children. It typically overlooks the likely consequences on them should such a restriction not be imposed.

*Relationship of the 'Crimes (Family Violence) Act' to Family and Criminal Law*

It is evident from the observations made by focus group participants, and an analysis of Wearing's research, that there is another reason why magistrates are unwilling or reluctant to make sole occupancy intervention orders or orders that preclude the defendant from child contact. This relates to the way courts interpret the relationship between the legislation, the Family Law Act and, to some extent, Criminal Law.

As mentioned at the beginning of this Section, the CFV Act was created to address the deficiencies of both the Family Law Act and relevant criminal codes in providing immediate and comprehensive protection to victims of family violence. For this reason, provisions to protect children and remove perpetrators from the home were included. But the coexistence of two pieces of legislation with overlapping content and jurisdiction has resulted in courts informally delineating boundaries between the CFV Act and the Family Law Act. While the line drawn is not consistent across all Magistrates' Courts in Victoria, the overwhelming tendency is to demarcate issues relating to occupancy of the family home or the parenting of children as the appropriate sphere of Family Law.

Despite the scope of the legislation to protect children and their non-offending parents through limiting defendants' contact with children, focus groups participants noted that magistrates do not often consider this within the appropriate scope of the legislation.

*I've heard many times a magistrate say 'this is a Family Court issue' in relation to getting children on orders and 'you will have to deal with this in the Family Court' . . . Many magistrates are quite open about saying 'we don't want to touch this, we don't want to touch anything to do with kids' . . .*



This observation – that magistrates consider child contact to be exclusively a Family Court issue – is confirmed and illuminated by Wearing’s interviews with magistrates and court staff. They reveal a strong and pervasive belief that the Family Court is the appropriate sphere in which to consider applications for sole occupancy or exclusive custody. By-and-large, applications for these under family violence legislation are deemed an inappropriate use of the legislation. For example, one magistrate told Wearing:

*If there is an urgent order required I suppose that really falls squarely within the provisions for the C(FV)A, and I have got no objection to the application being made under the C(FV)A in that case. But if it comes out in the evidence that there are going to be **all sorts of disputes over property and children**, I advise them I think you are better off making the application under the FLA, because in my view that is the appropriate jurisdiction that handles those sorts of matters, whereas restraining violence comes under C(FV).<sup>73</sup>*

The view that ‘Crimes (Family Violence) [is] about violence, [while] Family Law [is] about custody, access, maintenance and property’<sup>74</sup> was also ‘stated unequivocally’ by 40 of the 70 court clerks Wearing interviewed.<sup>75</sup> When asked about which legislation they advise complainants to apply under, they said such things as:

*This Act [CFV] is certainly preferable for cases of violence, but I believe that it shouldn’t be used as a means of preventing custody and access to children.*

*If it’s not a property or access dispute but a violence thing, I don’t worry about advising them about Family Law.<sup>76</sup>*

As with the magistrate quoted above, issues pertaining to property or children are seen by these court clerks as merely ‘disputes’ requiring adjudication by the Family Court, rather than as matters which are fundamentally and intrinsically wedded to the ‘violence thing’. The view that applications relating to property or children under the CFV Act are typically used as an illegitimate back door to more favourable Family Court outcomes is also apparent from comments made by magistrates

<sup>73</sup> Wearing 1992: 214, emphasis added

<sup>74</sup> The terms ‘custody’ and ‘access’ were replaced by ‘residency’ and ‘contact’ in Family Law following the enactment of the Family Law Reform Act in 1995. These terms are used interchangeably in this Discussion Paper.

<sup>75</sup> In this Paper, the term ‘registrar’ rather than ‘court clerk’ is used, except when referring to Wearing’s research, in which she exclusively used the latter term.

<sup>76</sup> Wearing 1992: 135

and court clerks and cited in Wearing's report.<sup>77</sup> One magistrate stated:

*What happens in their homes has got nothing to do with me, that's a Family Court matter. Many times the women involved are determined to proceed to divorce and resolution of property and I believe they should find their own level through negotiation via solicitors.*<sup>78</sup>

Consistent with this view, DVIRC focus group participants noted that it is a common practice of courts to deny applications for sole occupancy or exclusive custody, or refer these to the Family Court instead.

The demarcation made between 'family violence' and 'Family Law' by magistrates and court clerks seems to correspond to a separation of the issues along the lines of criminal and civil law. In Wearing's research, one magistrate explained:

*Domestic violence as I am always telling people in my court is a criminal matter . . . It has nothing to do with the Family Court. Do [sic] you want to stop him having access to the kids, you go to the Family Court . . .*

Similarly, another magistrate stated:

*I think that access arrangements are for the Family Law, where intervention orders are ones that deal with reasonably acute situations that breach the Criminal Law.*<sup>79</sup>

We can see that the CFV Act is viewed as pertaining and responding to the *crime* of family violence, while Family Law attends to the domestic practicalities arising from associated family breakdown. In this view, the purpose of the CFV Act to *complement* the Criminal Law – by providing appropriate protection to victims of family violence – seems to be somewhat obscured. There is a sense in which the CFV Act is viewed as *replacing* the Criminal Law in matters of family violence, rendering its primary purpose as civil protection legislation secondary. Through the Act, it was undoubtedly the intention of legislators that a 'reasonably acute situation that breaches the Criminal Law' be dealt with *as a crime* under Criminal Law, as something from which a victim requires immediate and appro-

77 Wearing 1992: 139ff, 216ff

78 Wearing 1992: 214

79 Wearing 1992: 214

appropriate protection. In view of the nature and location of the crime of family violence, the options to remove the perpetrator from the home or preclude his contact with children were viewed as fundamental components of the legislation by those who originally developed it.

These interpretations of the appropriate scope and purpose of the Act clearly and significantly diminish its capacity to protect women and children and to remove perpetrators of family violence from the home. In line with family violence protection legislation around the world, the CFV Act was constructed in a way that recognises both the *family* nature of family violence, and that provisions to intervene at the level of accommodation and childcare are essential. In practice, this valuable insight is distorted by magistrates and registrars who maintain a dichotomy between 'family' and 'family violence', such that the only intervention orders the Court is comfortable making are personal non-molestation orders.<sup>80</sup> Orders relating to children and occupation of the home are referred back to Family Law which, at its best, is ambivalent when dealing with violence on account of its construction around the 'no fault' principle of marriage breakdown. The Family Court has therefore been historically compromised in its capacity to respond effectively to family violence: reluctant to pass judgement on the behaviour of parties, to restrict the 'right of the child' to ongoing contact with both parents, or in any other way to prioritise the safety of those affected by family violence. Moreover, access to the Family Court is slow, expensive and restricted to a limited subsection of all those who make applications for intervention orders. And this is in addition to the fact that the protection Family Court injunctions offer is inferior to that available under the State law.

The tendency of courts to impose a restricted interpretation on the scope and purpose of the legislation thus results in another Catch-22 for women who seek the protection of sole occupancy and exclusive custody of children. Section IV of the Discussion Paper considers some possible strategies for clarifying and enforcing the original scope and purpose of the legislation, with a view to improving women's access to these sorts of interventions.

<sup>80</sup> The sense that the CFV Act does not concern *family* violence is further complicated by amendments made to the Crimes Act in 1995 to extend the provisions of the CFV Act to victims of non-family violence molestation, such as stalking and other harassment.

*Breaches*

The way magistrates treat breaches of intervention orders is another important issue emanating from Wearing's research. Only nine of the 40 magistrates she interviewed considered that all breaches are 'serious' in their contempt of court; but even these magistrates expressed reluctance in imposing maximum penalties. Eighteen felt the need to distinguish between 'serious' and 'nominal', 'minor' or 'technical' breaches. Non-serious breaches tended to be viewed as those where no physical violence had occurred, or those for which there was no evidence of physical injury. The study also reveals an inconsistency in magistrates' approaches to penalising offenders, although most were unwilling to consider the penalty of jail – especially for a first offence. The general preference was for small fines. One magistrate stated 'I don't see any point in penalties unless I have really got to, because it usually only inflames a difficult situation. I usually give a bond or a community based order'.<sup>81</sup> These views about appropriate sentencing are reflected in contemporary court statistics.<sup>82</sup>

Again, there is a distinct sense in which family violence is viewed as a private relationship problem that is more suitably served by therapeutic interventions than by the imposition of criminal sanctions. The tendency to distinguish a hierarchy of breach offences also means that perpetrators can continue to engage in a range of intimidating, harassing and life-threatening behaviours with relative impunity. Remaining in premises that are known to the perpetrator can make women and children particularly vulnerable to such violence.

*Inconsistency in Judgements*

A final point on the interpretation of the CFV Act is one that was made frequently by focus group participants. It has also been made by numerous other observers over the years. There is a significant inconsistency between magistrates in their interpretation and use of the Act, including with respect to what is considered reasonable evidence, what is demarcated as Family Law and family violence, what justifies the inclusion of children on an order, or a claim for exclusive occupancy of the family home. In the words of one DVIRC focus group participant, 'it's hit and miss depending on the magistrate you get'. Some magistrates – in fact, some courts – appear to be relative-

<sup>81</sup> Wearing 1992: 203

<sup>82</sup> See Department of Justice 1999

ly sensitive to the needs and issues faced by those experiencing family violence; others are much less so.<sup>83</sup> Some courts routinely make sole occupancy intervention orders; others rarely do so.<sup>84</sup> Unlike in Family Law, the magistrates' judgments do not contribute to a body of case law that can assist in the development of a standardised interpretation of statute. Neither is there an established bench protocol for the interpretation of the legislation, or an objects clause in the Act to guide the use of the Court's discretion. At the same time, the legislation is constructed in a way that gives a fair degree of discretion to individual magistrates. The resulting inconsistency between magistrates leads to much confusion about the legitimate entitlements of applicants, and what they may expect to achieve in court.

### Summary

This part of Section II has outlined the major differences between the provisions for excluding perpetrators of family violence from the home under the Family Law Act and the CFV Act. While it is possible to see that the provisions of the Victorian legislation mark a considerable improvement on those of Family Law, it clear that the way the legislation is implemented and administered negates significant aspects of its progressive potential.

In particular, the insistence by many magistrates and registrars that applications pertaining to children and the family home should be the exclusive province of Family Law limits the legislation's power to provide an effective response to violence. This is particularly the case where the victim lives with the perpetrator or has children in common with him. At another level, the legislation's ambivalence towards excluding an alleged perpetrator from the home gives considerable scope to magistrates to use their discretion in a biased way. By including a provision that requires the Court to consider the accommodation needs of the defendant, magistrates are able, and generally inclined, to prioritise the property rights of defendants over the property rights and safety needs of women seeking exclusion orders. A structural tension in the legislation further compounds magistrates' reluctance to use the full extent of their powers to protect victims of family violence. The provisions of the Act to suspend significant civil and human rights of

<sup>83</sup> This point came out very clearly in the DVIRC focus groups, which were attended by workers from different metropolitan and rural areas familiar with the practices of their local courts. See also Babbel 2002. One eastern metropolitan court's commitment to improving the access of applicants to sole occupancy orders extended to supporting a local domestic violence outreach service's submission for a specialist court support worker.

<sup>84</sup> I am not aware of statistical evidence to support this claim. It is an observation that has been documented in various reports and policy proposals, including those of Victorian Community Council Against Violence 1992, 1996 and the Office of Women's Policy in its recent policy proposal *Key Directions in Women's Safety* (2002).

alleged perpetrators without notice, and without a requirement to establish criminal guilt, sits awkwardly with important principles of our system of justice, such as the right to due process and a fair trial, the right to be assumed innocent until proven guilty beyond reasonable doubt, and so on. In turn, the Court is inclined to treat applications for sole occupancy – especially *ex parte* applications – as unjustifiable unless supported by proof beyond reasonable doubt that criminal assault took place.

The gender bias of the courts in relation to their treatment of exclusion orders and other family violence interventions is not unique to Victoria or Australia. Many of the problems identified in this section correspond to very similar issues in other jurisdictions that have enacted such legislation.<sup>85</sup> Some of the strategies that have been used in these jurisdictions to diminish such bias, and improve the extent to which the law achieves what legislators intended it to, will be considered in Section IV of this Paper, when we look at ‘Strategies for the Future’.

### **Naming Legal Rights and Options: The Invisibility of Sole Occupancy Intervention Orders**

*To have a sense of entitlement women need to know that [sole occupancy intervention orders] are out there in the first place. It always surprises me when women come to the service with prior knowledge of sole occupancy orders because there just doesn't seem to be [any information on it specifically]. It is only really when they come into domestic violence services that they first hear about it. I would like to see some sort of brochure [on sole occupancy intervention orders] in courts that women who come in are presented with as an option.*<sup>86</sup>

In the focus groups and other consultations conducted with family violence service providers, one issue that was frequently raised is the complete lack of information available to women about the legal option of having the perpetrator removed from the home. Women might learn from their doctors or police that they can apply for an intervention order to protect them and their children from further violence, but they are unlikely to be informed about the option of having perpetrators excluded from their homes. Nor do court registrars often explain or name this option when women go to their local court to apply for an intervention order; and women are not

<sup>85</sup> For example, almost identical problems have been raised concerning the shortfall between what is legislated and the way courts interpret statutes in the UK (by Morley and Mullender 1994), in the USA (by Epstein 1999 and Tracey 1997) and in New Zealand by Busch 1994.

<sup>86</sup> Domestic violence outreach worker, DVIRC focus group

<sup>87</sup> A good example is information provided by the Monash Oakleigh Legal Service on the Monash University Law Faculty web site [http://www.law.monash.edu.au/legal/mals/fam\\_viol.htm](http://www.law.monash.edu.au/legal/mals/fam_viol.htm) (site visited in June 2002).

This site provides lots of really helpful information about intervention orders, without specifically naming or explaining the option of removing the perpetrator from the home and how one might go about achieving this. There are also a number of notable exceptions to this rule, one of which is the third edition of the booklet *Family Violence: A Simple Guide to Intervention Orders and Other Legal Remedies* produced by the Federation of Community Legal Centres (Victoria). This is an exceptionally good information source that deals adequately and accurately with the Family Law dimensions of the CFV Act.

<sup>88</sup> Victoria Legal Aid and the Law Foundation of Victoria 2000

<sup>89</sup> Emphasis added, p.6

<sup>90</sup> For example, in the United Kingdom <http://www.gingerbread.org.uk/advice/sheets/fact3.html>, <http://www.answers.uk.com/services/domestic.htm>, [http://www.herefordshire.gov.uk/ssh/ssh\\_housing\\_advice2.htm](http://www.herefordshire.gov.uk/ssh/ssh_housing_advice2.htm), <http://www.compactlaw.co.uk/injun11.html>, <http://thompsons.law.co.uk/ttext/fsfam006.htm>, <http://www.newhamdvf.org.uk/Civil.html>. In Guyana <http://www.sdn.org.gy/hands/dv.html>. In South Africa [http://www.doj.gov.za/brochure/domestic\\_violence.htm](http://www.doj.gov.za/brochure/domestic_violence.htm). In New Jersey, USA [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm). In Alberta, Canada [http://www.gov.calgary.ab.ca/community/publications/plena\\_manual/additional\\_legal\\_remedies.html](http://www.gov.calgary.ab.ca/community/publications/plena_manual/additional_legal_remedies.html). In Northern Ireland [http://www.niwaf.org/domestic\\_violence\\_and\\_the\\_law.htm](http://www.niwaf.org/domestic_violence_and_the_law.htm).

necessarily apprised of it if they have access to legal advice or representation.

This information vacuum does not appear to be well addressed by other sources of legal information for victims of family violence. Many electronic and printed materials on legal remedies seem to stop short of explicitly naming or outlining this option and how women might go about achieving it.<sup>87</sup> The widely circulated booklet *Applying for an Intervention Order* provides a good example.<sup>88</sup> While this booklet is a good source of information on intervention orders generally, its information on removing a violent household member is very scant (two sentences in a booklet of 24 pages) and somewhat misleading. Under the section 'Standard Orders', there is a sub-section 'Staying away from your home or work' that discusses applying for an order restricting the defendant from such premises. There is an inherent assumption, even in the wording of the sub-heading, that the home is not jointly occupied – that it is principally *the woman's* home, and that the defendant can be ordered to stay away from it. All the booklet specifically says about having the defendant removed is that '*In practice*, [getting such an order] means that the other person cannot live with you. If they are living with you now, it means that they will have to move out'.<sup>89</sup> There is a discernible assumption here that we are not talking about the family home or premises that the defendant has more than a casual relationship to, because his 'moving out' is viewed as nothing more than a pragmatic and relatively unproblematic detail. *Applying for an Intervention Order* stops short of explicitly stating to the reader that her protection can be prioritised over the defendant's property rights – that the Court can order him to leave jointly-occupied premises *even if* those premises are owned by the perpetrator or leased in his name.

This situation is profoundly different to that which applies in other jurisdictions in the English-speaking world. Seemingly countless web sites in the United Kingdom, the United States, Canada, Guyana and South Africa, for instance, explicitly offer and explain to women the option of engaging the law to have perpetrators removed from their homes.<sup>90</sup>

This extraordinary deviation begs the question: why? The widely held view amongst magistrates, court administrators and lawyers that the Family Court is the appropriate sphere in

which to consider issues to do with the occupation of the family home is possibly a factor in the invisibility of this option to women as a family violence remedy. To the extent that these different groups of legal practitioners hold this view and mutually reinforce this interpretation of the legislation, women are unlikely to be informed of this option. If they have found out about it from another source, they are likely to be advised against pursuing it, or be directed instead to apply for a Family Court injunction or property settlement. If more magistrates were to allow the legislation to be used in the way it was intended, by accepting the legitimacy of applications for sole occupancy intervention orders, then arguably lawyers and registrars would be more inclined to provide information to women about this option.

Another important dimension of the invisibility of this legal option arguably lies in the absence of a dedicated term or provision in the legislation by which to refer to it. To the extent that this option is referred to at all in the CFV Act, it is subsumed within the broad group of orders that may be made restricting the defendant from premises in which the 'aggrieved family member' lives, works or frequents (s5(1)(b)). This provision does not explicitly state that a defendant may be excluded from occupation of *his* home, or that the applicant may be entitled to exclusive occupancy of *their* shared property. While these options may be implied by references to the defendant's 'legal or equitable interest' in the premises, or the need to consider everyone's accommodation needs, the legislation stops short of explicitly stating these possibilities. That is, it stops short of explicitly challenging the limited interpretation magistrates generally bring to bear on the statute.

While the lack of specific and explicit provisions in the legislation for removing the perpetrator and granting sole occupancy may be dismissed as relatively insignificant, this phenomenon appears to constitute a principle difference between the exclusion order provisions available under Victorian legislation and those available in the jurisdictions listed above. In contrast to Victoria, other jurisdictions that seem to be associated with more explicit and readily available information on legal options and entitlements have legislative provisions that are much more explicit in regard to these twin options. For example, in New Jersey excluding perpetrators



and granting sole occupancy are separately named and specified in family violence legislation. Amongst other remedies available to the Court, it can make:

- an order granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned by the parties or jointly or solely leased by the parties . . .
- an order restraining the defendant from entering the residence, property or school, or place of employment of the victim of other family or household members of the victim.<sup>91</sup>

Family violence legislation in the United Kingdom, Northern Ireland, Guyana, Canada and New Zealand similarly draws a distinction between 'occupation' or 'possession' orders (that give victims the right to exclusively occupy shared premises) and 'non-molestation', 'restraining' or 'protection' orders (that restrict the defendant's access to particular places and premises and constrain his ability to otherwise contact or harass the subjects of his violence).<sup>92</sup> To ensure there is no room for ambiguity about the perpetrator's property rights, occupation orders in the United Kingdom can specify that the perpetrator must *leave* the home.<sup>93</sup> In this jurisdiction, such orders are further classified into a handful of different categories, according to the underlying property rights of the parties involved. Parties undergoing separation where there is no family violence can also apply for occupation orders that specify one party is to leave all or part of the family home. These orders are distinguished from family violence occupation orders to the extent that a power of arrest cannot be attached to them.<sup>94</sup>

Naming and classifying legal options and entitlements in this way enables a user of the legislation to more easily identify their rights and options, and may accordingly improve their access to appropriate legal interventions.<sup>95</sup>

In examining different legislative models for excluding perpetrators, it has been made evident to me how profoundly important it is that something be named in order to have material existence. A name facilitates the ascription of substance and form to an object which cannot be easily ignored or denied. I believe the lack of a specific name or provision in the Victorian legislation obscures the existence of sole occupancy orders and their legitimacy as a legal option for victims of family violence. The pervasive lack of information on this option

<sup>91</sup> See web site of law firm Kenneth Vercaemmen and Associates [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm).

<sup>92</sup> See internet references in previous footnotes.

<sup>93</sup> From <http://www.compactlaw.co.uk/injunq11.html>. Family violence workers indicated to me that magistrates' failure, in making sole occupancy orders, to specify that the perpetrator must leave the premises, can result in significant enforcement problems. See Ineffective Enforcement of Orders in Section III of this Paper.

<sup>94</sup> See section 47 of the UK's *Family Law Act 1996* at [http://www.bailii.org/uk/legis/num\\_act/fla1996114/index.html](http://www.bailii.org/uk/legis/num_act/fla1996114/index.html).

<sup>95</sup> Whether these differences in legislation actually reflect improved access to sole occupancy in these countries is difficult to establish in the absence of comparative quantitative data. My observations only extend to the quality and extent of information provision, which presumably reflects the level of the public's awareness of the law and hence their likelihood of pursuing such intervention.

to users of the legislation reflects and reinforces this namelessness and obscurity, through which courts and members of the legal profession that consider sole occupancy to exceed the appropriate purview of family violence legislation can quite easily deny applicants access to this intervention. Without the means to unambiguously identify the object of their claim, those who seek to have the perpetrator removed from the home can find it difficult and even impossible to navigate a way around those who gate-keep this legal option.<sup>96</sup>

One episode of which I learned illustrates this point well. On approaching her local Magistrates' Court, a woman explained to the registrar that she wanted a 'sole occupancy order' so that her violent husband could be removed from their home. The registrar told the woman 'We don't do those here. You'll have to go to the Family Court or to the Residential Tenancies Tribunal to get that type of order'. In the absence of a specific, legislatively-defined term to name the intervention this woman was seeking, she borrowed one that is commonly used by workers in the family violence sector. But this terminology was not recognised by the court registrar. To the extent that it was, it was deemed to be the jurisdiction of Family Law or Residential Tenancy Law, despite the provisions in the CFV Act for such an intervention. So because of her inability to satisfactorily *name* the unique and entirely legitimate legal intervention she required, this woman was misdirected elsewhere.<sup>97</sup>

The absence of a name renders sole occupancy intervention orders invisible or non-existent in another highly critical regard – with respect to data collection. While the Magistrates' Court of Victoria collects statistics on intervention orders according to a wide variety of parameters, including the type of restriction placed on the defendant and the nature of the relationship between the defendant and the AFM, no data is published on sole occupancy orders. Sole occupancy intervention orders are not deemed to have a unique identity. Again, they are subsumed within the broad category of orders made under section 5(1)(b) restricting defendants from any premises in which the AFM lives, works or frequents. The result of this is that we do not actually know how infrequently orders are made which involve the exclusion or removal of persons from their homes. Anecdotal evidence suggests they are made *very* infrequently but there is also evidence of considerable variation

**96** The role of registrars, police and solicitors in gate-keeping women's legal options is explored in more detail in Section III of this Paper.

**97** Since being told this story, I have heard a number of very similar accounts from other support workers, in which the absence of an appropriate terminology has complicated or prevented access to an application for sole occupancy.

between courts, with some making such orders regularly and others rarely, if ever. Data collection plays a critical role in any policy analysis or development. To the extent that sole occupancy orders are not specifically named or represented in CFV statistics, it is not possible to evaluate the effectiveness of the legislation to deliver this type of protection to victims of family violence.<sup>98</sup> Neither is it possible to demonstrate the extent to which many courts consistently treat applications for these orders differently to applications for other orders under section 5(I)(b).

In the absence of a legislatively-defined term, common names such as 'sole occupancy' come to fill a language void. In addition to the problem just identified – that the term may not be recognised by those who gate-keep this legal option – there are at least two other problems with using common terms to talk about legal entitlements. The first is that they are rarely subject to consistent definition, so different people interpret them differently, and how they are defined can change over time. Definitional variation in the use of 'sole occupancy' is well illustrated in the focus group extract transcribed below. In this conversation, one worker defined sole occupancy in terms of *outcome* – whether the woman got to live in the family home without her violent partner. Another defined it more narrowly, as an application or an order for the *removal* of the violent party from the household. And the facilitator saw sole occupancy in terms of the exclusion of the defendant from premises in which he had proprietary rights, irrespective of whether he was currently residing there and would require removal. What is also clear in this extract is that naming and not naming can be strategic choices.

*Facilitator 1: What about the language of 'sole occupancy orders'? Is this generally recognised by registrars and magistrates, or are you just talking in terms of this restriction or that? Do you actually use the words 'sole occupancy order'?*

*DV Worker 1: In our court, the name 'sole occupancy order' is not used: it's 'he's not there at the moment and she wants an **intervention** order to stop him returning' without saying 'sole occupancy order'. If we stated that [the applicant's house] is where [the defendant] lives, we want a sole occupancy order, it wouldn't happen.*

*DV Worker 2: That's not a sole occupancy order. To my mind that is purely a woman taking the opportunity to get a [standard intervention*

<sup>98</sup> Where sole occupancy orders *are* made, it would be interesting to know the composition of AFMs and defendants. For instance, how often do children apply successfully to have a violent parent removed from the home? Likewise siblings or unrelated housemates?

order] when she is living apart from him . . . I don't consider that to be a sole occupancy order. I consider a sole occupancy to be when he is actually told to leave the home.

DV Worker 1: I think very few magistrates in our area would actually say [to the defendant] 'you have lost the right to live at that particular place'.

Facilitator 1: I've been defining sole occupancy as any order that has restriction 5(1)(b) in it [the relevant section of the Act]. That is, he can't go to the property where she lives and he has a prior interest in the property.

DV Worker 2: I would just say that that is a standard intervention order, it just so happens that it is a property that he has an interest in.

Facilitator 2: Are you saying that it is relatively easy to get an order if he is out of the house?

DV Worker 2: Yeah. It's not perceived by me, and certainly not by magistrates, as a sole occupancy order.

Facilitator 1: So the defining issue for you, and magistrates, is whether the order involves his removal? And that's what's hard to get, almost impossible?

DV Worker 2: Yeah.

DV Worker 1: It's about being strategic, though. I don't know how long it will take before we can start saying that this lady wants a sole occupancy order. If you are supporting a woman going for an intervention order, you say, when the registrar asks [where does the defendant live] 'well, he stayed last night at his mother's place', so you give the mother's address. It's about being strategic. [Then the issue of removal is circumvented.]

DV Worker 2: I don't think that we are getting sole occupancy orders [in such a case]. The outcome might be that she has occupancy of the home and he can't go back there. But the court doesn't see it that way. They don't see that they are granting sole occupancy orders, and I don't see that the women we are working with are applying for them.

The other significant problem that arises from using common names such as 'sole occupancy' to denote legal rights or entitlements, is that these names can enter common usage with a whole lot of baggage attached to them from their use in another context. This is overlaid onto the new context, obscuring the intended meaning. In the case of 'sole occupancy order', this terminology originated in Family Court case law, where 'sole use and occupation order' has come to refer to cer-

tain property orders made under s.114 (1) or s.79 of the Family Law Act. Neither of these orders is intended or dedicated as a family violence intervention that might justify prioritising the safety needs of victims. The Family Law heritage of the term 'sole occupancy' may thus contribute further to confusion about the purpose of the intervention being sought.

The term undoubtedly also carries other baggage around with it which I have not considered here. But at least one other issue to reflect upon in considering the utility of 'sole occupancy' is the way it focuses attention on the *occupation* of premises, rather than the *removal* of household members (which is implied by such terms as 'exclusion' or 'ouster' orders). This focus may again serve to obscure the protective purpose of the intervention. It is really interesting to note the tendency in other jurisdictions to have separate provisions and terms for excluding perpetrators and for granting exclusive occupancy to victims. Such an approach eliminates ambiguity about what is being applied for or granted.

### III. Major Obstacles to Remaining in the Home

#### Introduction

Several policy documents relating to family violence have recently emerged from the Victorian government. They signal support to enable women who are experiencing family violence to remain in the home. However, arguably, they do not adequately acknowledge<sup>99</sup> or propose to address<sup>100</sup> the significant structural barriers that women face when they seek to make this choice. For the vast majority of Victorian women experiencing family violence at this time, remaining in the home and having the perpetrator removed is not a genuine option. Significant reforms need to occur at a number of levels before this will be the case. Improving women's support options, which is the primary strategic response of government to this policy issue, is an important but grossly inadequate response to the diverse and complex systemic barriers women face if they seek to remain in their homes.

In the preceding section of this Paper, we examined in detail some of the significant reasons why remaining in the

<sup>99</sup> *Key Directions in Women's Safety* identifies a need for 'legal protection from further acts of violence, an appropriate police response, support of family violence services, health and community based services, and the provision of practical assistance to improve security in the home' (p.39). The *Crisis Protection Framework* identifies the need for 'outreach support, legal options such as intervention orders and sole occupancy orders; financial assistance; development of safety plans; liaison with schools; and assistance to improve security of property via locks, lighting or security doors' (p.20). It also refers to the need to examine emergency accommodation options for perpetrators.

<sup>100</sup> The *Crisis Protection Framework* talks in terms of 'refocusing resources' with an increasing emphasis on the 'flexible support options' provided by outreach services. *Key Directions* signals the Government's intention to review the CFV Act, improve advocacy and referral services for women and 'establish a cross-Departmental project team to explore the feasibility of providing enhanced support and options for women so that more women can exercise the right to remain in their home following family violence' (p.39).

home is not a genuine option for the majority of women experiencing family violence. That section outlined some of the many ways in which the law is ambivalent about protecting women, if to do so would compromise the property rights or other civil liberties of those who are accused of perpetrating violence. The section pointed to the tendency of many magistrates and Family Court judges to view family violence as a private relationship conflict, rather than a battleground over citizenship rights or a sphere of dangerous crime in which the safety of victims must be prioritised. Accordingly, applications for the exclusion of perpetrators from the home are frequently viewed as 'property disputes' which require the impartial adjudication of the Family Court, rather than as a legitimate measure that may be engaged to ensure the protection of victims from assault, murder or illegal eviction from their accommodation. The section concluded by exploring a number of ways in which the legal option of having the perpetrator removed is systematically obscured from women by the absence of an appropriate, legislatively-defined terminology.

By drawing on existing research and commentary, as well as evidence collected by DVIRC during the research for this Paper, the following section of the Discussion Paper details more of the landscape of obstacles women face if they seek to remain in the home and have the perpetrator removed. The issues that will be explored here are:

- women's poorly developed sense of entitlement to the family home;
- the inaccessibility and insensitivity of the legal system to women seeking protection;
- the role that police, solicitors and court administrators play as gate-keepers to legal protection and sole occupancy;
- the ineffective enforcement of intervention orders by police and the courts, such that women are often not safe to remain in their homes;
- the unique barriers to ousting perpetrators in rural contexts; and
- other legal and financial obstacles to remaining in the family home.

All of these issues need careful consideration by policy makers seeking to expand women's options in leaving violent relationships. Many are not new to public discussion, having

been raised in previous papers and reports. Unless these issues are acknowledged and addressed by the government in a meaningful way, it will be misleading, frustrating, and – in many cases – quite dangerous to encourage women to pursue this option.

### An Inadequate Sense of Entitlement to the Family Home

One DVIRC focus group participant expressed the following view, based on her experience as a domestic violence outreach worker:

*In order to even consider sole occupancy, women have to have a fairly well-developed sense of entitlement which most of the women we work with don't, and I think often for women from some cultural backgrounds – and I mean this varies considerably – there is even a less-developed sense of entitlement for lots of reason. So the idea of actually claiming the family home as their own and having what might be considered a head-of-household figure turfed out, would be the last thing they might consider.*

One of the largest obstacles women experience in relation to remaining in the home is the belief that they do not have an equal entitlement to the premises they share with the perpetrator. Influential cultural attitudes and economic structures in our social organisation support this belief. Women's sense of control and ownership of shared space can obviously be further eroded by exposure to family violence. The result, unsurprisingly, is that many women assume their only options are to put up with the violence or leave the home.

Women's reduced sense of entitlement to the family home is linked to the inferior status given to their contribution to family economies. Due to a disproportionately high responsibility for childcare and housekeeping, and inferior status in a gender-stratified labour market, women's direct financial contributions to rent or mortgage payments is often lower than that of their male partners.<sup>101</sup> One result can be that women's property rights are undervalued. Evidence of this has clearly emerged in patterns of property division on divorce;<sup>102</sup> and is reflected in the recent observation made by a domestic violence worker that 'a lot of women believe that if he works and pays the mortgage,

<sup>101</sup> McDonald 1986, Funder 1986, Baker 2001

<sup>102</sup> McDonald 1986, Baker 2001

she is not entitled to the home'.<sup>103</sup> As Australia's peak body for women's services, the Women's Services Network (WESNET) also recently observed, 'Many women believe that once they have fled the home they have lost all realistic claim on it'.<sup>104</sup>

Another reason why some women have a particularly under-developed sense of entitlement to their homes is associated with a lack of permanent residency status. Women who have been sponsored to Australia and only have provisional residency, with no access to an independent income, are not only very vulnerable to abuse but are even less likely to feel they have a right to evict their sponsor or husband from shared accommodation. According to another DVIRC focus group participant, such women 'have an ingrained sense that Australia owes them nothing and is not going to do anything for them'.

The view that women have an inferior entitlement to the family home is not a notion that has been restricted to certain immigrant or non-'Anglo' populations. It has also been prevalent in mainstream cultural attitudes. This is revealed in the question that is often asked about a woman who is experiencing family violence: 'Why doesn't she leave him?' This has distracted us from alternative questions: 'Why is he not removed?' 'Why is he not made to take responsibility for his violence'?

This view has also been implied by standard police and court responses to women seeking protection from family violence. Women have been encouraged to seek refuge, rather than assert their right to remain in their homes.<sup>105</sup> In our culture, men's relationship to their homes has often been viewed as more inviolate, more fundamental to their citizenship, than is the case for women. Women's relationship to the home has tended to concern proximity to the domestic sphere rather than pertain to possession or ownership: for as the common sayings reveal, while 'a woman's *place* is in the home', 'a man's home is *his castle*'.

Despite the prevalence of these attitudes, they are increasingly being questioned and challenged in response to changes in women's social and economic status. This is clearly evidenced by the advent of policy interest in supporting women to assert the right to remain in the home, and an agenda to review the gender equity of Family Court property division formulae. In line with these changes, it is important that women's property rights are clearly and vocally defended – in the way family violence legislation is written, interpreted and enforced. As

103 Respondent to DVIRC questionnaire, May 2002.

104 Earle 1998: 6

105 Nunn 2001



outlined in Section II, the construction and operation of the law at present is significantly biased in favour of men's property rights. The acute and pervasive silence around women's right to apply for sole occupancy must also be addressed if women are to develop a sense of entitlement to remain in the home. Improving the visibility and accessibility of this legal option is likely, in turn, to generate greater cultural acceptance of women's equal rights to property and safety.

### Problems in the Legal System

A wide body of research pointing to women's inferior access to the law on account of gender-based social inequality now exists.<sup>106</sup> Women with physical, intellectual or psychiatric disabilities, those who have limited access to independent financial resources, and women who do not speak English find it even more difficult to enter the legal system. Some critical issues relating to women applying for intervention orders include difficulty in gaining access to legal aid, court facilities that are insensitive to the needs of victims of violence, and inadequate or inappropriately-used interpreting facilities. In their recent study investigating the link between family violence and women's homelessness, Chung et al made the following observation:

*It was commonly agreed that women had little information about what they could do legally when experiencing domestic and family violence and that the court experience when orders were applied for was often very lonely, frightening and bewildering. Language difficulties faced by many women from non-English speaking backgrounds and Indigenous women compounded their problems. . . . The attitude of magistrates and a perceived cautious exercise of their discretion came in for criticism by a number of women and stakeholders. It was felt that they did not always understand the nature of domestic and family violence.*<sup>107</sup>

They also noted that few women were able to afford legal representation. The courts' considerable reluctance and antipathy towards granting sole occupancy intervention orders or Family Court exclusion orders – especially where they impact on a defendant's access to children – suggest that such support and representation are even more critical requirements for success.<sup>108</sup>

**106** Two of the most significant contributions are the 1994 Australian Law Reform Commission Reports No. 67 (*Equality before the Law: Women's Access to the Legal System*, Interim Report) and No. 69 (*Equality before the Law: Justice for Women*).

**107** Chung et al 2000: 3

**108** DVIRC focus group participants raised the importance of good legal representation. However lawyers who are poorly informed about the nature of family violence, or unsympathetic to the needs and issues faced by women approaching the legal system for protection, came in for considerable criticism.

One focus group participant said they can be 'as bad as perpetrators'.

Women's significant inequalities in gaining access to legal aid dollars has been well documented.<sup>109</sup> This situation has become even more pronounced in recent years with changes to the Commonwealth-State Legal Aid funding agreement in 1996. The impact of resulting cuts in the Legal Aid budget on women seeking representation in civil and Family Law matters, especially where family violence is an issue, has been enormous.<sup>110</sup> Applications for intervention orders and Family Court injunctions on account of family violence are generally regarded by Legal Aid Commissions as not necessitating legal representation.<sup>111</sup> Women who apply for such assistance need to explain why their situation is exceptional. If their application is not contested, they are very unlikely to qualify for assistance.<sup>112</sup> Since it is often impossible to know whether an application is going to be contested until the day of the hearing, women may not be able to organise legal representation at such short notice; and if they adjourn the hearing to seek legal advice, the other party's costs are likely to be awarded against them.<sup>113</sup>

Many courts have duty lawyers available.<sup>114</sup> Some have specialist intervention order advocacy services, but these are not available universally.<sup>115</sup> Where they do exist, they are usually provided for a fraction of the total time the court is in session. If governments are really committed to providing women with the option of remaining safely in their homes, there needs to be a much greater financial investment made with respect to the provision of legal assistance and other advocacy services for women seeking exclusion orders. Without these, such women are likely to remain uninformed about the option of having the perpetrator removed, and so continue to struggle to persuade reluctant courts that such intervention is justified. Moreover, access to legal assistance should not remain conditional on the attendance of the defendant, as it is clear that the defendant's absence can further prejudice a court against making such an order.<sup>116</sup>

The injustice, frustration and disempowerment experienced by indigenous and migrant women who attempt to engage legal protection can be even more profound.<sup>117</sup> These women often have even less knowledge of the (white) Australian legal system, which is further exacerbated by a general lack of information provided by courts and legal centres in languages

**109** See Australian Law Reform Commission 1994b: 92ff.

**110** See Clarke et al 1999, Nicholson 2001, Millbank 2001.

**111** I contacted Victoria Legal Aid to enquire about the availability of assistance for these types of applications. I was told that applicants in these matters do not need representation and so legal aid is not required unless the situation is 'exceptionally complicated'. This information is consistent with the guidelines outlined in the *Victoria Legal Aid Handbook* 2000.

**112** At the same time, legal aid is available to intervention order defendants if they are children, if they have been arrested and are in custody, or if 'the order sought would curtail an important right of the defendant (for example excluding the defendant from his/her home), and a Court might be persuaded to make a less restrictive order or no order at all' (*Victoria Legal Aid Handbook* 2000: 25).

**113** DVIRC focus group observation.

**114** DVIRC focus group participants noted that the assistance provided by duty solicitors varies tremendously. In some cases it is worse than no advice at all. The value of the assistance is related to the duty solicitors' awareness of the nature and dynamics of family violence and the needs and issues faced by victims seeking protection.

**115** Babbel 2002. Volunteers or workers seconded from other funded services generally run intervention Order Support Schemes, denoting the lack of dedicated public resourcing of this important form of advocacy.

**116** As outlined in Section II, Wearing's (1992) research confirms that magistrates are exceptionally reluctant to make sole occupancy intervention orders on an *ex parte* basis.

**117** See Australian Law Reform Commission (1994b), paragraph 4.27ff. At the same time, the needs of indigenous and migrant women to remain in their home can often be accentuated by the necessity of maintaining proximity to a language and cultural community. Women from communities that encourage couples to have a large number of children or live in extended kinship systems may have even greater need to remain in the home due to the difficulty of obtaining emergency or alternative long-term housing suitable for large families, and the high level of disruption that would be caused to children and other family members by leaving the home.

**118** Babbel 2002

**119** Australian Law Reform Commission 1994b

**120** Babbel 2002

**121** According to Babbel's recent study, other problems with court facilities that were raised by the Australian Law Reform Commission in 1994 also remain prevalent. These are a lack of private interview rooms and an absence of separate waiting rooms for applicants and defendants. The resulting lack of privacy and vulnerability to violence that women experience further contribute to the disempowerment and fear they can experience in seeking legal intervention.

**122** Wearing 1992, 1996, Babbel 2002.

other than English.<sup>118</sup> The Australian Law Reform Commission has commented on a range of problems pertaining to the inadequate and inappropriate use of interpreters in courts, particularly in cases relating to family violence.<sup>119</sup> Recent research by Babbel exploring women's experiences of applying for intervention orders in Victoria indicates that many of the problems raised by the Commission eight years ago remain prevalent. The availability of interpreters in the Magistrates' Court is inconsistent and in some cases results in significant delays in the hearing of applications. Registrars rarely use interpreters when speaking to applicants, even when interpreters may subsequently be required in the courtroom. And when interpreters are used in court, the same individual will often interpret for both parties. Babbel's study also reveals disturbing evidence of a continuing culture of impatience, insensitivity and rudeness towards court users who require interpreting services.<sup>120</sup> If migrant and indigenous women cannot access legal representation, are poorly apprised of their rights or not given access to appropriate interpreting services, it is unlikely that they will be able to effectively assert their equal entitlement to the family home or gain the level of protection they or their children require.<sup>121</sup>

### Registrars, Solicitors and Police as Gate-keepers of Women's Legal Options

Earlier research points to the important role played by registrars, solicitors and police in providing advice to women about their legal options.<sup>122</sup> Each of these parties has considerable power to influence the decisions women make and, in some cases, limit their choices by discouraging or preventing them from applying for a particular type of restriction. This 'gate-keeping' role – particularly in relation to registrars and solicitors – was a recurrent theme in the focus group sessions DVIRC held with family violence workers. One participant stated:

*It is becoming more and more of an issue in the courts that the court staff are taking on that gate-keeping role. It's not actually their role. They're not supposed to do that at all. They are advising people not to*

*put [particular information] in front of judges. And I've even heard them say things like 'no, you can't do that' when their role is to assist to present the material in a way that the magistrate can comprehend it, not to decide what the material is, not to decide what applications go up to the judge. They are doing it more and more.*

Observers generally acknowledge that the role of registrars in Victorian Magistrates' Courts is very challenging. It requires the management of complex and diverse responsibilities, often with relatively little support, long case lists and inadequate facilities.<sup>123</sup> This situation is further exacerbated by the fact that many intervention order applicants (and defendants) do not have legal representation, are not linked to specialist support or advocacy services, and are often experiencing strong and traumatic emotions. Court staff themselves acknowledge that they experience pressure to play the various and at times conflicting roles of neutral administrator, legal adviser, social worker and personal assistant to the magistrate.<sup>124</sup> The result is that critical aspects of their role, such as facilitating access to appropriate legal protection for women experiencing family violence, are often performed inadequately.

Available evidence points to four main ways in which registrars act as gate-keepers to legal protection.<sup>125</sup> The first is in failing to provide critical information to women about their legal options, particularly the option of having the perpetrator removed from the home. In addition to the reasons given above, it is likely that registrars fail to inform women of the full range of options available to them under State legislation because many believe that applications pertaining to property occupation and the custody of children should more properly be dealt with under Family Law than CFV legislation.<sup>126</sup> Women who are seeking such applications are likely to be referred by registrars directly to the Family Court, even though the available options and the level of protection afforded them under this legislation are inferior to those that are (ostensibly) available under State law. They are also less immediate.

The second way that court staff act as gate-keepers is by advising women against making particular applications such as for sole occupancy. This advice seems to be based on a belief by registrars that magistrates will not grant these orders, and that the registrars will be personally sanctioned in some way for

**123** Babbel 2002, Wearing 1992.

**124** See Babbel 2002 and Wearing 1992 for interviews with registrars or 'court clerks' who administer CFV cases.

**125** Wearing 1992, 1996, Babbel 2002, Chung et al 2000 and DVIRC focus groups and questionnaires

**126** Wearing 1992. See Section II above.

allowing such an application to go before the Court.<sup>127</sup> Lack of evidence of physical injury or other material signs of violence seem to be particular causes for registrars advising applicants not to proceed.<sup>128</sup>

Wearing's research indicates that the attitudes, opinions and advice of registrars are tremendously influential in women's decision making about pursuing legal intervention. Of the 91 women she interviewed, 37 per cent indicated that these contributed to their decisions to withdraw their applications for intervention orders.<sup>129</sup> In her earlier study, Wearing found that

*the most significant experience for [the women interviewed] was their contact with the clerk. If they found the clerk supportive, that had a powerful influence on their subsequent behaviour and confidence. They all expressed the view that they were completely dependant on the clerk's response – there were some who were devastated when the clerk informed them that he thought they had little hope of their case succeeding, for example.*<sup>130</sup>

A third gate-keeping technique is refusing to allow eligible persons to make an application. Sometimes this is based on a view that the applicant is not genuine. From her interviews with court registrars from three metropolitan courts, Babbel reports they each:

*described acting as filters to prevent applicants they view as 'non-genuine' . . . or 'frivolous' from appearing before the Court. Staff at [one] court go to the extent of marking 'potentially frivolous' files with a coloured marker for the Magistrate to see . . . Registrars who had put 'clearly frivolous' cases before the Magistrate had themselves been threatened with the Court costs.*<sup>131</sup>

Refusing eligible applicants can also be based on prejudice stemming from ignorance about the nature of family violence, the strategies women employ and the pathways they take in extricating themselves from violent relationships. This is demonstrated in a statement made by a court clerk interviewed by Wearing:

*One time I did turn one down, I had prepared an application for complaint for her. She came to see me the day before the court and said*

127 Babbel 2002, DVIRC focus group

128 Wearing 1992, DVIRC focus group

129 Wearing 1996

130 Wearing 1992: 415

131 Babbel 2002: 23

*she wanted to withdraw it because her and hubby had got back together again, kiss and cuddle. Three weeks later she was back in wanting another one. I said sorry lady, you only get one bite of the cherry here. You withdrew the first one and you are just as likely to withdraw the second one. As soon as your old man gets served properly you kiss and cuddle, and then a couple of weeks later, bash bash bash — my policy is they get one bite of the cherry and that's it.*<sup>132</sup>

The fourth way in which court staff gate-keep is by assuming the role of a mediator or negotiator with a view to obtaining an agreement between the applicant and the defendant so as to diminish hostility between the parties and save the magistrate's time. Some comments made by the clerks Wearing interviewed demonstrate this practice and its rationale:

*I often try to settle or resolve the cases to save the Magistrate's time. Sometimes we feel like social workers or marriage guidance officers . . .*

*The general trend is for consent. I talk with them independently and relay versions until there is consent. The Magistrate is happy to sanction it and it saves his time — but it is important that they see the Magistrate briefly — it gives solemnity . . .*

*On the day of the listing I get the parties together interview them and get an agreement — this is to save the Magistrate's time.*<sup>133</sup>

While the practice of court staff in assuming such a role is obviously well intentioned, it again reveals critical ignorance about the nature of family violence as a multifaceted practice of power and control by one person against another. It ignores the fundamentally unequal nature of the relationship between the person seeking protection and the person committing the violence, and falsely assumes that both parties have equal bargaining power. In practice, the object of negotiation in protection order cases is the level of the victim's protection.<sup>134</sup> To the extent that exclusive custody of the children and sole occupancy of the family home are prime targets of such negotiation, this practice can seriously erode the level and quality of protection women achieve.

Getting the AFM to consent to an undertaking of good behaviour by the defendant, in place of having an intervention

<sup>132</sup> Wearing 1992: 54. Two of DVIRC focus group participants reported that similar comments had been made to them by court staff about their clients.

<sup>133</sup> Wearing 1992: 43

<sup>134</sup> An alternative focus of negotiation that does not impact as significantly on women's safety outcomes is the defendant's admission of guilt. He may agree to having the order made against him on the condition that he does not have to acknowledge guilt.

order made against him, appears to be another standard direction of negotiation in these cases.<sup>135</sup> Alternatively, an applicant may be encouraged or pressured to have an order made against her as a condition of the perpetrator consenting to an order being made against him.<sup>136</sup> The safety afforded by the Court to victims of family violence is significantly diminished where an undertaking is substituted for an intervention order, in so far as a breach is not a summary offence for which an offender can be arrested and prosecuted by the state. On the other hand, 'mutual order' provisions in family violence legislation have been extensively criticised around the world for the way they reduce family violence to gender-neutral relationship conflict. To the extent to which this is the case, they obscure the threat posed by the perpetrator and diminish the victim's claim to a superior level of protection, such as would be provided by sole occupancy or exclusive custody of the children.<sup>137</sup> So while court staff may believe that in assuming the role of a negotiator they are saving the magistrate's time, or intervening constructively in a relationship conflict, they are effectively undermining women's access to legal protection and particular legal options such as sole occupancy.

The view that family violence amounts to a power-neutral relationship conflict, or is merely symptomatic of the end of a relationship and thus more appropriately aided by facilitated negotiation than adversarial contest, is one that is frequently shared by other legal practitioners such as solicitors. DVIRC focus group participants indicated that solicitors often encourage their clients to consent to mutual orders or undertakings:

*DV Worker 1: It seems to have become a standard strategic response from a perpetrator for their lawyer to come back and say 'look, we can work this out this morning really quickly by having an undertaking' . . .*

*DV Worker 2: And her solicitor will say 'that's really good. You won't have to present evidence, you won't have to go through this in front of other people'. And as her support worker, you're trying subtly to say 'look hang on, you're not going to get the same level of protection that you would'. But on the other hand, the solicitor has got the status . . .*

A number of workers in the focus groups reported finding themselves regularly in conflict with their clients' solicitors because of the solicitors' lack of knowledge about, or sensitivity

**135** DVIRC focus group, Babbel 2002

**136** DVIRC focus group, Babbel 2002

**137** Joan Zorza (1999) presents a strong case against the use of mutual orders. She argues that 'they are more dangerous to the victim than having no order at all' (p.1). According to Zorza, mutual orders typically involve denying due process to the original applicant, obscuring perpetrator responsibility, providing a new and effective avenue for further control and abuse of the victim by the perpetrator, and often leading to considerable confusion for police in their enforcement. Such confusion can, in turn, lead to inappropriate responses that may have serious consequences for the victim and her children.

to issues faced by victims of family violence and, accordingly, their poor judgement about what constitutes a good outcome for clients.<sup>138</sup> Some workers reported being asked to 'leave the room' or remain silent by their clients' solicitors. Workers also observed that such conflict noticeably intensifies the anxiety and trauma already being experienced by their clients, and further erodes their confidence in the legal system to protect them.

Like court staff, solicitors' advice, opinions and attitudes play a tremendously important role in women's decision-making about legal intervention. The powerful gate-keeping role exercised by both these groups of professionals needs to be recognised and addressed by policy makers. Two important social policy responses to enhance women's access to justice and protection deserve consideration. They are the radical expansion of specialist court-based advocacy services for women seeking protection from family violence, and the creation of specialist family violence courts. Both these options will be discussed in Section IV of this Paper, which looks at 'Strategies for the Future'.

Police, too, play a critical role in shaping women's choices and options. Much research has been undertaken into police responses to family violence and women's experiences of these.<sup>139</sup> For most women, police are their first point of contact with the justice system. Police action or inaction has been shown to have a tremendous impact not only on women's confidence in the legal system to protect them and their willingness to pursue legal action, but also on the outcomes they achieve in court.<sup>140</sup> Liz Kelly's research in the United Kingdom indicates that 'it is the quality, consistency and reliability of responses abused women receive that is strongly influential in their achieving effective outcomes for themselves and their children'.<sup>141</sup> Likewise, Wearing has argued that 'access to justice is in large part determined by the quality of police action, especially in relation to violence in the home'.<sup>142</sup> In Victoria, the high degree of variability in the police response to family violence that is indicated by existing research and substantial anecdotal evidence is particularly concerning in the light of these observations. Indeed, Wearing argues 'It is the *unpredictability, arbitrariness and variability* of police action that is perhaps the most problematic and dangerous aspect of family violence legal procedures in Victoria'.<sup>143</sup>

**138** Domestic violence services often develop close and cooperative relationships with particular solicitors or legal firms who share a commitment to empowering women. Likewise, most community legal services that support court-based advocacy services for women seeking intervention orders engage solicitors who hold such a philosophy. Conflict stemming from radically different views about the interests of women approaching the legal system for protection is usually occasioned by 'outside' legal representation.

**139** Some Victorian examples include Nicholson 1997, Wearing 1992, 1996, Nunn 2001, Victoria Police 1992. Victoria Police has recently undertaken insightful and comprehensive research exploring the adequacy of police responses to family violence from a wide range of perspectives including police, magistrates, women's advocacy and domestic violence services, etc.

**140** Holder 2001, Wearing 1992, 1996

**141** Holder 2001: 8 paraphrasing Kelly 1989, 1999

**142** Wearing 2001: 10

**143** Wearing 2001: 10



In addition to responding 'swiftly and thoroughly',<sup>144</sup> one of the most critical actions that police can take to facilitate women's access to legal protection is to apply for intervention orders on their behalf. Making applications on behalf of victims of family violence not only sends a clear message to both parties that family violence is seriously unacceptable behaviour, but it can radically change women's subsequent encounter with the court system. As Prichard and Malcolm explain with reference to police-initiated protection orders in New South Wales,

*When police make [an] application . . . on behalf of women, the police prosecutor then becomes the woman's legal representative. The police officer present on the day . . . will perform many of the functions surrounding legal representation – preparatory work for taking instructions, explaining the legal process, liaising with the defendant and following up after the court proceedings [as] well as ensuring the safety of the woman while she is in the court vicinity.*<sup>145</sup>

A woman's vulnerability to attack or manipulation by the perpetrator in the courtroom can also be reduced by the presence of a police advocate.

While Victorian legislation gives police the power to apply for intervention orders in this way, they consistently resist assuming this role. In 1998/99, police-initiated complaints for intervention orders comprised only 14.4 per cent of all complaints.<sup>146</sup> This compares to an estimated 60 per cent in NSW, where family violence legislation requires police to apply for a protective order on behalf of a person who has been, or is likely to be, the victim of a family violence offence.<sup>147</sup> Women's access to safety and justice is diminished in practice by the refusal of police to assume this role in Victoria.

Even when police do initiate intervention order complaints, it has been noted that they rarely apply for a sole occupancy restriction, or discuss this option with women. Instead, they typically discuss where the woman and her children can seek refuge.<sup>148</sup> To some extent, this may be due to poor knowledge of the legislation on the part of police. It may also be influenced by the tendency of courts to treat applications for sole occupancy as an illegitimate use of the legislation. But whatever the reason, the failure of police to inform women of this option and pursue it on their behalf when initiating com-

**144** This is the police response that Wearing's respondents said made them feel safe and able to cope (1992).

**145** Prichard and Malcolm 1999: 2

**146** Department of Justice 1999: 23

**147** See section 562C *Crimes Act* (NSW). The 60 per cent figure is based on unpublished research reported in Prichard and Malcolm 1999. Apparently, the rate of police-initiated Apprehended Violence Orders compared to privately-initiated orders varies considerably from region to region.

**148** Nunn 2001

plaints for intervention orders, deprives women of exactly the sort of advocate who is most capable of shifting the indifference or hostility of courts to sole occupancy orders.

### Ineffective Enforcement of Orders

Any discussion about the legitimacy or feasibility of a policy of encouraging or supporting women and children experiencing family violence to remain in the home must give critical attention to the issue of safety. It is well documented that violence perpetrated against women and children typically escalates, sometimes quite dramatically and dangerously, at the point of their decision to separate from the perpetrator.<sup>149</sup> Because sole occupancy intervention orders amount to court-ordered separation, the period following the order can be quite dangerous, especially for those in isolated or remote locations or otherwise without access to an immediate police response. The fact that the perpetrator knows the family's whereabouts and has an intimate knowledge of the fortress within which they are protected contributes further to this vulnerability. If women and children are to remain safely in their homes during this time, the police and court response to breaches must be immediate, unequivocal, consistent and effective.<sup>150</sup>

On the basis of their research in NSW, Trimboli and Bonney reflected that:

*the enforcement process for breach of orders would appear to be the weakest link in the [Apprehended Violence Order] process. AVOs would be more effective if the criminal justice system, particularly police officers, undertook positive and decisive action when breaches are recorded.*<sup>151</sup>

Available evidence indicates the situation is similar in Victoria. A fundamental duty of care owed to victims of family violence is routinely violated by police attitudes, practices and procedures in relation to their enforcement of intervention orders.<sup>152</sup> Magistrates' reluctance to treat breaches as serious offences deserving harsh sanction has already been noted.<sup>153</sup> In practice, relatively few breaches are brought before the Court and even then up to one-third of these are struck out as

**149** Tracey 1997, Epstein 1999, Fritzler and Simon 2000

**150** Research on the operation of protection orders around the world indicates that consistent, unequivocal and decisive enforcement is necessary for these to be an effective tool in reducing repeat violence (Trimboli and Bonney 1997, Tracey 1997, Epstein 1999, Young et al 2000, Finn and Colson 1990, Harrell and Smith 1996 and Carlson et al 1999).

**151** Trimboli and Bonney 1997: 69

**152** Nicholson 1997, Chung et al 2000, Wearing 1992, 1996, DVIRC focus groups.

**153** In 1998/99 only 359 prison sentences were given, out of a total of 3,808 breaches prosecuted. The median length of sentence was 37 days. By far the most common penalty was a fine or a bond (Department of Justice 2000). See Section II above for the attitude of magistrates and Family Court judges to breaches of intervention orders and Family Court injunctions.

'not proven'.<sup>154</sup> Evidence that most breaches are not even reported to police, and those that are rarely result in any action being taken by police, is also concerning.<sup>155</sup>

A significant dimension of this equivocation by police appears to lie in the pervasive tendency to distinguish between 'serious' breaches, which involve criminal assault or property damage, and 'technical' breaches, which do not.<sup>156</sup> While police might consider prosecuting 'serious' breaches if there is obvious evidence of their occurrence, 'technical' breaches may not even be documented or followed up. If the perpetrator has left the scene by the time police arrive and there is no evidence of criminal assault or property damage, women are routinely told that the breach they have reported cannot be prosecuted because it amounts only to her word against his. In many instances, police fail to conduct a thorough investigation of the woman's complaint or to treat the site of the breach as a crime scene from which evidence must be scoured and preserved. This inadequate response would appear to be compounded by poor accountability mechanisms.<sup>157</sup> The implication for a woman who has gained sole occupancy of her home is that she can be systematically harassed, threatened and subjected to surveillance and intimidation without any effective police intervention. What police may write off as small, minor or technical breaches are most likely to be part of a pattern of intimidation and harassment that leave women and children fearfully imprisoned within their homes.

This situation seems to be accentuated by poor management of information about breach incidents by police.<sup>158</sup> If women report a succession of breaches, each time they contact police they typically speak to a different officer. If no action is taken, which is usually the case, no official record will be generated; or if it is, it is not referred to by police the next time the woman calls to report an offence. The incident is treated as an isolated event, and possibly a minor one at that. This fragmented or piecemeal approach to policing intervention orders further contributes to women's vulnerability, because it disguises patterns of perpetrator behaviour that might point to a heightening danger they and their children face. It also constantly reinforces the message to perpetrators that the intervention order doesn't really mean anything, and that ongoing violence is unlikely to result in the imposition of criminal sanctions.

**154** In 1998/99 1,132 of the 3,808 breaches prosecuted (i.e. 30 per cent) were not proven (Department of Justice 1999). This raises issues about effective evidence gathering and the difficulty of standard evidentiary requirements in proving intimate abuse.

**155** Chung et al 2000, Wearing 1992, 1996, DVIRC focus groups. This corresponds to what Trimboli and Bonney (1997) found in NSW, with up to 72 per cent of reported breaches resulting in no action by police.

**156** A DVIRC focus group participant commented 'What I maintain in dealing with the police is that a breach is a breach is a breach ... Police are convinced that there are major and minor breaches ... I've never seen a breach go to court'. It is clear from research on police attitudes to family violence (such as Nicholson 1997) that police often view male violence against women in the family as less serious than violence perpetrated against men in public; and that women are usually perceived as having a role in provoking the violence committed against them.

These attitudes undoubtedly feed into the practice of ranking breach offences on a hierarchy of seriousness, in spite of their universal status as criminal acts.

**157** Victorian Community Council Against Violence 1996: 23

**158** This issue has been raised previously by Wearing (1992) and in a DVIRC focus group.

Focus group participants noted two additional issues that contribute to a poor enforcement of sole occupancy intervention orders. One pertains to the ambiguous or unspecific way in which a significant number of sole occupancy intervention orders is worded. Police reluctance to enforce an order by evicting the perpetrator can be compounded by the failure of courts to specify on the order, for example, that the defendant 'must leave' the family home, notwithstanding any rights he may have in respect of the premises. Police equivocation in this regard is especially likely to occur when they are confronted by a perpetrator who asserts his rights in relation to the property, or claims he has nowhere else to go.

The second additional obstacle to the enforcement of sole occupancy orders that was raised by focus group participants concerns the inclusion of a requirement for child contact by the perpetrator. It is clear from research,<sup>159</sup> the testimony of women,<sup>160</sup> and that of their advocates,<sup>161</sup> that child contact provides the perpetrator with a whole variety of avenues by which to breach protection orders with relative impunity. Police and courts typically view these breaches as innocuous and not justifying a criminal justice response.<sup>162</sup> To this extent, child contact can constitute the 'thin edge of the wedge', as one focus group participant put it, through which the perpetrator pushes his way back into the lives of his victims.

The attitudinal and procedural resistance of police and courts to meaningfully enforce intervention orders renders many orders ineffective. It is disappointing that key policy documents recently released by the Victorian government in support of women's right to remain in the home do not adequately acknowledge this enormous problem or offer relevant policy solutions.<sup>163</sup> To encourage or support women to remain in their homes without first addressing these serious shortcomings in the enforcement of protection orders is arguably an irresponsible approach that may have serious consequences for those affected by family violence.

## Other Obstacles to Maintaining Occupancy of the Family Home

Once women secure sole occupancy of the family home under the terms of a protection order, they may face several obstacles

**159** Rendell et al 2000

**160** Wearing 1992.

All of the women Wearing interviewed who were unhappy with the outcome of their orders identified the inclusion of a requirement for child contact as a source of frustration and vulnerability to ongoing violence.

**161** DVIRC focus group participants.

**162** See the comments of a magistrate to this end in Wearing 1992 (205, paragraph 4.23.3).

**163** *Key Directions in Women's Safety*, the policy framework for the forthcoming Women's Safety Strategy, acknowledges that transformations need to take place but does not name specific problems or offer any policy recommendations to this end.

in maintaining occupation of the premises. As just discussed, ongoing harassment and intimidation or escalating physical violence that is not effectively responded to by police or courts is a major problem and one that can leave the family isolated and living in fear. Another critical issue concerns the affordability of the home in cases where a perpetrator defaults on rent or mortgage payments. Rent and mortgage payments may be substantial financial commitments that a woman is unable to meet alone and for which payment of government assistance is insufficient or unavailable. Women on low incomes who live in rental accommodation may be eligible for Rent Assistance, but those who have mortgages are not.<sup>164</sup> The Mortgage Relief Scheme provides short-term, interest free loans of up to \$15,000 to private borrowers experiencing difficulty with mortgage repayments, but it is only available to applicants who are likely to be able to repay both loans concurrently in the future.<sup>165</sup>

The Family Court may be able to address some of these inequities when a couple was married or has children together. However accessing the Family Court is, in general, a slow process that is unlikely to relieve immediate financial pressures experienced by women who remain in the home. As various observers have commented, these pressures often force women to admit perpetrators back into their lives.<sup>166</sup> The Family Court can simultaneously create other problems for women who seek to remain in the home. It may, for instance, make orders that overturn their right to exclusive occupancy of the home. Likewise, parenting orders may be made that are inconsistent with intervention orders precluding contact. While the Family Court is obliged to consider the existence of any family violence order in making decisions about parenting arrangements, it can make orders that contradict or are inconsistent with State orders, where this is deemed to be in the best interests of the child.<sup>167</sup> Exposure to family violence and child abuse are only two of 12 issues that the Court is obliged to consider in deciding on the child's best interests (s68F). These come together with, but not prior to, the right of the child to have regular contact with both parents.<sup>168</sup>

Maintaining occupancy of the home following the achievement of a sole occupancy order can also be made difficult or impossible where the property is owned or leased in the name

**164** Rent assistance is available to certain recipients of Centrelink payments. See [http://www.centrelink.gov.au/internet/internet.nsf/payments/qual\\_how\\_ra.htm](http://www.centrelink.gov.au/internet/internet.nsf/payments/qual_how_ra.htm).

**165** Victorian government <http://www.parliament.vic.gov.au/fsrc/report4/register/h15.htm>.

**166** For example Epstein 1999, Tracey 1997.

**167** Alexander (1996) notes that, in practice, inconsistency rarely occurs between parenting orders and family violence orders because magistrates almost always tailor family violence orders to co-exist with any existing Family Court order – despite the power given to them in the Family Law Act to do otherwise under s68T.

**168** Under s68K, the Family Court is required to ensure that parenting orders do not expose a person to unacceptable risk. Rhoades et al's (1999) research indicates that this section of the statute is not well known or used by judges. Alexander (1996) points out that this provision directly contradicts the power of the Court to make inconsistent parenting orders, revealing an inherent tension in the legislation or a persistent ambivalence about protecting victims of family violence.

of the perpetrator and he chooses to sell it or to terminate the tenancy agreement.<sup>169</sup> Where the property is the matrimonial home, women may be able to get an urgent injunction in the Family Court to prevent the sale of the property or the termination of the lease. Where this is not the case, however, there is little legal protection available to women. Neither, at present, are there provisions in Victorian residential tenancy legislation to enable victims of family violence to have perpetrators removed from the tenancy agreement, or to have the agreement transferred into their name.<sup>170</sup>

### Obstacles Faced by Women Living in Rural or Remote Locations

The nature and extent of domestic violence in regional Australia has been documented by various researchers and commentators, as have obstacles women face in accessing family violence services and legal protection in these areas.<sup>171</sup> While escaping from the family home can be especially difficult for women living in rural or remote areas, having the perpetrator removed from a rural property can be fraught with a range of additional problems.

One of these is the significant time delay in engaging a police response on account of traversing great distances. This can make exclusion orders extremely difficult to police, and render isolated women and children particularly vulnerable to ongoing violence – especially in view of the greater prevalence of firearms in such contexts. A second obstacle that may be faced more frequently by rural women is the unwillingness of courts to make orders that exclude perpetrators from domestic premises that constitute a family business or provide a livelihood to the perpetrator. This is likely to be the situation much more frequently in farming communities. The resistance of courts to making such orders is compounded by an even more acute shortage of emergency accommodation in rural and regional Victoria.<sup>172</sup> These are very significant issues that need to be considered by government in developing policy to encourage or support women to remain in their homes.

**169** This problem with exclusion orders was specifically raised at the Workshop on National Legislation on Domestic Violence in the Mekong Basin Sub-Region December 2001. See Unifem web site <http://www.unifem-eseasia.org/Projects/EVAW2001-3/regionalpgm/MekongWorkshop2001.htm>.

**170** Such provisions do exist under residential tenancy legislation in Queensland.

**171** Kristensen 2000, WESNET 2000, Keys Young 1998

**172** See Department of Human Services 2001 regarding the acute lack of emergency accommodation in rural and remote areas.

## Summary

This section of the Discussion Paper has filled in more of the landscape of barriers faced by Victorian women who seek to leave violent relationships without fleeing their homes. Many of these issues are not new to public knowledge. They have been raised here because they were highlighted as specific problems for women who seek to remain in their homes at focus groups conducted on this issue. They have also been included because they appear to have been largely overlooked in the strategic policy being generated by government in support of women's right to remain in the home.

## IV. Strategies for the Future

### Introduction

Until now, this Paper has focussed on the diverse and extensive obstacles women face in securing the type of legal interventions that may assist them to escape a situation of family violence without being forced into protracted homelessness and acute financial disadvantage. It is easy to be overwhelmed by the scope of these problems and feel that women's access to safety and justice is predicated on an unlikely sea change in community attitudes and a transformation of economic structures that seem impervious to change.

While significant shifts in cultural attitudes towards women and children are needed, together with a much more inclusive construction and articulation of citizenship, the process of transformation is already in progress. Over the last three decades, dramatic changes in society's treatment and understanding of male violence against women are evidence of this. So, too, are highly positive local and international initiatives that offer specific ideas and strategies for accelerating the process of social change and addressing some of the main obstacles identified in this Paper. In this section, I will survey a handful of these strategies. Some of these ideas have emerged out of the practice and experience of family violence workers who participated in DVIRC questionnaires and focus groups

for this purpose; others have been prompted by initiatives or approaches that have been documented or experimented with elsewhere.

The strategies that will be surveyed in this section are:

- improving police responses to breaches;
- providing court-based advocacy services;
- accommodating perpetrators;
- establishing Domestic Violence Courts; and
- undertaking law reform.

These strategies are not presented as offering a comprehensive solution to the problems identified in this Paper. Neither is it my intention that they be viewed as isolated innovations. As has become increasingly evident to social reformers in this area, both here and in other parts of the world, positive systemic change is not well facilitated by piecemeal or fragmented approaches that concentrate on one aspect of a problem in isolation from others. For example, while changing the law and improving family violence support services are fundamental matters, they have proved inadequate strategies on their own to ensure that women achieve justice and protection from violence. It is critically important in successful family violence interventions that the different agencies that comprise the criminal justice and social service systems interact together to set and achieve common goals that are in line with progressive social policy.<sup>173</sup> Establishing accountability structures and philosophical frameworks to guide action in ways that are consistent and mutually supportive, across these different institutions and agencies, are equally critical. The influential attitudes of those who administer justice and deliver social services cannot be assumed to coincide with policy priorities in this area.

In this section, the strong emphasis placed on law reform is not intended to obscure or diminish the importance of system-wide reforms. It is given in light of the recent decision by the Victorian government to review the CFV Act. Because of the legislation's significance in framing broader social and legal responses to family violence, this decision opens up a critical opportunity for the community to rethink the scope, purpose and construction of the legislation. By incorporating into the legislation the lessons learned in the past 15 years, and drawing upon successful legislative innovations that have been experi-

**173** There is a large literature on 'integrated' or 'coordinated' responses to family violence. For a way into this literature, see DVIRC's (forthcoming) 'Coordinated and Integrated Responses to Domestic Violence: A Briefing Paper for Victorian Community Workers'.



mented with elsewhere in the world, we have an opportunity to significantly improve the quality of legal protection available to victims of family violence in Victoria.

### Improving Police Responses to Breaches

The serious inadequacy of current police responses to breaches was briefly outlined in Section III. This problem is one of the most significant obstacles faced by Victorian women in trying to remain safe without leaving their homes. It must be addressed at the highest level within Victoria Police, because the failure of police to respond adequately to breaches is clearly related to poor procedural and accountability systems as much as it is to attitudinal problems. Victoria's new Police Chief Commissioner has recently acknowledged this problem. The development of a detailed strategy to address procedural, accountability and attitudinal issues within the Force will hopefully deliver change in this area in the near future.

In an attempt to address the poor police response to breaches of protection orders in NSW, that State's legislation was recently amended. In April 2000 the *Crimes Act 1900* was changed to include a provision (s562I(6)) requiring police to prepare a written statement of their reasons for not initiating criminal proceedings against a person alleged to have breached an Apprehended Violence Order (AVO).<sup>174</sup> This is an interesting legal development. It forces police to be more reflective and accountable in their practices. However it also imposes an additional paperwork burden. In so far as police resist initiating criminal proceedings because of the time and paperwork involved is concerned, this change in procedure may go some way towards balancing out the disincentive to take decisive action on breaches. In the long run, it may be less work to initiate criminal proceedings than it is to repeatedly document reasons for inaction. It will be interesting to see the impact of these reforms on the rate of breach prosecutions in NSW. Undoubtedly, a similar reform should be considered in Victoria, even if it does nothing more than impose a new level of accountability on police responding to breaches.

While we await reforms to the law and to the operation and accountability of police in Victoria, those who participated in

DVIRC's focus groups spoke of strategies they have developed to improve women's safety and police responses to breaches.

*Build Relationships with Local Police.* In many police stations, there is a high turnover of police personnel. Due to this, and to their inconsistent working hours and frequent leave periods, most family violence workers reported difficulty in building relationships with their local police. A couple of workers had successfully built a relationship with the station management. In one case this involved establishing an effective protocol around responses to breaches and other domestic violence call-outs. Where a woman contacts this agency regarding an inadequate or inappropriate police response, the agency contacts a designated senior officer at the police station, who in turn investigates the allegation. The agency worker follows up this call by faxing a written account of the complaint to the officer. If necessary, this documentation can contribute to evidence of breach in subsequent court proceedings. The police officer then investigates the complaint and apprises the agency and woman of the outcome of the investigation.

*Make an Appointment with the Senior Sergeant.* One worker reported that an effective strategy for dealing with a fragmented and poorly-coordinated police response to persistent breaches by a perpetrator, is to make an appointment to see the station manager to point out the breaching pattern and the escalating danger being faced by the woman. This can result in an alert being recorded against the woman's name so that when she calls, the police who respond are apprised of the context and act more decisively.

*Ask Police Officers for their Names.* A number of workers commented that the police response improves when police are asked to give their names. Workers encourage their clients to do this every time they have contact with police, either in person or on the phone. Recording names can also be really helpful for future breach prosecutions where evidence is required, or to follow up police action or make a formal complaint.

*Educate Women about Evidence-gathering and Grievance Processes.* Most focus group participants raised this as a critical strategy for

empowering women in relation to breaches. A resource kit for women who gain intervention orders would be invaluable in reducing the powerlessness women experience in relation to breaches. Such a pack could include:

- information about police responsibility in relation to breaches and some techniques for engaging police to respond to breaches (e.g. when calling police emphasise feelings of fear; inform police of any threats or assaults; record the officer's name);
- a note book in which to record every breach, together with instructions for what to include (e.g. date, time, the presence of any witnesses, what happened, how it made the person feel, who was contacted about it, the name of the police officer to whom the person spoke, who attended, etc);
- information about what constitutes evidence in court, and some strategies for gathering it (one worker provides her clients with information based on DVIRC's training module 'Where's the Evidence?');<sup>175</sup>
- information on how to make a complaint about inadequate police responses, and relevant contact numbers to initiate such processes; contact numbers for outreach and other advocacy services for assisting women in taking grievance actions or otherwise supporting them to get a better response from police.

In view of the likelihood that perpetrators will breach protection orders, or try to push the boundaries set by the order, this kit could also include:

- strategies for improving personal and property security;
- contact details of firms that supply subsidised or low-cost security improvements (e.g. security doors, lock changing, alarm systems, security lighting, etc);
- strategies for maintaining safe and firm boundaries with the perpetrator where intervention orders are made subject to child contact orders.

With respect to improving the enforceability of orders, one further recommendation that deserves attention has been made by Chung et al. This is to investigate 'new technologies which would allow breach of orders to be automatically registered with police so that the sole responsibility for reporting does not fall with women'.<sup>176</sup> The extent to which breaches could be successfully prosecuted is likely to be enhanced by such a strategy. What police or courts might previously have written off as 'her

175 This training focuses on what counts as evidence in support of applications for an Intervention Order, and the evidentiary requirements for breach proceedings.

176 Chung et al 2000: 5

word against his' could be confirmed by this new source of evidence. Such a strategy might also help to counteract the tendency of police and courts to dismiss breaches that do not involve assault or property damage as 'minor' or 'technical'.

### Court-based Domestic Violence Advocacy Services

This Paper has identified and restated a wide range of personal and systemic obstacles limiting women's access to sole occupancy and forms of protection from family violence. One highly successful innovation that has been experimented with both in Australia and overseas to facilitate women's access to legal protection is the establishment of specialist, court-based advocacy services, the first of which – the Redfern Women's Domestic Violence Court Assistance Scheme – was set up in Australia in 1990. Since then, numerous courts around the country have established similar schemes to enhance women's ability to obtain appropriate legal protection and gain entry to the range of social and legal services necessary to reclaim their lives from violence.<sup>177</sup>

The original Redfern Scheme involved a collaboration between domestic violence and community legal services that emphasised the importance of advocacy and support being coordinated, integrated and holistic, addressing the legal as well as the social, financial and cultural dimensions of family violence.<sup>178</sup> Many of the schemes that were subsequently established have been based on a similar operational and philosophical framework.<sup>179</sup> While a substantial amount of the advocacy and support functions of these schemes are already performed in Victoria by Domestic Violence Outreach and Refuge services, the vast majority of women who experience family violence do not use such services.<sup>180</sup> Therefore the value of court-based schemes is that the women who approach the legal system without the support of police or such agencies would no longer fall through the cracks. Instead, they would be supported and empowered to achieve the legal interventions and social services they need.<sup>181</sup>

Schemes based on the Redfern model vary considerably in the services they provide, depending on the agencies collaborating to provide the service, the extent of dedicated funding available to the service, the resources that are available locally

**177** Australian Law Reform Commission 1994b

**178** See Australian Law Reform Commission 1994b: 130ff, 281ff

**179** Australian Law Reform Commission 1994b: 130ff, 281ff, Gloury 1994, Prichard and Malcolm 1999, Babbal 2002

**180** Australian Bureau of Statistics 1996, Department of Human Services 2001. See Keys Young's research (1998) on the reasons women do not use such services.

**181** Prichard and Malcolm 1999, Kelly and Humphries 2000. Chung et al (2000) point to the isolation and fear experienced by many women who approach the legal system alone for protection from family violence.

and, where applicable, the impact of Statewide or regional coordination. While the particular services offered by these schemes vary, the core functions of assistance are similar. They usually include legal advocacy, emotional and practical support, information provision and referral, and systemic advocacy. The following list details some of the specific services that have been associated with these core functions. In practice, most schemes are only able to offer a selection of these.<sup>182</sup>

#### *Legal Advocacy*

- legal representation of women, or ensuring empowering legal representation is available;
- information and advice on legal rights and options;
- assisting with preparation for the hearing, including gathering evidence and tailoring applications to meet the needs of individual women and their children;
- preparing women for negotiation with the defendant's legal representative.

#### *Emotional Support*

- coaching women in presentation skills for the hearing to improve their confidence and reduce anxiety (i.e. facing the magistrate, facing the perpetrator, presenting evidence)
- contacting women between the interim and final hearings to ensure that they are safe and ready for the hearing.

#### *Practical Support*

- ensuring a woman has transport to the court on the day of the final hearing;
- ensuring an interpreter has been booked for the hearing, if required;
- ensuring women are safe before, after and during the hearing;
- providing advice on safety planning;
- assisting and advising on upgrading property security after the eviction of the perpetrator.

#### *Information Provision and Referral*

- developing and/or disseminating information resources to improve women's ability to advocate for themselves;
- providing active referrals for women to the range of services, resources and supports they are likely to need (including

<sup>182</sup> In addition to information provided through DVIRC questionnaires and focus groups, this list has been compiled from Prichard and Malcolm 1999, Kelly and Humphries 2000, Gloury 1994, Australian Law Reform Commission 1994b, Epstein 1999, Fritzler and Simon 2000, Tracey 1997, Bradfield Nyland Group 1998, Domestic Violence Advocacy Service 1998, Babbel 2002.

housing, counselling, family and Criminal Law advice, family violence support groups, culturally-specific services, child support and other financial assistance);

- providing support or referrals for women with additional needs (such as those associated with drug and alcohol dependency, mental illness, physical or psychiatric disabilities, etc).

#### *Systemic Advocacy*

- educating court staff about family violence;
- providing a voice for survivors of family violence in important forums like court-user groups.

#### *Other Individual Advocacy*

- advocacy and follow up to women where there has been an inadequate, ineffectual or inappropriate police response to breaches;
- advocacy to women in raising formal complaints.

Where evaluations of these schemes exist, they indicate that the schemes have the potential to radically improve the outcomes women achieve in approaching the legal system:<sup>183</sup> with respect to securing appropriate legal protection, necessary services and supports, and other forms of social, legal and economic empowerment.<sup>184</sup> The schemes are also able to contain the worst excesses of the gate-keeping function performed by court staff, as they relieve these staff of the role of providing information to women about their legal rights and options.

Yet in spite of such extraordinary successes, almost all of these specialist advocacy schemes suffer from an acute lack of resourcing. Most have little or no dedicated recurrent funding from government.<sup>185</sup> Typically, they rely on the labour of volunteers, *pro bono* solicitors, and/or workers who have been seconded from other community organisations. To this extent they are heavily subsidised by other funded programs, particularly women's services.<sup>186</sup> This lack of funding leads, predictably, to inconsistent and inadequate service provision, poor training and support of volunteers, and a low public profile.<sup>187</sup> If the government is genuinely committed to improving women's access to the option of remaining in the home, this is arguably a key strategy in which investment must be made.

**183** See Bradfield Nyland Group (1998) evaluating the NSW Women's Domestic Violence Court Assistance Program, and Gloury (1994) evaluating the Court Network Intervention Order Community Access Program, or Epstein (1999) on lay advocacy for women survivors of family violence approaching the legal system. Kelly and Humphreys (2000) survey a range of outreach and advocacy services.

**184** They are also commonly reputed to improve the efficiency of courts by relieving court staff of work which they are poorly resourced and inadequately trained to undertake. See Gloury (1994) for an economic argument in favour of such schemes.

**185** Australian Law Reform Commission 1994b, Babbel 2002. Since 1996, the NSW government has provided recurrent funding to the Women's Domestic Violence Court Assistance Program, which covers many of the most used courts in that State. However the lack of funding to courts in rural areas has not, to date, been adequately addressed (Domestic Violence Advocacy Service 1998).

**186** Bradfield Nyland Group 1998

**187** Babbel 2002, Domestic Violence Advocacy Service 1998, Australian Law Reform Commission 1994b, Bradfield Nyland Group 1998. Because of a short-fall in resourcing, Intervention Order Support Schemes in Victoria are only available in some courts, and usually for only one day a week.

## Accommodation for Perpetrators

The lack of emergency accommodation for perpetrators is often presented as a major reason behind the tendency of courts and police to encourage women to leave their homes and move into refuges.<sup>188</sup> This argument is supported by research that indicates the homeless service system in Victoria is currently catering to only 75 per cent of demand, and crisis accommodation services – especially those in rural and regional areas – are particularly inadequate to meet demand.<sup>189</sup> While this research is possibly very accurate, it is a false basis upon which to defend court and police practices in relation to encouraging women to leave, because women are affected by the crisis in the homeless service system no less than men. Over 25 per cent of women and children who approach family violence homelessness services are turned away due to inadequate resources being available to assist them.<sup>190</sup>

The comparatively high public profile of women's refuges, and a lack of knowledge about accommodation services for men by police and courts, have possibly contributed to the inaccurate view that men are more poorly served by available resources.<sup>191</sup> Chung et al note the irony of this situation:

*Domestic violence activists who fought for safe accommodation for women and children so many years ago could not have foreseen that it would inadvertently have led to being a reason for removing and disrupting women and children and leaving men in the home.*<sup>192</sup>

Family violence workers have developed various strategies to address the tendency of courts to prioritise the accommodation needs of perpetrators. One fairly successful approach has been to develop a list of possible accommodation options for a perpetrator. This list is presented to the magistrate, together with a case for why the applicant should be preferentially accommodated in the family home, to pre-empt the question 'but where will the defendant live?'<sup>193</sup> Another strategy to achieve sole occupancy intervention orders is to pre-arrange emergency accommodation for the perpetrator, e.g. with a Salvation Army court worker. The capacity of a welfare agency to accommodate the perpetrator, and assist him to secure alternative long-term housing can then be conveyed to the Court in order to allay its

**188** Victorian Community Council Against Violence 1992

**189** Department of Human Services 2001: 17-8. See also SAAP un-met need 1998/99 in Australian Institute of Health and Welfare 2000.

**190** Department of Human Services 2001: 64. It is also clear that the majority of women who experience family violence do not use such services but rely on informal support networks in preference (Australian Bureau of Statistics 1996, Keys Young 1998).

**191** The Victorian Community Council Against Violence has made this point (1992, 1996). Likewise, Nunn surmises 'because police are aware of refuge accommodation, they are provided with an "easy option" for housing women and their children, thus rendering them homeless' (2001: 35).

**192** Chung et al 2000: 57

**193** DVIRC focus groups, Babbal 2002

anxiety about making an order that will result in the defendant's homelessness.<sup>194</sup> Another possible strategy that government could consider is to establish Housing Information and Referral services at courts, either on a permanent or outreach basis. These could assist court users with the accommodation side of family violence matters.<sup>195</sup> Alternatively, the Court could establish a referral protocol with local crisis and transitional housing services. This would ensure perpetrators who are excluded from their homes have access to emergency accommodation, and assistance to secure long-term housing. The justification for rejecting a sole occupancy application on the basis that there is no alternative accommodation available for the defendant would hopefully be diminished by these strategies.

A number of observers have argued that existing homelessness services for men poorly serve the particular needs of perpetrators of family violence. Some may even inadvertently heighten the perpetrator's denial of responsibility for his violence, and sense of injustice regarding his eviction from the home. Specialist accommodation services and residential programs are required to more effectively accommodate these men and intervene in their violence. While Boyle advocates for courts to exclude perpetrators from the home, he argues that existing accommodation services for this group of men are neither adequate nor appropriately supported or located. Boyle's chief recommendation is for the funding and further evaluation of specialist crisis accommodation services for perpetrators, based on the successful operation of two pilot services in Victoria (Leaside-Rotary House and Phoenix House) which – prior to being de-funded – provided short-term accommodation and behaviour change programs for perpetrators who voluntarily left their homes in order to address their violence.<sup>196</sup> The Victorian Community Council Against Violence (VCCAV) has likewise proposed that courts give greater consideration to excluding perpetrators from the home, and that specialist residential programs for men be expanded. Moreover, the Council argues that such programs should be made mandatory, in some cases.<sup>197</sup>

These two recommendations for specialist perpetrator accommodation stand in contrast to an earlier proposal by the Australian Law Reform Commission for a 'men's refuge' which

**194** DVIRC focus groups, Babbel 2002

**195** Housing Information and Referral (HIR) workers would be able to disperse Housing Establishment Funds (HEF) for emergency accommodation as required.

**196** Boyle 2001

**197** Victorian Community Council Against Violence 1996: 21 and 1992: 15



198 Australian Law Reform Commission 1986: 57

199 Chung et al 2000

200 Such as Chung et al 2000: 5, 57, 59.

Stakeholders who participated in this study likewise emphasised that any such re-orientation of men's emergency accommodation services 'should not involve the transfer of funds from women's domestic violence services' (p.57).

201 Boyle 2001: 10

202 *Key Directions in Women's Safety* does not mention this issue specifically, but proposes an interdepartmental taskforce to investigate options to assist women to remain in the home (p.39). The *Family and Domestic Violence Crisis Protection Framework* refers to a need to examine the adequacy of accommodation and support options for violent men, but does not offer any details about how, when, where and by whom such an examination would take place, which leaves doubt about the extent to which it is a priority or is understood to be a problem (p.11). The *Victorian Homelessness Strategy* refers to the interdepartmental taskforce of the Office of Women's Policy and indicates that the short- and long-term housing needs of perpetrators will be examined by this group (p.71).

203 This phrase is used repeatedly in the *Family and Domestic Violence Crisis Protection Framework* to denote an expansion of women's traditional accommodation options to include the option of remaining in the home, among other things (including forms of emergency accommodation that differ from the traditional 'refuge' model).

would provide 'a place for violent men to take time out from the family, often at the suggestion of the police'. Rather than actively intervening in the perpetrator's violence, the chief focus of this accommodation appears to be to 'relieve the pressure on the battered woman to leave the home'.<sup>198</sup> A similar concept has recently been proposed by Chung et al, who argue for the establishment of 'bail hostels' to assist police in removing violent men from the home.<sup>199</sup>

In the absence of specialist services, Boyle, together with others, argues for a reorientation of existing emergency accommodation services for men, with a view to more effectively protecting women who remain in the home and intervening strategically in men's violence.<sup>200</sup> According to Boyle, 'It is imperative for existing men's accommodation services to link with male family violence intervention programs . . . and that these programs not be offered in isolation from other family violence services offered to women and children'.<sup>201</sup> Such a reorientation would mirror the trend towards integrating other specialist services (such as drug and alcohol treatment programs, and mental health and disability support services) into the homeless service system. It is not entirely clear what a reoriented emergency accommodation service would look like. Presumably it would involve the development of closer relationships between housing services and male violence intervention services, which may result in integrating behaviour change programs in accommodation provision, engaging specialist support staff in housing services, and/or designing more effective referral pathways to enable perpetrators to address their violence.

It is pleasing to see that, after more than a decade of concern being raised about this problem, the Victorian government is indicating a willingness to investigate the adequacy of support and accommodation services for perpetrators. However this issue has received comparatively scant treatment in recent policy documents.<sup>202</sup> It is concerning that the government does not appreciate the extent to which it is a problem. Policy makers must come to terms with the fact that women's access to 'flexible accommodation options'<sup>203</sup> is predicted, albeit unfortunately, on the accommodation needs of perpetrators first being met. Moreover, each of these suggestions for specialist perpetrator accommodation or the

reorientation of existing services has been accompanied by an argument that their establishment must not be at the expense of providing existing or future accommodation and support services to women escaping family violence. Such unanimity deserves the attention of policy makers.

### Domestic Violence Courts

As already outlined in this Paper, women's entitlement as citizens to comprehensive protection and relief is often diminished by courts' views that family violence amounts to family conflict. To the extent that this is their view, courts have a tendency to overlook the safety needs of women and equivocate around perpetrator accountability. This can be seen, for example, in the practice of registrars to mediate between the parties to achieve agreement to save magistrates' time. The tendency of magistrates to treat sole occupancy intervention orders as an unconscionable violation of a defendant's civil rights likewise demonstrates this attitude. As Epstein has argued, these cultural attitudes and values are deeply embedded in the court system and, as we have seen in Victoria, enacting progressive legislation cannot easily shift them.

*Most judges and clerks have little understanding of domestic violence as a complex web of social and psychological difficulties; instead they operate from a lifetime of exposure to the myths that have long warped the public's attitude toward the problem. The result is a widely prevalent anti-victim bias . . . .*

*A law is only as good as the system that delivers on its promises, and the failure of the courts and related institutions to keep up with legislative progress has had a serious detrimental impact on efforts to combat domestic violence. This gap, between the responsive legislative branch and the unresponsive judicial and executive branches, suggests where the next generation of reform must focus — on a fundamental restructuring of the traditional justice system's approach to this age-old social problem.<sup>204</sup>*

A number of jurisdictions have established Domestic Violence Courts (DVCs) as an approach to court reform.<sup>205</sup> DVCs appear to vary tremendously in their constituent compo-

**204** Epstein 1999: 6, 4. See also Busch 1994 on the similar problems regarding judicial practices and attitudes in New Zealand.

**205** There are many different models in existence. See, for instance, Violence Intervention Programs based around Adelaide and Elizabeth Magistrate's Courts in South Australia; Quincy District Model Domestic Abuse Program in Massachusetts, Manitoba and Toronto courts in Canada (Ursel 1997); Domestic Violence Court in the District of Columbia, Washington (Epstein 1999); Vancouver Domestic Violence Court, Washington (Fritzlner and Simon 2000); Domestic Violence Courts in California (Judicial Council of California 2000); and ACT Magistrate's Court Family Violence Intervention Program (Keys Young 2000).

nents and structures. However all involve some form of specialised management of domestic violence cases. There appears to be a common emphasis on 'enhancing victim safety, holding batterers accountable, improving case management, and making more efficient use of resources'.<sup>206</sup> Some of the more common DVC features are listed below.<sup>207</sup>

- *Specialised intake systems.* These are designed to link related cases (i.e. criminal matters with protection orders and Family Law proceedings) and screen cases in order to provide specialist services to victims of family violence.<sup>208</sup>

- *Improved case management.* As far as possible, civil protection orders, Family Law and criminal dockets relating to the same relationship or family are all heard together or are heard by the same judicial officer. This coordination is intended to minimise the generation of conflicting orders, which are easily made when different judicial officers operate in an information vacuum and are unaware of related cases. Improved coordination is intended to improve the safety of victims and the accountability of perpetrators.<sup>209</sup>

- *Integrated service provision.* This meets, in a more holistic way, the social, economic and cultural needs of applicants and defendants through collaboration with local communities. It includes assistance in gaining access to counselling services, housing, drug and alcohol treatment, women's refuges, childcare, transport, income support and child support, etc.

- *Specially designed court facilities.* Such facilities accommodate related support and advocacy services and provide privacy and safety to victims.

- *The engagement of specially trained judicial officers and court staff.* This reduces anti-victim bias.<sup>210</sup>

- *Proactive monitoring of cases to ensure compliance with orders.* This may include monitoring perpetrator involvement in behaviour change programs, drug and alcohol programs and parenting classes, as well as periodic evaluation of compliance with protection orders. The court's involvement in monitoring also requires the development of much closer and more coordinated relationships with correctional services, public prosecutions and other law enforcement agencies.

Where evaluations exist of DVCs, they indicate these can have a significant positive impact on the outcomes women achieve in approaching the legal system for intervention in

**206** Judicial Council of California 2000

**207** This information is drawn from the models referred to earlier. The features listed are not necessarily shared by all the different models.

**208** Judicial Council of California 2000. A really interesting and detailed description of the intake system in the Washington, DC Domestic Violence Court is outlined in Epstein 1999: 29-32.

**209** Epstein (1999: 5-6, 23-8) presents an excellent argument for strong case coordination in family violence cases and points to the all-too-often tragic consequences of a fragmented legal response.

**210** Principles of 'therapeutic jurisprudence, preventative law and restorative justice with the aim of holding the offender accountable, ensuring the safety of victims and their children, and improving victim satisfaction with the justice process' underpin the provision of justice services provided by the Vancouver Domestic Violence Court in Washington (Fritzler and Simon 2000).

family violence.<sup>211</sup> It is therefore worthwhile that policy makers and family violence activists alike scrutinise the particulars of these experiments in judicial administration more closely, to consider their possible local application.<sup>212</sup>

### Legislative Reform

In light of the range of problems identified with the operation of the CFV Act, the forthcoming review of the legislation offers a tremendous opportunity to rethink the Act's purpose and scope. How best can it be reconstructed and implemented to deliver these? To this end, government would be well advised to adopt terms of reference for the review that are sufficiently broad to enable the Act to be reconstructed in a way that is informed by the lessons of the past 15 years, incorporating progressive and effective features of legislation in other jurisdictions.

This part of the Discussion Paper offers some preliminary suggestions about reforms that may address some of the problems with the legislation, particularly with respect to delivering sole occupancy orders. It draws upon, and reinforces, some of the insightful recommendations that have previously been made by WESNET in relation to the development of national Model Domestic Violence Laws.<sup>213</sup> It also draws upon creative, intelligent and progressive aspects of family violence and residential tenancy legislation in other jurisdictions, to suggest some new ways of thinking and approaching these problems. The four main strategies considered here are:

- reviewing the purpose and scope of family violence protection legislation;
- containing and directing the use of the Court's discretion;
- improving the implementation of the law;
- reforming residential tenancy legislation.

Clearly, it is beyond the scope of this Paper to offer an exhaustive set of options for law reform, especially given the breadth of issues requiring attention. This small list of ideas is therefore presented simply to stimulate thought and reflection at the beginning of the reform process. It is not intended to limit the scope of analysis that is ultimately undertaken. For instance, one critically important issue that is not included

**211** Epstein 1999, Fritler and Simon 2000, Judicial Council of California 2000

**212** These experiments have also had unintended consequences that have sometimes compromised the empowerment offered women. In view of this, it is important that local policy makers heed lessons from these experiments and family violence advocates.

**213** Earle 1998

here, but clearly must be considered in the review of the legislation, is the invisibility of sole occupancy intervention orders. In Section II of this Paper, I argued that the way the law is written obscures the existence and legitimacy of this legal option to victims of family violence. The lack of legislatively-defined nomenclature reflects and reinforces this invisibility and further renders the option intangible, elusive and obscure to those who would have perpetrators removed from their homes. I also outlined a substantial tension in the legislation – between its scope to withhold or suspend significant rights of alleged perpetrators and its capacity to do so short of fully criminalising the violence alleged. I argued that the way this tension is negotiated in practice by courts radically compromises the integrity of the legislation and diminishes its capacity to deliver the full range of protection that is ostensibly on offer. If victims of family violence are genuinely to have access to the option of remaining in their homes, this too is an important issue that must be explored and addressed in the reform process.

### **Reviewing the Purpose and Scope of Family Violence Legislation**

The intended purpose of the CFV Act is to provide more comprehensive, immediate and accessible protection to victims of family violence. This was clearly outlined in the 1985 report *Criminal Assault in the Home*.<sup>214</sup> I have referred to the ways in which that goal has been consistently subverted or obscured, in practice, by those who have interpreted, administered and enforced the law. Magistrates and registrars widely hold a radically truncated view of the legislation's purpose and scope, as the Women's Policy Coordination Unit originally proposed it. By constructing 'family violence' and 'Family Law' as distinct and mutually exclusive spheres of law, the scope of the CFV Act has been pruned to exclude everything except a 'bare bones' notion of personal protection. Applications pertaining to the Family Law sphere, such as those concerning child custody and contact or occupancy of the family home, are viewed as illegitimate, and applicants are suspected of being 'Family Law queue-jumpers'. At the same time, Family Law remains inaccessible to many victims of family violence, and poorly developed in relation to naming violence in the family and providing meaningful remedies or penalties for it.

<sup>214</sup> Women's Policy Coordination Unit 1985

According to Wearing, it is not difficult for those implementing the legislation to lose sight of its original purpose.

*Often an Act is passed after months or even years of political debate about a social problem (such as family violence), and once it has been passed, it tends to lose its high political profile. Other social issues take its place, and the relevant authorities tend to forget the fundamental issues that were paramount in the early days of the legislation. It is not surprising that old attitudes and practices creep back in.*<sup>215</sup>

These observations suggest the need for a device to clarify the purpose or intention of legislation and preserve it over time. In its submission on national Model Domestic Violence Laws, WESNET argued for including a clear set of principles and purpose in the code, to assist in its interpretation and guide the exercise of judicial discretion. The CFV Act presently has no such clause. The example included in WESNET's submission deserves replication here:

*The purpose of this Act as part of a coordinated multi-agency response to domestic violence is to:*

- (i) give primacy to the safety of victims of domestic violence;*
- (ii) achieve a reduction in the incidence of domestic violence in the community;*
- (iii) achieve more just and equitable responses by the legal system; and*
- (iv) strengthen the authority of the law in its effective and important role of influencing community attitudes and supporting social change.*

*In seeking to achieve the purpose detailed above the Court shall in the exercise of its jurisdiction observe the following principles:*

- (i) Domestic violence is behaviour by a person adopted to control their victim which results in physical, sexual and/or psychological damage, forced isolation or economic disadvantage;*
- (ii) Domestic violence, whatever form it takes, is unacceptable and must cease;*
- (iii) The safety, wellbeing and protection of any victim of domestic violence, including any child affected or likely to be affected, is of primary concern; and*
- (iv) The protections available under this Act must be as accessible as possible and to that end Court processes should be as simple, clear, quick and economical for the parties as possible.*<sup>216</sup>

<sup>215</sup> Wearing 2001: 8

<sup>216</sup> Extract from the ACT Community Law Reform Committee Report No.11, *Civil Issues*, cited as an appendix to Earle 1998. See also the objects statement in New Zealand's Domestic Violence Act <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1995/se/086se5.html>

In 2000 the NSW Crimes Act was amended to include a similar objects clause incorporating reference to the International Declaration on the Elimination of Violence Against Women.<sup>217</sup> Statements of principle and purpose such as these may go some way towards challenging the prevailing view of family violence by the courts as gender- or power-neutral family conflict, and redirect intervention towards comprehensive protection of victims and possible victims.

In an essay about building a model protective order process in the United States, Tracey similarly argues that it is essential to consider the goals that a protective order policy is designed to serve. Not only does this guide its construction and implementation, it also provides the framework for future evaluation and monitoring. Tracey argues that 'a model protective order process is one that a victim is aware of, has access to, and provides for the victim's short-term and long-term protection', because 'without short-term physical protection, there can be no long-term physical protection'.<sup>218</sup> To meaningfully provide short-term protection, Tracey argues that the legislation has to offer a comprehensive package of remedies as well as restraints that demonstrate real understanding of the obstacles women face in separating safely from violent partners.

She particularly emphasises measures to support the economic independence of women from violent partners, as ongoing economic dependence on the perpetrator results in ongoing vulnerability to violence. There are many ways in which the economic protection of the victim can be enhanced. Granting women sole occupancy of the family home is one option, although this alone is not enough, especially where occupation of the property is provided at a price that women cannot afford. The following list of remedies that improve women's financial protection from family violence is extracted from the protective order legislation in New Jersey (USA). Similar terms exist in other jurisdictions.<sup>219</sup>

<sup>217</sup> Kaye 2000: 71

<sup>218</sup> Tracey 1997: 14, 2

<sup>219</sup> Such as in South Africa's *Domestic Violence Act 1998*.

<sup>220</sup> Note the precise and unambiguous articulation of this remedy, compared to the generic s.5(1)(b) in the CFV Act, which shies away from explicitly stating the option of removing a party from their home.

1. *An order granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned by the parties or jointly or solely leased . . .*<sup>220</sup>
2. *An order requiring the defendant to pay the victim monetary compensation for losses suffered as a direct result of the act of domestic violence. . .*

3. *An order requiring the defendant to make or continue to make rent or mortgage payments on the residence occupied by the victim or other dependent household members. . .*<sup>221</sup>
4. *An order granting either party temporary possession of specified personal property, such as an automobile, checkbook, documentation of health insurance, any identification documents, a key, and other personal effects.*<sup>222</sup>
5. *An order awarding emergent monetary relief to the victim and other dependents, if any. An ongoing obligation of support shall be determined at a later date pursuant to applicable law.*
6. *An order granting any other appropriate relief for the plaintiff and minor children.*<sup>223</sup>

Other housing-related provisions could include restricting the defendant from selling the premises from which he is excluded or terminating a tenancy agreement in respect of the premises.<sup>224</sup> Tracey's model code also includes provision for orders relating to the payment of child support. Use of these and other measures could go a considerable way towards protecting women and empowering them to remain in the family home or achieve other sustainable and appropriate housing.

The other critical component of Tracey's model protective order process is ensuring the safety of women and children through the provision of more comprehensive, less equivocal protection to children. 'If a protective order policy cannot insure the safety of children, women will be forced to choose between staying with the batterer and attempting to protect their children as best they can or taking their chances with an inadequately designed and enforced protective order'. She argues forcefully that 'protective orders *must* trump custody arrangements in order to be effective'.<sup>225</sup> As Alexander has argued, the persistent equivocation of both magistrates and Family Court judges around this issue – their tendency to place the right of contact above the right of the child and the child's care-giver to safety – cannot continue to be ignored by policy makers.<sup>226</sup>

In comparison to some jurisdictions, Victorian family violence legislation is relatively conservative in the scope of provisions it offers. Its emphasis is entirely on restraining the defendant. It does not include provision for remedies, such as those discussed above, to more comprehensively ensure the

**221** The Department of Justice in South Africa has also acknowledged that 'many victims do not make use of a protection order due to ... financial concerns.' To this end, new family violence legislation likewise includes orders to pay rent or mortgage or emergent monetary relief. See [http://www.doj.gov.za/brochure/domestic\\_violence.htm](http://www.doj.gov.za/brochure/domestic_violence.htm).

Incorporating the requirement to pay rent for the protected parties would need to be carefully integrated within residential tenancy legislation, or else default on payments may still result in the eviction of the woman and children.

**222** A similar provision is provided under the ACT *Domestic Violence Act 1986* s9(1)(g) (Earle 1998: 7).

**223** NYSA 2C:25-29(b), quoted in [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm).

**224** The vulnerability of protected parties to loss of accommodation on account of these issues has been raised by the Australian Law Reform Commission in their review of protection order legislation (1986: chapter 10). It was also raised at the Workshop on National Legislation on Domestic Violence in the Mekong Basin Sub-Region December 2001 (Unifem web site [http://www.unifem-eseasia.org/Projects/EVAW\\_2001-3regionalpgm/Mekong\\_Workshop2001.htm](http://www.unifem-eseasia.org/Projects/EVAW_2001-3regionalpgm/Mekong_Workshop2001.htm)).

**225** Tracey 1997: 12, 10

**226** Alexander 1996



protection of victims through alleviating their economic vulnerability to ongoing abuse. Moreover, while the legislation empowers the Court to impose any restriction on the defendant deemed necessary to ensure the protection of victims, the set of restrictions and prohibitions listed in the Act 'inevitably . . . become[s] a standard checklist both for the courts and for the applicants'.<sup>227</sup> Items not included may tend to be viewed as beyond the scope of the Court's discretion or the victim's reasonable entitlement to protection. In view of this, it is important to be as broad and specific as possible in constructing this list to ensure the scope of available interventions provides comprehensive protection and a sufficient prompt to the exercise of the Court's discretion. To this end it would be valuable for government to consider some of the provisions available under protective order legislation in other jurisdictions.

The standard restrictions and prohibitions are also the parameters by which the Department of Justice collects and analyses data concerning the use and operation of the legislation. As outlined in Section II, by failing to specify particular options – such as exclusion from jointly occupied premises – no data is available to show how effective the Court is in delivering this form of protection to women.<sup>228</sup>

Given that Victorian magistrates are reluctant to make orders under existing legislation that will significantly constrain the liberty of defendants (especially on an interim *ex parte* basis or without a level of evidence that exceeds the statutory requirements), in reforming the law it will be necessary to consider strategies that challenge this conservatism.<sup>229</sup> Arguably, without fully criminalising the behaviour of the perpetrator, courts will remain resistant to making orders that constrain or suspend his important human or civil rights. Neither are courts likely to impose financial or other penalties on such men, should these remedies be included in the legislation. After all, perpetrators do not come before the Court in intervention order cases as charged or convicted felons. They are merely defendants to civil claims.<sup>230</sup>

### Containing and Directing the Use of Discretion by Courts and Police

Section II outlined how magistrates often interpret and use the CFV Act in ways that compromise the extent of the Act's capacity to provide protection to victims of family violence. Some of

<sup>227</sup> Earle 1998: 7. WESNET is referring here to a proposed national Model Domestic Violence Code, but its comments are just as relevant to the Victorian legislation.

<sup>228</sup> 'Sole occupancy' intervention orders are subsumed within the broad category of orders made under s5(1)(b), excluding the defendant from all premises in which the AFM lives, works or frequents irrespective of whether the defendant shares premises with the AFM.

<sup>229</sup> See Section II above for a further discussion of this issue.

<sup>230</sup> For a full discussion about the 'civil' status of the response to family violence, see Douglas and Godden 2001.

the strategies considered in this section – such as improving specialist advocacy services for survivors, engaging specialist judicial officers, and inserting a statement of purpose in the legislation to guide its interpretation – are likely to effect positive changes in this tendency. Specifying in the legislation a broader range of prohibitions and remedies may also stimulate magistrates' creativity in a way that improves outcomes for applicants.

Another strategy is to change the emphasis or presumptions inherent within the particular wording of legislation in order to encourage a 'default' position that is less biased against the victim. Four examples of changes that could be made to contain and direct the use of discretion (both by courts and by police) in family violence cases are outlined below. They are based on ideas from legislation in other places. This is by no means an exhaustive list, but it is one that particularly targets obstacles experienced by women who try to remain in the home.

*Discretion Regarding the Use and Occupation of the Family Home*

The sections of the NSW Crimes Act that concern restricting the defendant from the home (sections 562D and 562DA) are quite similar to those of the current Victorian legislation except in two respects. The first is that in NSW the Court is also required to give consideration to the likely consequences for the victim and any children if it fails to make such an order. The second is that the Court is required to offer an explanation for its decision where it decides against making an exclusion order. In the absence of quantitative data to compare the frequency with which exclusion orders are made in these two States, it is not possible to claim that these differences in legislation lead to radically different practices by courts, although this would be really interesting to find out. But at least the NSW provisions encourage greater reflection about the protection and housing needs of victims, and impose a level of accountability on the Court for its use of discretion against the victim.

WESNET, in its submission concerning model family violence legislation, supported a 'presumption in favour of an exclusion order where one has been requested and where the safety of the protected person/children would not be compromised by remaining in the family home'.<sup>231</sup> WESNET also

called for inclusion of a provision requiring the Court to consider the exclusion of the defendant even if the application does not specifically request such a restriction. The value of this proposal is that those who are exposed to family violence but may not feel entitled to claim sole occupancy for various reasons, will be informed of their right to do so.

Another WESNET recommendation in relation to this aspect of the legislation was removal of the requirement to give consideration to the housing needs of all parties affected by the order.<sup>232</sup> As illustrated throughout this Discussion Paper, the inclusion of this clause frequently serves to distract the Court from its primary responsibility of ensuring the safety of the person seeking protection, and gives rise to a contest of rights that women typically lose. Removing this clause would delete a significant obstacle to women's achievement of sole occupancy protection.

The provision requiring the Court to consider the accommodation needs of defendants is by no means a universal clause in protection order legislation around the world. In New Jersey, for example, the relevant legislation presupposes the physical separation of the parties and the removal of the defendant. There, a judge can only make an order allowing the offender to retain joint occupancy of the premises 'if the plaintiff requests such an order'.<sup>233</sup> Such an orientation completely alters the scope and direction of the Court's discretion and empowers the victim to determine the boundaries of her protective needs.

#### *Discretion Regarding Accepting Undertakings and Making Mutual Orders*

Brief mention was made in Section III that the provision to make mutual orders of protection serves to diminish women's claim to sole occupancy and other forms of superior protection. In view of this, and the fact that mutual orders usually deny victims of family violence due process,<sup>234</sup> Zorza has argued forcefully against their inclusion in family violence legislation. In addition to these problems, she suggests that mutual orders can lead to new forms of control, intimidation and abuse by the perpetrator which cannot be effectively policed. In line with observations reported by DVIRC focus group participants, Zorza claims that, even where women consent to the making of mutual orders, this is

<sup>232</sup> S.5(2)(c) CFV Act

<sup>233</sup> [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm).  
See also <http://www.njcbw.org/legalreliefs.htm>.

<sup>234</sup> Most applications for intervention orders against the original applicant are initiated on the day of the hearing or in response to the original application. The original applicant is typically denied due notice of the complaint.

*usually because the abuser (or the abuser's attorney) intimidates the victim, or the judge or victim's attorney is lazy or feels rushed and does not want to hold an evidentiary hearing about whether either party perpetrated abuse that was not justified.*<sup>235</sup>

In view of these arguments, legislators should consider removing mutual order provisions from the Victorian Act. In America, the *Violence Against Women Act* has encouraged States to do just this, by denying mutual orders 'full faith and credit' status.<sup>236</sup>

In exactly the same way that a woman may be pressured to accept mutual orders by the defendant, his solicitor or even her own solicitor, women who have applied for an intervention order can be pressured or advised to accept an undertaking from the defendant to be of 'good behaviour'. These orders, made under the *Magistrates' Court Act 1989*, are largely unenforceable since there is no power of arrest attached to them and the onus is on the victim to prosecute any breach.<sup>237</sup> They provide even less protection than the little offered by a Family Court restraining order. To ensure that women are not manipulated or intimidated into compromising on their protection, legislation should revoke the power of a magistrate to accept an undertaking where the original application before the Court is for an intervention order.<sup>238</sup> After all, an intervention order is not a criminal conviction. It is merely a warning – just like an undertaking.

#### *Discretion Regarding Child Contact Orders*

Throughout this Paper, the reluctance of magistrates and Family Court judges to prioritise women's safety over defendants' rights to maintain contact with their children has been identified as a serious obstacle to the effectiveness of sole occupancy and other intervention orders. WESNET has suggested that one of the reasons why magistrates do not use the power given to them under the Family Law Act (s68T) to 'make, revive, vary, suspend or discharge' a parenting order as necessary in making intervention orders, is that it is a fairly new (1995) addition to the legislation. The obscurity of this power is reinforced by the fact that it is not explicitly referred to in the State law, nor are the relevant provisions from the Family Law Act reproduced in the statute for easy reference. WESNET has

**235** Zorza 1999: 1

**236** Full faith and credit enables a protection order to be recognised and enforced in any other American State. See <http://www.vaw.umn.edu/FinalDocuments/restrain.htm>. New Jersey is one such State that prohibits mutual orders. See <http://www.state.nj.us/lps/dcj/agguide/9dvout0.pdf>.

**237** Violence Against Women and Children Working Group 1999: 48, s.126A of Victoria's Magistrates' Court Act

**238** Both the Magistrates' Court Act and the CFV Act should be amended to reflect this.

recommended that magistrates be reminded of, or alerted to this power; and that this be reinforced through explicit incorporation of the relevant provisions into the CFV Act.

Unfortunately, this still leaves discretion around parenting entirely in the hands of magistrates who have collectively demonstrated a tremendous reluctance to limit or preclude the right of contact to protect victims of family violence. One way of encouraging magistrates to use this power more would be to oblige the Court to suspend contact with the perpetrator unless the applicant requests otherwise, or unless it can be satisfactorily established that contact will not expose the children – or their parent – to future violence. This is similar to the situation in New Zealand, where the relevant legislation is constructed on a presumption in favour of no contact with a violent parent.<sup>239</sup> In other jurisdictions, such as New Jersey, there is at least a presumption in favour of custody by the non-violent parent, and applicants can ask the Court to authorise a risk assessment for contact by the perpetrator where concern is held for children's safety.<sup>240</sup>

With a view to more effectively protecting women and children, learning from legislative experiments in other jurisdictions is a valuable and sensible approach that should be part of any law reform process. WESNET's call for urgent 'research and evaluation of different legislative models for supporting and protecting children who are subject to or witness to violence in their families' should be supported.<sup>241</sup>

#### *Discretion Regarding Police Initiation of Orders*

Police resistance to acting on the power given them under the CFV Act to initiate a complaint for an intervention order was discussed earlier in this Paper. The failure of police to act on this power deprives women of support and advocacy that could greatly assist them to persuade a reluctant court to exclude a violent defendant from the home. The same phenomenon of police inaction was evident in NSW until 1992, at which time the wording of the relevant legislation was changed. The new law removed the police officer's discretion in deciding whether or not to initiate a complaint. Instead, it stated that police *must* apply for an order on behalf of any person who has been, or is likely to be, the victim of a domestic violence offence – unless the victim intends to make the complaint or has good reason

<sup>239</sup> Earle 1998: 11

<sup>240</sup> Kenneth Vercammen and Associates web site: [http://www.njcbw.org/legal\\_reliefs.htm](http://www.njcbw.org/legal_reliefs.htm) and the web site of the New Jersey Coalition for Battered Women: [http://www.njlaws.com/domestic\\_violence\\_in\\_new\\_jersey.htm](http://www.njlaws.com/domestic_violence_in_new_jersey.htm).

<sup>241</sup> Earle 1998: 11

not to make such a complaint.<sup>242</sup> This change in legislation has dramatically improved police involvement in applications for protection orders. Prior to the changes, police initiated a maximum of 18.9 per cent of all applications.<sup>243</sup> By 1997/8 this figure had increased to 60 per cent.<sup>244</sup> The dramatic impact a small change in legislation can have in this area offers a valuable lesson for Victorian legislators.

*Improving the Implementation of the Law*

While changes to the law are important, it is clear that poor implementation and enforcement can easily subvert progressive intentions. Some of the ideas presented in this section of the Discussion Paper – such as reforming the administration of courts' handling of family violence issues, and improving systems of police accountability – are likely to enhance the operation of good legislation. In its submission on model domestic violence laws, WESNET made some other valuable recommendations. First, it argued that without an effective means of evaluating the performance of protective order legislation, it is very difficult to make good decisions about appropriate or necessary law reform. To this end, WESNET reiterated an earlier call by the National Committee on Violence Against Women for systematic monitoring and evaluation of the operation of protection order legislation.<sup>245</sup> Secondly, WESNET argued that the model law should be backed up by model implementation strategies that would include models of a police protocol and a bench guide for magistrates, together with 'best practice' training strategies.

*The purpose of these would be to guide and inform the exercise of discretion by key law enforcement agencies. They would provide more detailed guidance about the principles, purpose and intended effect of the law, and increase awareness and understanding among law enforcement officers of the nature, extent and seriousness of domestic violence.*<sup>246</sup>

Inscribing a consistent view of the purpose and scope of the legislation into institutional procedure and culture is arguably a critical strategy towards resolving police and court attitudinal and structural biases against victims of family violence. The Victorian government should consider drafting such protocols

**242** S.562C of NSW's Crimes Act

**243** Egger and Stubbs 1993: 16

**244** Prichard and Malcolm 1999: 1

**245** See Egger and Stubbs 1993

**246** Earle 1998: 23

as part of the reform process. For the same reasons Rosemary Wearing's suggestion for the training of those implementing or using the legislation should be considered. Wearing argues that good training provides the foundation for improving access to justice in the family violence area.

*If I wanted to improve access to justice in the family violence area, I would start with training – I would improve the quality, length and comprehensiveness of the training of all those concerned, and moreover, I would train them all together – police, court officials, refuge workers, lawyers. I would set up training sessions where these different players could share their wisdom, experiences, knowledge, fears and doubts and draw upon each other to provide a cohesive, caring and professional team response to family violence.*<sup>247</sup>

### Reforming Residential Tenancy Legislation

A supplementary and complementary means to enhance the ability of women experiencing family violence to remain in the home would be to introduce family violence provisions in residential tenancy legislation. Existing legislation in Victoria allows a landlord to apply to evict a tenant if they have endangered the safety of neighbours, maliciously damaged the rented premises or persistently disturbed the peace, comfort or privacy of neighbours.<sup>248</sup> But there is no provision for a co-tenant who has been subjected to violence, threats of violence, or had their peace, comfort and privacy persistently violated, to apply for the removal of a violent partner, child or other co-occupant. Neither is there protection for such household members from punitive action taken by a landlord in response to neighbourhood disturbances or property damage caused by the perpetrator.<sup>249</sup>

In Queensland, the *Residential Tenancies Act 1994* has provisions to assist co-tenants, tenants' spouses, and people who are not specifically named on the tenancy agreement, to take action to remove a perpetrator of family violence from the premises.<sup>250</sup> Similarly, New Zealand's family violence legislation has provisions for making 'tenancy orders' which empower the Court to terminate a tenancy that is in the perpetrator's name, and place it in the name of the remaining household members.<sup>251</sup> How effective these different provisions are in according safety and rights to victims, and to what extent they could be appropriated for Victorian legislation, need careful evaluation.

<sup>247</sup> Wearing 2001: 14

<sup>248</sup> See Victoria's *Residential Tenancies Act 1997*

<sup>249</sup> Redfern Legal Centre (NSW) has raised these issues in relation to legislation in that State and called for changes to the legislation that would establish acts of domestic violence as a breach of tenancy. See Redfern Legal Centre web site:

[http://www.rlc.org.au/lawreform/tenancy/lawreview/Sub\\_ten\\_laws-ISSUE-32.html](http://www.rlc.org.au/lawreform/tenancy/lawreview/Sub_ten_laws-ISSUE-32.html).

<sup>250</sup> Queensland Residential Tenancies Authority web site: [http://www.rta.qld.gov.au/fact\\_sheets/domviol.pdf](http://www.rta.qld.gov.au/fact_sheets/domviol.pdf).

<sup>251</sup> See s56-59 of New Zealand's Domestic Violence Act at web site: <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1995/an/086.html>.

In addition, there is an urgent need for the Victorian government to clarify the relationship between residential tenancy and family violence legislation, because existing ambiguities have serious implications for women and children trying to remain in rented homes. At present, it is not clear how exclusion orders under family violence law affect tenancy rights and obligations. There is a presumption in the wording of s5(1)(b) of the CFV Act that an intervention order excluding a defendant from premises can be made, regardless or in spite of his legal status as a tenant of the property. But whether the exclusion order terminates, suspends or otherwise alters the tenancy status, rights or obligations of the defendant, or indeed that of the AFM, is not clear. Neither does the *Residential Tenancies Act 1997* clarify this issue. Victims of family violence could easily fall through the legal cracks here. For instance, there is nothing to stop a violent person who has been excluded from a property he rents from terminating the tenancy with the landlord, leaving other household members homeless.

### Summary

This section of the Discussion Paper has surveyed a range of strategies for challenging some of the systemic barriers faced by victims of family violence in obtaining the range of legal protections which are ostensibly available to them. The section has specifically focussed on strategies that address obstacles women face in trying to have the perpetrator removed from the home, and it has raised a number of suggestions for social and legal reforms based on local and other experimental innovations.

## V. Conclusion

The impetus for this Discussion Paper came out of DVIRC's view that 'removing the perpetrator from the home' is an important and long overdue policy agenda. Many women and children are forced into homelessness through family violence, and this is a grave injustice that has serious social and economic consequences – both for individual women and their children, and for the broader community. Providing victims of family violence with the option of having the perpetrator removed from the home ostensibly offers them



a means by which this injustice may be contained or circumvented. It implies that perpetrators of family violence should, rightly, be expected to wear the material consequences of their actions: that – notwithstanding pervasive cultural attitudes to the contrary – their rights to family property are neither more sacred nor more inviolate than those of women and children.

At the same time, it is our view that a will to transform social and legal responses to family violence should be accompanied by critical and creative reflection that is informed, as far as possible, by the insights of available research and practice knowledge. In this way, we can move forward better able to anticipate and avoid policy choices that may inadvertently contribute to further social inequality. This research encourages precisely this sort of reflection in the community and in government.

### Summary of the Main Issues

The first part of this Paper outlined and evaluated the two main legal avenues by which victims of family violence in Victoria may currently invoke the law to have perpetrators removed from the home. I argued that, while ‘sole occupancy’ provisions under Victorian family violence legislation represent a considerable development on those available under Commonwealth Family Law, neither legal option is particularly visible, accessible or effective. The capacity of the CFV Act to deliver meaningful protection has been greatly circumscribed, despite its enactment to address the failure of the Family Law Act and relevant criminal codes to adequately protect victims of family violence. This is particularly so with regard to removing the perpetrator from the home.

Section II considered a number of reasons why this is the case. I argued that the coexistence of two pieces of legislation with overlapping content and jurisdiction has resulted in courts informally delineating boundaries between the two. While the line is not drawn consistently across all Magistrates’ Courts in the State, the overwhelming tendency is to demarcate issues relating to occupation of the family home or the parenting of children as the appropriate sphere of Family Law rather than family violence legislation. The effect has been that courts

often view applications for sole occupancy intervention orders, or orders that involve a restriction on child contact by the defendant, as somewhat illegitimate, and they view complainants as Family Law 'queue jumpers'.

The practice of referring such applications to the Family Court dramatically diminishes women's access to meaningful protection from family violence, because sole occupancy provisions under Family Law are not specifically written or intended as family violence interventions. Therefore, those who are redirected to the Family Court are likely to find that their safety needs are not highly prioritised in the decision-making processes of the Court; and that the level and quality of protection achieved is considerably inferior to that of an intervention order. Moreover, access to the Family Court is limited to certain groups of applicants and is typically expensive and delayed, particularly in view of the Court's strong resistance to hearing matters of this nature on an interim *ex parte* basis. So by virtue of courts' informal delineation of the appropriate scope and purpose of these two overlapping pieces of legislation, victims of family violence who seek to remain in the home are unlikely to achieve an optimal legal outcome.

The second major reason that the CFV Act has been constrained in its capacity to provide this type of protection to victims lies in the ambivalent way that the law is written. On the one hand, the Act empowers courts to place any necessary restriction on the defendant to ensure the safety of those subjected to violence, including ordering his exclusion from the home. At the same time, it requires the Court to give consideration to the accommodation needs of all those affected by the order, including the defendant. The inclusion of this provision sets up a contest between the perpetrator's property rights and victim's right to safety. Available evidence suggests that, when faced with such a contest, most magistrates will prioritise the accommodation needs of a male perpetrator over the safety or housing needs of a woman and her children.

The Court's gender bias is not simply a result of ambivalently worded legislation. It extends to imposing evidentiary requirements for the achievement of sole occupancy that exceed statutory requirements. Many magistrates appear to view the exclusion of a man from his home as too serious a penalty to be justified on the 'balance of probabilities' that violence, or

threats of violence, have been perpetrated. Proof that a criminal level of violence has occurred 'beyond reasonable doubt' appears to be a more common benchmark for justifying the denial of a fundamental citizenship right. While the Court focuses on the needs and rights of the defendant, it simultaneously fails to acknowledge the needs and rights of women and children – that refusing to exclude an alleged perpetrator is most likely to result in the property rights of women and children being extinguished by default.

Beyond these considerable problems with the construction of the legislation and its interpretation by courts, this Paper has highlighted the profound invisibility of this legal option to victims of family violence, arguing that this obscurity compounds its inaccessibility. While a considerable volume of printed and electronic material exists to educate users of the legislation about intervention orders, there is an almost complete absence of information that explicitly and unambiguously informs users of the legislation about the option of having the perpetrator excluded from the home. Other potential sources of information about legal remedies to family violence, such as police, registrars and solicitors, often compound this information vacuum by failing to apprise women of this particular legal intervention.

In considering radical differences in the availability of information on family violence exclusion orders in other jurisdictions, I argued that a significant dimension of this invisibility lies in the absence of a specific term or provision in the Victorian legislation by which to refer to it. To the extent that this option is referred to at all in the CFV Act, it is subsumed within the broad group of orders that may be made restricting the defendant from premises in which the AFM lives, works or frequents. In contradistinction to legislation in many other jurisdictions, the Victorian legislation does not specifically and unequivocally state that the defendant may be excluded from jointly-occupied premises. Neither does it explicitly state that the AFM may be granted exclusive occupancy of such premises. While this is implied within the legislation, in failing to explicitly name these options the legislation stops short of challenging the limited interpretation that courts and the broader legal system have brought to bear upon it. In the absence of a legislatively-defined name or dedicated provision

in the Act, the existence and legitimacy of 'sole occupancy' intervention orders are easily obscured or denied by courts inclined to view such matters as the appropriate and exclusive province of Family Law. The difficulty – indeed, the impossibility – of asserting entitlement to something one cannot satisfactorily name is another critical respect in which inadequate terminology diminishes the material existence and accessibility of sole occupancy intervention orders.

Section III of the Discussion Paper considered a number of other structural obstacles faced by women who seek to have perpetrators removed from their homes. In the absence of information to the contrary, many women believe they do not have an equal entitlement to the family home. This belief is supported by a range of social and economic structures and influential cultural attitudes. Women who do assert their right to be protected by the law often find their way blocked by professionals who 'gate-keep' their legal options. Navigating a successful pathway through an insensitive, and at times hostile, legal system is especially difficult for certain groups of women, including women with disabilities, those with poor access to independent financial resources, and women who do not speak English well. The unique set of barriers women living in rural or remote locations face in having perpetrators removed from the home were also considered.

Even when women are successful in having perpetrators removed, they are often unable to maintain the cost of their housing or achieve subsequent outcomes in the Family Court that support their exclusive occupancy of the family home or protect them from further violence. Levels of vulnerability to ongoing harassment, intimidation and physical violence by perpetrators would seem to be high for women who remain in the home. This is often exacerbated by child contact arrangements that give considerable scope to perpetrators to breach orders with impunity. Combined with the widespread failure of police to respond decisively to breaches of orders, these factors often force women and children into subsequent hiding and homelessness.

In view of the diverse structural barriers faced by women who would have perpetrators removed, this section highlighted the need to develop a multifaceted policy response to the issue. It also warned of some of the dangers and pitfalls of pursuing

such an agenda without an adequate understanding of the breadth and nature of the systemic barriers women face in exercising this choice.

In Section IV, the focus of the Paper shifted from looking at problems to possible solutions. Drawing on successful local and international initiatives and approaches, this section presented a handful of ideas for reforming the law and improving the operation of the criminal justice and social service system. It was not intended that these strategies be viewed as a comprehensive solution to problems that are clearly very complex and multifaceted. Rather, these strategies were included to stimulate discussion and reflection on approaches that may contribute to positive social change in this area, if they are sufficiently researched and thoughtfully incorporated into broader strategies for tackling family violence.

In light of the Victorian government's recent decision to review the CFV Act, a particular emphasis was given to strategies for law reform. Several options that would reduce the inherent ambivalence of the legislation were considered, as were techniques for containing and directing the use of the Court's discretion in order to reduce its bias against women, and a few options for reforming residential tenancy legislation. Various strategies for clarifying the scope and purpose of the legislation to the professionals who use and implement it were also suggested, with a view to improving consistency across the system and reducing the glaring shortfall between what legislators intended the law to do and how, in practice, it operates.

In addition to law reform, the Paper argued for reforms to courts' administration of family violence cases and changes to police procedure and accountability systems. Radically extending the availability of court-based advocacy for women seeking legal protection from family violence was also proposed, in view of the documented success of such programs in addressing the personal and structural barriers women face in achieving appropriate legal outcomes. To remove pressure on women to leave the home, a number of options for accommodating perpetrators was also presented.

## Comments on the Direction of Government Policy

While writing this Paper, the feedback I have received from workers in the family violence field regarding the resurgence of government interest in this policy issue has been quite mixed. At one level, there is excitement about a perceived shift in the way family violence is regarded, culturally and by governments. People feel encouraged that family violence is being acknowledged as a widespread and costly violation of citizenship rights that justifies removing perpetrators from family homes. At another level, there is deep concern that the Victorian government does not adequately understand the diversity and complexity of the obstacles that women face in pursuing such an option. This concern is based on analysis of the various policy documents specifically referring to this issue that have been released in the past year. Two of these – the *Family and Domestic Violence Crisis Protection Framework* and *Key Directions in Women's Safety* – get as far as naming some of the obstacles that have been identified in this Paper.<sup>252</sup> Unfortunately, beyond 'improving support options' for women, neither paper follows up acknowledgement of these obstacles with a detailed strategic response.<sup>253</sup> This leads to a degree of cynicism from workers about the government's commitment. One DVIRC focus group participant summarised these concerns in the following way:

*All the policy documents refer to enabling women to remain in their own home but none of them refer to what they are going to do with the men for accommodation . . . what they are going to do to make the courts enforce orders – or just to **make** [orders] as they are not making them at the moment. There's no talk about creating systemic change to support it, so I guess that makes me quite cynical about it . . . I feel there is an implication that support services will deal with this problem; that there is something we can do just by telling women 'well here's a great idea, why don't you just stay at home and we'll support you in that decision . . .'*

Others have expressed concern that this policy is being driven, in part, by an economic rationalist agenda that does not have women's best interests at heart. Some speculate that talk about 'options', 'choices' and 'flexible support' for women may be a smokescreen for redirecting demand away from costly

**252** The third document is the *Victorian Homelessness Strategy*. For obstacles named in *Key Directions* and the *Crisis Protection Framework*, see Footnote 99.

**253** The *Crisis Protection Framework* talks in terms of 'refocusing resources' with an increasing emphasis on the 'flexible support options' provided by outreach services. *Key Directions* signals the government's intention to review the CFV Act, improve advocacy and referral services for women and 'establish a cross-Departmental project team to explore the feasibility of providing enhanced support and options for women so that more women can exercise the right to remain in their home following family violence' (p.39).

homelessness services towards the cheaper alternative of providing outreach support to women who remain in the home. Accordingly, there is a degree of concern that, despite emphasising safety as the overriding goal of intervention, women will increasingly be encouraged – or forced by a lack of alternatives – to remain in their homes without adequate legal protection or meaningful enforcement of orders by police.

Whether or not this is a factor in the government's decision-making, in our view it is absolutely essential that this policy does not lead, deliberately or inadvertently, to a reduction in the capacity of the homeless service system to assist women and children who are escaping family violence. For many women, remaining in the home is not only highly dangerous, it makes the process of recovery difficult and even impossible. Research currently being undertaken by Women's Health Goulburn North East is also finding that some women experience the home as a material reminder of the violence.<sup>254</sup> In order for women to choose how best to leave a violent relationship, there needs to be a unequivocal government commitment not only to maintain but also to develop, expand and modernise the women's refuge network and other homelessness services for those escaping family violence.<sup>255</sup>

To some extent, this Paper's observations and findings restate and elaborate obstacles and strategies for change previously identified by the writers of the *Home Safe Home* study.<sup>256</sup> In line with the recommendations made in that report we, too, hold that change is required in a number of areas. To the extent that the agenda of supporting women to remain in their homes conflicts with other significant social priorities – such as upholding male property and parenting rights – it is likely to continue being subverted by the judiciary and police unless new structures, protocols and forms of accountability are established to contain these groups' use of discretionary power. The provision of outreach support and advocacy is undoubtedly critical to the success women have in approaching the legal system for protection. However, without comprehensive and substantive change to the administration, interpretation and enforcement of the law, many women will be endangered by policies that encourage them to remain in the home.

This Paper has also emphasised the short-term nature of the solution provided by an exclusion order. Such orders, under

**254** While these women resent the injustice of being forced to leave their homes, and would have liked to have been able to remain in their own communities, they overwhelmingly expressed the view that leaving was essential for their safety and recovery. They indicated that the refuge experience had provided them with a unique experience of community which undermined the isolation they had experienced in their own homes. The impossibility of being safe while remaining in the home in an isolated rural context was also restated by women interviewed in the Hume region (Lea Markey, pers. comm.).

**255** It is clear from recent research such as Keys Young (1998) that many women experiencing family violence choose not to use family violence and homelessness services for a range of reasons. This research provides invaluable information for reforming and developing the provision of these services so that they are more widely accessible and effective in assisting women who need to leave violent relationships. The research should not, however, be misused to justify diminishing or discontinuing the provision of such services, which provide critical assistance to many women. As it is, these services are unable to meet the level of demand made on them.

**256** Chung et al 2000

existing legislation and in the absence of reforms to other policies, do not adequately address the economic barriers that women face in leaving violent relationships, especially where children are involved. Many women who secure sole occupancy of their homes remain vulnerable to poverty, homelessness and ongoing dependence on perpetrators. A policy agenda that empowers women escaping family violence in a genuine and sustainable way must, arguably, develop housing and income-related policies that address this vulnerability.



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