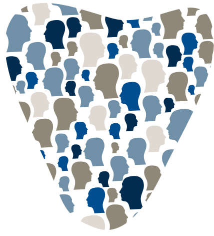

sentencing ADVISORY COUNCIL

SENTENCING OF ADULT FAMILY VIOLENCE OFFENDERS

FINAL REPORT No.5

October 2015

About This Report

This Report provides advice on the sentencing of adult family violence offenders in Tasmania and includes consideration of the range and adequacy of sentencing options and support programs available and the role of specialist family violence lists or courts in dealing with family violence matters. The request to the Sentencing Advisory Council was made by the then Attorney-General and Minister for Justice, the Hon Brian Wightman MP in October 2013. The Council was not required to provide recommendations but instead the Report offers a number of observations about current sentencing practices for family violence offences.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the Government by informing, educating and advising on sentencing issues in Tasmania. At the time this reference was concluded, the Council members were Emeritus Professor Arie Freiberg A M (Chair), Dr Jeremy Prichard, Ms Kim Baumeler, Mr Chris Gunson, Professor Rob White, Ms Linda Mason, Mr Scott Tilyard, Dr Graham Hill, Mr Peter Dixon, Ms Terese Henning and Ms Jo Flanagan.

Acknowledgments

The Council would like to thank all those who provided information in relation to this reference, in particular the Chief Magistrate and Deputy-Chief Magistrate, representatives of the *Safe at Home* partners (the Department of Justice, the Department of Police and Emergency Management and the Department of Health and Human Services), the Senior Consultant, *Safe at Home* Coordination Unit (Community Corrections), the Defendant Health Liaison Service and Research Officers within the Department of Justice who provided data on numbers of family violence offences and sentencing outcomes. Early drafts of the Report were prepared by Lisa Gregg and the final version written by Dr Helen Cockburn.

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Glossary

Accessorial liability an individual may be liable to punishment as an accessory where they assist the commission of a crime

Family violence instance an instance of a criminal offence committed in circumstances of family violence (as defined in s 7 *Family Violence Act 2004* (Tas)) but which may also be committed outside of a family violence context

Immediate custodial sentence where an offender must serve an immediate term of imprisonment. It includes a partly suspended sentence

Non-family violence instance an instance of a criminal offence which is not committed in circumstances of family violence (as defined in s 7 *Family Violence Act 2004* (Tas)) but which may otherwise be

Protection order a generic term for family violence orders, police family violence orders and interim family violence orders

Recidivist premium a progressive increase in the severity of the sentence imposed as an offender acquires more convictions

Wholly suspended sentence where an offender is sentenced to a term of imprisonment but is not required to serve any time in custody provided he observes certain conditions

Acronyms

CRIMES — Criminal Registration Information Management and Enquiry System

CMD — Court Mandated Diversion

DHHS — Department of Health and Human Services

DHLS — Defendant Health Liaison Service

DPAC — Department of Premier and Cabinet

DPEM — Department of Police and Emergency Management

DTO — Drug Treatment Order

FVA — *Family Violence Act 2004* (Tas)

FVIO — Family Violence Intervention Order

FVMS — Family Violence Management System

FVO — Family Violence Order

FVOIP — Family Violence Offender Intervention Program

FVPA — *Family Violence Protection Act 2008* (Vic)

FVSN — Family Violence Safety Notice

PFVO — Police Family Violence Order

RAST — Risk Assessment Screening Tool

SIMS — *Safe at Home* Information Management System

TILES — Tasmanian Institute of Law Enforcement Studies

List of Observations

Observation 1 — *page 17*

There is a need for research into the nature of breaches of protection orders.
Those subject to an order must be fully informed of the content of the order, the obligations it imposes and the consequences of breach.
Consideration could be given to adopting a FVSN system where a PFVO is considered an application for an FVO. This would result in greater court supervision of the process.

Observation 2 — *page 22*

The adverse effects of the sentence on the victim should be taken into account. However, victims' wishes should not be given undue weight. If an appropriate sentence is to be imposed that prioritises the victim's safety but also promotes the aims of rehabilitation and family reintegration the sentencing Magistrate must be able to call on relevant background information from other agencies.

Observation 3 — *page 24*

The practice of charging a victim as an accessory may discourage the victim from reporting an incident to police. A clearer understanding of the process for applying to vary or revoke orders is likely to reduce instances of victim precipitated breaches of protection orders.

Observation 4 — *page 27*

The widespread use of release on an undertaking under s 7(f) of the *Sentencing Act 1997* for contravention of a protection order is problematic where there are no conditions attached to the undertaking and where the court lacks the capacity to monitor released offenders. Without further research into the type of cases which attract conditional release orders it is not possible to determine whether they are being utilised appropriately but in any case the capacity to monitor released offenders should be developed.

Observation 5 — *page 31*

The imposition of sanctions alone is not bringing about a change in offender behaviour. It may be that a greater investment in rehabilitative interventions and the adoption of a more therapeutic approach to sentencing should be considered.

Observation 6 — *page 35*

Consideration should be given to inserting a sentencing aggravating provision in the summary offence of common assault (s 35 POA) which applies in cases where the person assaulted was a pregnant woman.

Observation 7 *page 36*

It is important that the sentencing officer has access to a complete record of prior family violence convictions and protection orders imposed. This requires a reliable and accessible database and may require development of information sharing protocols. The SIMS database may be useful in this regard as it contains information organised on an individual case basis.

Observation 8 *page 36*

Whilst there is no evidence of a practice of downgrading charges, it is important that plea negotiations do not ultimately result in the imposition of sentences which do not adequately reflect the seriousness of the offender's conduct.

Observation 9 *page 38*

A number of factors indicate that mandatory sentencing regimes are not appropriate in the context of family violence offending. These include the complexities of family violence (including the likelihood that incarceration of the offender will incur negative consequences for the victim), the lack of evidence that mandatory regimes are effective in deterring offending and the certain increase in prison budgets flowing from an expected increase in imprisonment rates. Instead, consideration could be given to developing a set of principles to guide the sentencing exercise in family violence cases.

Observation 10 *page 42*

Given the evidence of a correlation between alcohol abuse and family violence there is a strong case for extending the eligibility criteria for CMD to also include offenders who abuse legal substances.

Observation 11 *page 45*

Safe at Home has three major foci. Foremost is victim and child safety but behavioural change in offenders is also prominent. Victim safety in any case will often depend on effecting a change in the attitude of violent partners and a change in social attitudes more broadly. Despite its championing of rehabilitation, there are shortcomings in the legislation and in the framework of services which support the legislation which seriously restrict the ability of the court and other agencies from delivering on the rehabilitative aspects of *Safe at Home*.

Observation 12 *page 51*

Resource limitations are likely to confound attempts to create a separate family violence court however the operation of the family violence list could be improved by adopting the collaborative therapeutic models of, eg the Youth Justice Division.

1. Introduction

1. BACKGROUND

Concern about family and domestic violence is not new. In Tasmania, campaigns to tackle domestic violence date back to the 1970s. Early initiatives, such as the establishment of the Hobart Women's Shelter in 1974, tended to be reactive rather than proactive searches for long-term solutions to family violence. The release of the *Hopcroft Report*[1] in 1984 and the prominence that the issue of domestic violence received following the high profile murder of Maureen Thompson led to legislative amendments during the mid–80s and early 90s, including a push to have domestic assault recognised as a crime. The substantial reforms recommended by the *Hopcroft Report* sought 'to provide a broad scheme of protective orders with immediate enforcement mechanisms and more appropriate sanctions.'[2] The Tasmanian government's integrated response to family violence, *Safe at* Home, is the most comprehensive and far-reaching of the successive approaches to addressing family violence.

In more recent times the issue has become a strong focus of political and community concern. The federal government released the *National Plan to Reduce Violence against Women and their Children 2010-2022* in 2011 and the *Second Action Plan: Moving Ahead 2013–2016* in June 2014. The Queensland government's Taskforce on Domestic and Family Violence released its report on domestic and family violence support systems in February 2015[3] and the Senate Standing Committees on Finance and Public Administration are due to report on the Inquiry *into Domestic Violence in Australia* later this year. The Victorian Government is also currently conducting a Royal Commission into family violence. Much of the renewed public concern and press attention has been attributed to the selection of domestic violence campaigner Rosie Batty as Australian of the Year in 2015.

This Report contributes to the now extensive debate on family violence by focusing primarily on one aspect, sentencing. Information on the prevalence of family violence and sentencing outcomes for offenders has a vital role to play in sketching the extent of the problem of family violence and the adequacy of the justice system response.

Women and men may be both victims and perpetrators of family violence. However, there can be no doubt that family violence is a gendered crime. The Australian Bureau of Statistics' 2012 Personal Safety Survey (PSS) estimated that16.6% of all women over the age of 18 had experienced violence from a partner or ex-partner since the age of 15 compared to 5.3% of all men.[4] A recent report on patterns and trends in family violence reporting in Victoria shows that men consistently made up 80% of respondents in finalised protection order applications and were the perpetrator in 80% of reported family violence incidents.[5] An examination of the data prepared for this Report shows that women constituted less than 15% of all those convicted of a family violence offence since the commencement of the *Family Violence Act 2004* (Tas). This Report does not suggest that men can never be victims but it reflects the gendered reality of family violence, in most cases using gender–specific pronouns for victims and perpetrators.

1 Robyn Hopcroft, Department for Community Welfare (Tas), *Report of the Tasmanian Review on Domestic Violence*, Occasional Paper No 2 (1984).

2 Ibid 1.

3 Special Taskforce on Domestic and Family Violence (Qld), *'Not Now, Not Ever' — Putting an End to Domestic and Family Violence in Queensland*, Final Report (2015).

4 ABS, 'Experience of violence since the age of 15, relationship to perpetrator', table 4, *Personal Safety Survey*, cat. no. 4906.0, (2012) ABS, Canberra.

5 Department of Justice (Vic), *Victorian Family Violence Database Volume 5: Eleven Year Trend Analysis 1999–2010*, 18.

1.1 THE FAMILY VIOLENCE LANDSCAPE

1.1.1 Family or domestic violence

The notion of 'family violence' or sometimes 'family and domestic violence' covers a wide range of abusive behaviours committed against partners, ex partners, parents, other family members, children and caregivers or against a domestic partner who may not be intimately related, such as a friend or housemate. Legislative definitions of family violence in state and territory jurisdictions vary in the abusive behaviours they capture and the nature of the relationships they cover, but generally they contain a combination of some or all of the following types of conduct: physical abuse including sexual abuse, emotional or psychological abuse, abduction, stalking, economic abuse in the sense of a denial of economic or financial autonomy or the withholding of financial support, and injury to pets or personal property. Some jurisdictions provide that the exposure of a child to family violence or the effects of family violence also constitutes family violence.[6]

1.1.2 The prevalence of family violence

For the most part, estimates of the prevalence of family violence are compiled from information provided in victimisation surveys and from statistics on reported incidents kept by relevant agencies. As an example of the former, the Australian Bureau of Statistics' 2012 Personal Safety Survey (PSS), which collected information about the nature and extent of violence experienced by men and women since the age of 15 and during the 12 months preceding the survey, estimated that 16.6% of all women and 5.3% of all men over the age of 18 had experienced 'partner violence' (defined as 'sexual assault, sexual threat, physical assault or physical threat by a current and/or previous partner')[7] since the age of 15.[8] The Survey also asked about participants' experience of 'emotional abuse' (defined as 'behaviours or actions aimed at preventing or controlling [a person's] behaviour with intent to cause them emotional harm or fear').[9] Twenty-five percent of women and 14% of men over the age of 18 reported experiencing emotional abuse by a partner since the age of 15. These statistics indicate that family violence is committed predominately against women[10] although it is acknowledged that forms of family violence are not homogeneous.[11] A small proportion of men are victims of family violence, but men are more likely to experience violence from strangers.[12]

The PSS also revealed that 80% of women and 95% of men who experienced violence by a current partner did not report the incident to police.[13] Fifty-eight percent of women and 80% of men did not report an incident of violence perpetrated by a previous partner.[14] These figures suggest that family violence offending is grossly under-reported and this is borne out by the statistics on reported crime maintained by agencies such as the police. In its annual report for 2013-14, the Department of Police and Emergency Management (Tas) ('*DPEM*') reports that there were 2376 recorded family violence incidents during the reporting period.[15] If the PSS is at all accurate, these reports must represent only a fraction of actual FV incidents.

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6 See *Family Violence Protection Act 2008* (Vic) s 5(1)(b).

7 ABS 'Glossary', *Personal Safety Survey*, cat. no. 4906.0, (2012) ABS, Canberra.

8 ABS 'Experience of violence since the age of 15, relationship to perpetrator', table 4, *Personal Safety Survey*, cat. no. 4906.0, (2012) ABS, Canberra.

9 Ibid.

10 See also, Rosa Campbell, Australian Domestic & Family Violence Clearinghouse, *General Intimate Partner Violence Statistics* (2011).

11 In its submission to the *Victorian Royal Commission on Family Violence* the Centre for Forensic Behavioural Science at Swinburne University and the Victorian Institute of Forensic Mental Health (Forensicare) note: 'Family violence is a broad phenomenon involving psychological, physical and sexual violence between partners, siblings, parents, children and more distant family members': Submission to Victorian Royal Commission into Family Violence, May 2015, 5.

12 The Personal Safety Survey indicates that, of those men over the age of 18 who had experienced physical violence since the age of 15, 35% were assaulted by a stranger compared to 8.4% for women: ABS 2012, above n 2, table 5.

13 Ibid table 25.

14 Ibid table 26.

15 Department of Police and Emergency Management, *Annual Report 2013-14* (October 2014) 24.

The decision not to report to police is likely to be influenced by a complex mixture of factors which may include feelings of shame or helplessness, fear of abandonment, fear of reprisals, concern for the wellbeing of affected children, and, due perhaps to a misplaced sense of loyalty, an unwillingness to expose the violent partner to potentially serious legal consequences.[16]

1.2 THE FAMILY VIOLENCE ACT 2004 (TAS)

In the 1990s Tasmania experienced seven domestic homicides over a period of three years. In 2004 a coroner's report, produced as a consequence of these deaths, was highly critical of the State's response to family violence. This report became the significant driver for a new integrated Government response to the problem. With its *Safe at Home* initiative, the Tasmanian government introduced a raft of legislative and structural reforms aimed at tackling the often hidden problem of domestic violence. The *Family Violence Act 2004* (Tas) ('*FVA*') is the centrepiece of the reforms. It is at once a strong acknowledgment of the criminal nature of family violence and a legislative mandate for the deployment of protective interventions and offender risk management strategies. Its long title is '[a]n Act to provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence'.

1.3 PREVIOUS REVIEWS OF SAFE AT HOME

Two separate independent reviews of *Safe at Home* have been conducted since its inception. The first, in 2008, was a review of the *Family Violence Act* as required by s 43 of the *FVA*.[17] The second, in 2009, was a review of the whole of the Government's integrated response to family violence.

1.3.1 Review of the *Family Violence Act 2004* — Urbis

The Report, *Review of the Family Violence Act 2004* (Tas), ('*Urbis Report*')[18] was prepared for the Department of Justice by the consultants Urbis. The terms of reference were, to examine:

1. The effectiveness of the integrated criminal justice response to family violence (*Safe at Home*) in promoting the safety of people affected by family violence;
2. Whether the scope of the definition of family violence as determined by ss 7, 8 & 9 is appropriate and operating in a way that is consistent with s 3 Objects of Act;
3. Whether police powers and the mechanisms identified under ss 10, 11 12 & 14 in relation to the prevention, investigation and management of family violence are effective in promoting the safety of people affected by family violence;
4. Whether the provisions under ss 13(a) are appropriate and operating in the way that effectively manages the impact of family violence on children and in informing the Court about matters in relation to the 'risk' that an offender might pose and their capacity for successful rehabilitation;
5 Whether the powers granted to the Court under ss 12, 13 & 16 are effective in promoting the safety of people affected by family violence;
6. Whether the scope of the provisions of s14 in relation to Police Family Violence Orders are appropriate and operating in a way that is consistent with s 3;
7. Whether provisions at ss 14(3)(a), 16(3)(b), & 17 which address the right of the victim to remain in the family home, are appropriate and operating in a way that is consistent with s 3;
8. Whether the scope of the provisions in ss16, 18, 19, & 20 in relation to Family Violence Orders are appropriate and operating in a way that is consistent with s 3;
9. Whether s 33 in relation to Family Court Orders operates in a way that enables the effective management of victim safety;

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16 See, eg Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) *British Journal of Criminology* 14, 21–3; Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 442–3.

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

18 Urbis, Review of *the Family Violence Act 2004 (Tas)* (2008).

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

11. Whether s 38 in relation to 'mandatory reporting' should be proclaimed.

The *Urbis Report* found there were some early indications of a slight reduction in incidents of family violence.[19] It also found that whilst the introduction of new police powers in the *FVA* and changes in 'front end' police practices had improved the safety of adult victims of domestic violence to some degree, similarly positive impacts were not evident at subsequent stages of the criminal justice process. For example, the report notes:

> The majority of convictions under the Act are being reached through guilty pleas … The problems reported with this include concern that the decision to proceed with charges has been returned to the complainant and that there is a reluctance on the part of police prosecutors to test circumstantial evidence in cases where complainants are reluctant or uncooperative.[20]

1.3.2 Review of the Integrated Response to Family Violence – Success Works

The second review examined the integrated response as a whole. It was conducted by Success Works and the Final Report, *Review of the Integrated Response to Family Violence* ('*Success Works Report*')[21] was delivered to the Department of Justice in June 2009. The scope of the review was, in part, a response to the identification in the *Urbis Report* of those issues which were beyond the scope of the earlier review. The terms of reference were to determine:

1. What have been the achievements of Safe at Home to date including the strengths of the approaches used by the Safe at Home system?
2. Whether the available resources are being appropriately aligned to achieve the stated objectives of Safe at Home?
3. Whether the current programs and activities funded under Safe at Home are delivering the intended results?
4. Whether there are gaps or inefficiencies in the current approach?
5. How effectively the existing central, regional and local governance structure addresses ongoing service improvement?
6. Whether there are opportunities for the further integration and better coordination of Safe at Home services?
7. What relationship between Safe at Home and other government and nongovernment agencies should be developed to ensure their ongoing input into strategic directions?[22]

Amongst its findings, the Report noted that:

> There were some concerns expressed during the consultation process in relation to the perceived failure on the part of the Tasmanian Courts to 'take family violence seriously' as evidenced by the length of sentences that had been handed out in criminal matters. Success Works was unable to obtain evidence of the level of sentences given in family violence matters and it is recommended that this research take place in order to determine the length and characteristic of sentences prior to considering any further action.[23]

This finding formed the basis for Recommendation 36 of the Report, viz, 'Research is undertaken in relation to the sentencing of family violence offenders and the findings communicated to Magistrates'.[24]

Recommendation 36 was the impetus for the current reference to the Sentencing Advisory Council.

19 Ibid 2. The report noted that police data showed a reduction in the monthly average number of 'incidents of family conflict' attended by police from 418 in 2006–07 to 403 in 2007–08.

20 Ibid 3.

21 Success Works, *Review of the Integrated Response to Family Violence* (2009).

22 Department of Justice, *Safe at Home: An Integrated Response to Family Violence*, Review (Phase 2) — Draft Terms of Reference (2008).

23 *Success Works*, above n 21, 66.

24 Ibid 70.

1.4 THE CURRENT REVIEW

On the 10 of October 2013 the then Attorney-General, Brian Wightman requested the Council to inquire into sentencing for family violence offences in Tasmania. The Terms of Reference for the inquiry were as follows:

Terms of Reference

> I seek the Council's advice on the sentencing of adult family violence offenders in Tasmania. In particular I would request that the Council investigate and consider:
>
> 1. The number and rate of family violence offences since the introduction of the *Family Violence Act 2004*;
> 2. Sentencing practices in relation to family violence offences across Tasmania;
> 3. Sentencing standards for family violence offences in comparison to similar offences outside the family violence context;
> 4. The range and adequacy of sentencing options and support programs available to the courts when sentencing family violence offences;
> 5. The role of specialist family violence lists or courts in dealing with family violence offences.
> 6. In developing the Council's advice I would be particularly interested in the views of key stakeholders magistrates and victims of crime.

The amended terms of reference (received 24 March 2015) also requested the Council to consider whether or not mandatory sentencing and mandated treatment are appropriate sentencing tools and to provide advice on the provision of counselling and therapy to lessen the risk of future violence by perpetrators of domestic violence or those at risk of committing these crimes.

The Council was requested to provide its advice by 1 September 2014.

1.5 SCOPE OF THIS REPORT

This report addresses each of the terms of reference in turn. Sentencing matters are very much the focus and whilst reference is made to other aspects of the family violence landscape the report does not provide recommendations as such for improving institutional responses to the problem of intimate partner violence beyond acknowledging the need for top-down direction in this regard. In the main it is limited to making observations in connection with the terms of reference.

1.6 FAMILY VIOLENCE OFFENCES

The Terms of Reference of this report concern the disposition of 'family violence offences' in Tasmania. These are defined in s 4 of the *FVA* as '*any offence the commission of which constitutes family violence*'. 'Family violence' is in turn defined in s 7 as:

> (a) any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:
>
> (i) assault, including sexual assault;
>
> (ii) threats, coercion, intimidation or verbal abuse;
>
> (iii) abduction;
>
> (iv) stalking within the meaning of section 192 of the Criminal Code;
>
> (v) attempting or threatening to commit conduct referred to in subparagraph (i), (ii), (iii) or (iv); or
>
> (b) any of the following:
>
> (i) economic abuse;
>
> (ii) emotional abuse or intimidation;
>
> (iii) contravening an external family violence order, an interim FVO, an FVO or a PFVO.

Economic and emotional abuses are defined in ss 8 and 9 of the *FVA* and, like the behaviours listed in s 7(a), are restricted to actions against one's spouse or partner. 'Spouse or partner' is defined in s 4 as a person with whom one is, or has been, in a 'family relationship'. The term 'family relationship' is defined (in simple terms) as a marriage or significant relationship within the meaning of the *Relationships Act 2003* (Tas).[25]

Thus, in Tasmania 'family violence' is essentially abusive (etc) behaviour to a partner or ex-partner — it does not include such behaviour towards other family members (eg children or parents) or towards those with whom the person committing the violence does not have a 'significant relationship' (eg a short-term girlfriend).[26]

It is important to understand that the process itself of listing behaviours within this definition of 'family violence' has *not* created new or separate criminal offences. Some of the behaviours listed were already (and remain) criminal offences (eg assault, threat (a type of assault), abduction, stalking), and some were created as new criminal offences by other provisions of the *FVA* (eg 'economic abuse', s 8; 'emotional abuse or intimidation', s 9; and contravening a family violence order ('*FVO*'), s 35). However, some of the behaviours may not amount to a criminal offence at all (or at least, will rarely do so), such as 'intimidation' or 'verbal abuse' (which are not defined by the *FVA*).

Nevertheless, the labelling of behaviours as 'family violence' (whether they are also separate criminal offences or not) is important in that it 'triggers' other aspects of the *FVA*, such as:

- the right of a police officer to enter premises without a warrant, s 10;
- the right of police to issue a police family violence order ('*PFVO*');[27]
- the basis of a private (non-police) application for an FVO (similar to a restraint order) from a Court, Part 4 of the *FVA*; and
- a more stringent approach to bail, s 12.[28]

However, as this report is primarily concerned with the *sentencing* of 'family violence *offences*', 'family violence' which does not amount to a criminal offence, such as verbal abuse, is less relevant.

1.7 METHODOLOGICAL APPROACH

In order to respond to the Terms of Reference, the Council undertook an analysis of police and court data to determine the number and rate of family violence offences since the commencement of the *Family Violence Act 2004* on 30 March 2005.

The Council examined sentencing data for family violence offenders in both the Magistrates' and the Supreme Courts of Tasmania. The data set included all those offences identified above at [1.6]. Sentencing data for this Report was obtained from a number of databases. In the case of family violence offences this is principally Magistrates' Court data which is stored in the Criminal Registration Information Management and Enquiry System ('*CRIMES*') database, maintained by the Department of Justice. CRIMES records both finalised charges and finalised defendants. The statistics compiled for this Report are based on finalised defendants. The record of finalised defendants shows only the most serious offence for each person per date of finalisation. Where multiple sentences were handed down, only the most serious sentence (according to the Australia Bureau of Statistics' hierarchy) is shown. Sentencing data cannot be accessed from this database by magistrates, court staff or legal practitioners. Nor can it be accessed directly by the Sentencing Advisory Council. Instead, the Department provided specific Magistrates' Court sentencing data in response to requests made by the Council.

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25 *FVA 2004* (Tas) s 4; the *Relationships Act 2003* (Tas) defines a 'significant relationship' in s 4. In simple terms it is a relationship between two adults as a couple, and when determining whether a relationship is 'significant' regard is had to various factors such as the length of the relationship, whether they live together, have children, share finances, etc.

26 Of course, the same behaviour in other family relationships (eg parents and children) or 'couple-like' relationships which are not 'significant' may still amount to another offence or be grounds for a restraint order pursuant to Part XA of the *Justices Act 1959* (Tas).

27 As the name suggests, these are orders made by a police officer (of the rank of sergeant or above) with the advantage that they can be made quickly and avoid the need to attend court. They can be revoked or varied by an inspector or by court application. See *FVA 2004* (Tas) s 14.

28 If an offender is charged with a family violence offence more restrictive conditions for the granting of bail come into play. Section 12(1) of the *FVA* stipulates that bail is not to be granted 'unless a judge, court or police officer is satisfied that release of the person on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person or affected child'.

The Supreme Court maintains its own sentencing database. This contains comments on passing sentence for all offenders sentenced in the Supreme Court since 1989. It can be searched to retrieve all offences of a particular type (eg all assaults). Searches can be refined to retrieve all offences of a particular type with certain variables for example, judge, offender age, or prior convictions. But it does not provide quantitative data such as the proportion of custodial sentences, sentencing ranges or median and mean sentences. The Supreme Court's sentencing database can only be accessed by judges and their staff.

The Tasmania Law Reform Institute ('*TLRI*') maintains a database of sentences compiled from Supreme Court judges' comments on passing sentence, hard copies of which are held in the Law Library at the University of Tasmania. The database covers the years 2001–14.

A formal consultation process was not undertaken but discussions were held with the Chief Magistrate and Deputy-Chief Magistrate of Tasmania, the Department of Police and Emergency Management ('*DPEM*') and police prosecutors, the management of *Safe at Home*, and management and staff at all levels of the integrated response including Department of Premier and Cabinet ('*DPAC*'), Community Corrections, Department of Health and Human Services ('*DHHS*'), Legal Aid and Court Support and Victim Liaison Officers in order to inform the content and direction of this paper.

The Council also considered academic literature on family violence, reports prepared for government and non-government bodies, family violence legislation, and practices and court models at the state, national and international level.

2. Family Violence Offence Statistics

2. TERM OF REFERENCE 1: NUMBER AND RATE OF FAMILY VIOLENCE OFFENCES SINCE THE INTRODUCTION OF THE *FAMILY VIOLENCE ACT 2004*

2.1 INTRODUCTION

This section addresses the first of the terms of reference. Strictly speaking, in this context, a reference to a 'family violence offence' is a reference to an incident of family violence which has proceeded to prosecution and conviction. However, as well as detailing the number and rate of convictions for family violence offences this section of the Report also provides information about the number of family violence incidents reported to police and the number of family violence protection orders imposed. There are three types of protection orders which may be issued — Interim Family Violence Order ('*IFVO*'), Family Violence Order ('*FVO*') and Police Family Violence Order ('*PFVO*'). This information is important to give context to the data on breaches of FVOs.

Data on annual numbers of family violence incidents recorded by Police was obtained from the Police Family Violence Management System ('*FVMS*') maintained by DPEM. Data on the number and rate of family violence offences since the introduction of the *FVA* was obtained from CRIMES, the Supreme Court sentencing database and the TLRI database.

2.2 CATALOGUE OF FAMILY VIOLENCE OFFENCES

As stated above, 'family violence offence' means any offence the commission of which constitutes family violence (s 4). From the definition of 'family violence' (s 7) this might include the following offences:

- assault — *Police Offences Act* s 35 and *Criminal Code* s 184;
- sexual assault (which might consist of one of a number of sexual offences including indecent assault and rape);
- threats, coercion, intimidation or verbal abuse (where such conduct constitutes assault as defined in the *Criminal Code* s 182);
- abduction — *Criminal Code* s 186;
- stalking — *Criminal Code* s 192 ; or
- attempting or threatening to commit such offences:
- economic abuse — *Family Violence Act* s 8;
- emotional abuse or intimidation — *Family Violence Act* s 9;
- contravening an FVO imposed by another State or Territory (an external FVO), an FVO, a PFVO, or an interim FVO — *Family Violence Act* s 35. It will also be an offence to instigate or assist a breach of an FVO — *Justices Act* s 73;
- assault on a pregnant woman — *Criminal Code* s 184A.

It is clear that the catalogue of offences is not closed and any offending which occurs in circumstances of family

violence may be classed as a family violence offence. For example, a wounding or murder where the victim is the spouse or partner of the accused would constitute a family violence offence, as would an offence such as arson if the conduct otherwise satisfied the definition of family violence in s 7 of the *FVA*.

2.3 NOTES ON OFFENCES

2.3.1 Victim instigated breach

Victims of family violence, in respect of whom an FVO has been made, may be charged in Tasmania as accessories where they instigate or encourage a contravention of the FVO. Contravention of an FVO or a PVO is a summary offence and thus accessorial liability is imposed by virtue of the provision governing accessorial liability generally in s 73 of the *Justices Act 1959*. Section 73 provides that an accessory may be charged with actually committing the offence (s 73(1)(b)–(d). As a result the offence is treated as a family violence offence for the purposes of this review.

2.3.2 Assault on a pregnant woman

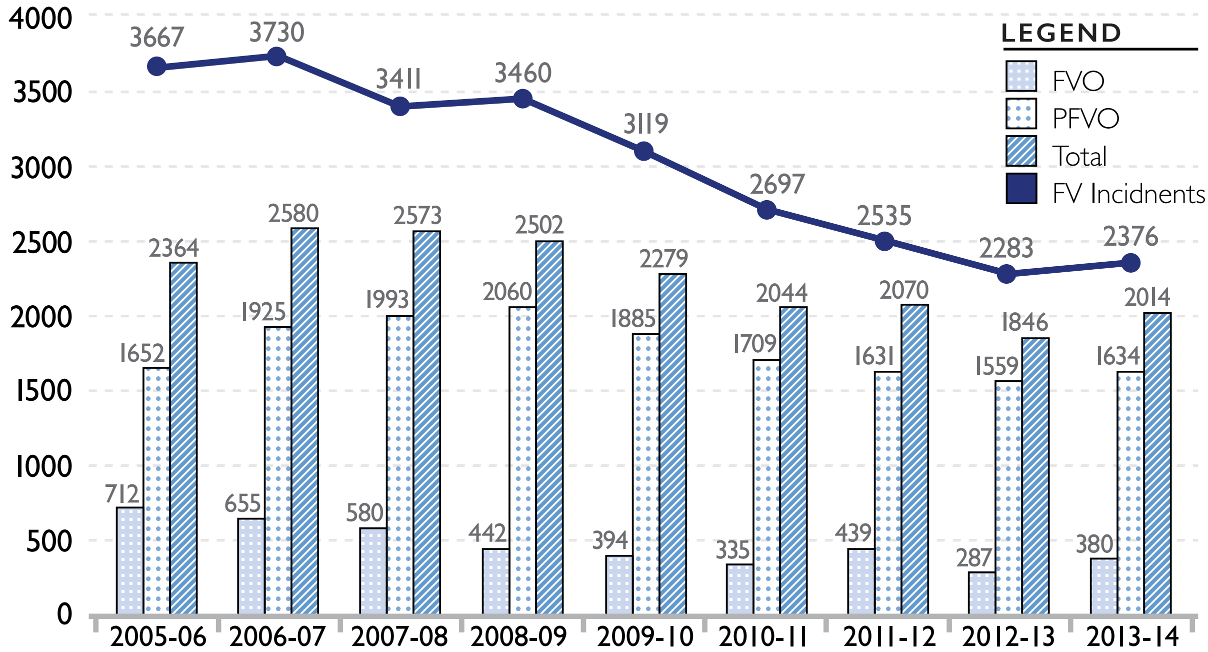
The offence of assault on a pregnant woman was created by s 44 of the *FVA*. Although the offence may be committed by someone other than the victim's spouse or partner, it has been included in this review in light of its status as part of the suite of reforms instituted by the *Family Violence Act*.

2.4 CRIMINAL JUSTICE DATA ON NUMBERS OF FAMILY VIOLENCE INCIDENTS AND FAMILY VIOLENCE PROTECTION ORDERS

2.4.1 The number of Family Violence Protection Orders

Although the Council was not asked to examine data on family violence protection orders the figures are provided to give context to the sentencing data which follows, particularly in relation to the data on breach of FVOs. The data were obtained from the FVMS. Figure 1 shows the number of family violence incidents recorded by DPEM relative to the number of PFVOs issued, the number of FVOs issued and the total number of orders issued for the period 2005-06 to 2013–14.

Figure 1: The number of family violence incidents, PFVOs and Court issued FVOs: 2005–06 to 2013–14.



Source: DPEM.

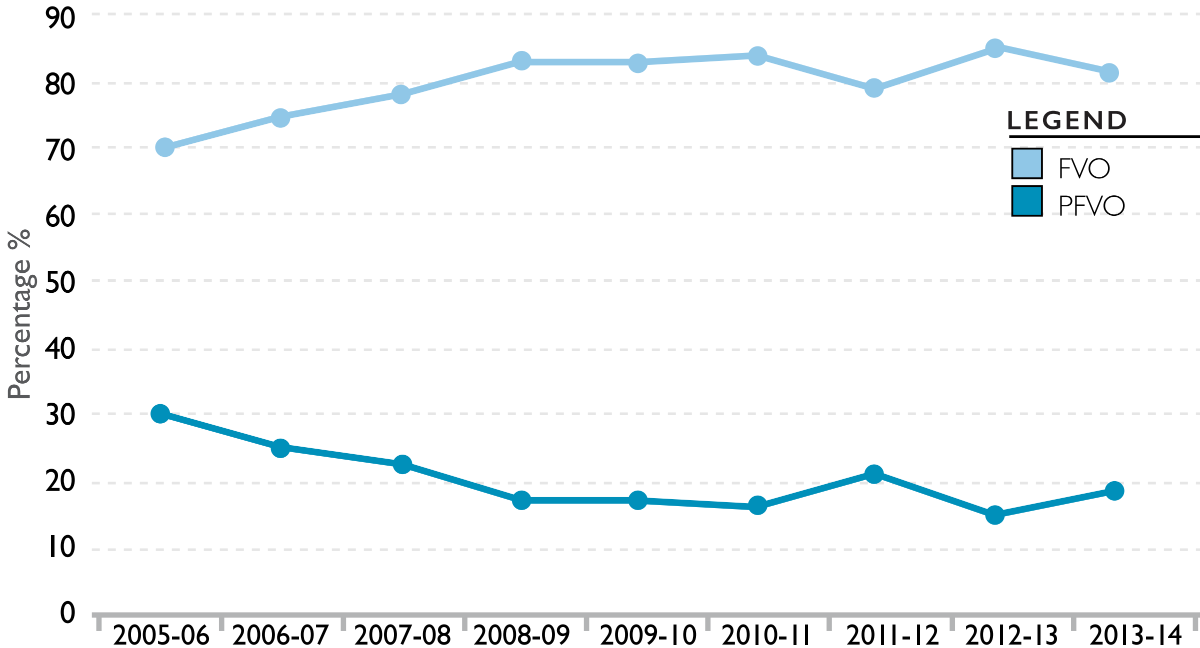
Once police respond to a family violence incident they assess whether the incident is a 'family argument' (in which no further action is taken) or a family violence matter requiring an appropriate response to ensure the safety of the victim and any affected children.

Figure 1 indicates that there was an initial rise in the number of recorded family violence incidents in the year after the *FVA* commenced with a steady downward trend since then — from a high of 3729 in 2006-07 to a low of 2283 in 2012-13.

Figure 1 also shows that apart from an initial rise in the number of orders issued after the commencement of the legislation in 2005, total numbers steadily declined — from a high of 2580 in 2006-07 to a low of 1846 in 2012-13. Numbers of FVOs imposed experienced a sustained decrease from 712 in 2005-06 to 287 in 2012-13 — a 60% reduction over the period. Numbers of PFVOs issued also decreased but by proportionately less, from a high of 2060 in 2008-09 down to 1559 in 2012-13 — a reduction of about 25%. Whilst the latest figures indicate that numbers of both incidents and orders issued have increased a generally downward trend is still observable.

Figure 2 shows the relative proportions of FVOs and PFVOs that make up the total numbers of protection orders issued. It is clear that PFVOs constitute the majority of orders. It is also clear that PFVOs make up an increasing proportion of all protection orders. Without more information it is not possible to state why this might be the case. It may suggest that a significant and growing proportion of cases are sufficiently serious to warrant the issuing of a protection order at the time police attend the family violence incident. Or it may be a reflection of police practice whereby the guidelines for issuing PFVOs have been relaxed.

Figure 2: Relative proportions of FVOs and PFVOs



2.4.2 Family Violence Incidents and Protection Orders - Rates per head of population

In order to gain an understanding of the scale of the problem of family violence in Tasmania, the data on FV incidents and protection orders is also presented in terms of per capita rates. Table 1 sets out annual per capita rates of FV incidents and protection orders in Tasmania and also provides per capita rates in Victoria as a point of comparison. In Victoria, protection orders may be commenced through the use of application and summons, application and warrant to arrest or by police issuing a family violence safety notice ('*FVSN*') which is taken to be an application for a family violence intervention order ('*FVIO*'). The table provides numbers for the years 2005–06 to 2013–14.

Table 1: FV incident rates and protection order rates (per 100,000 population)

Year	FV Incidents TAS*	FV Incidents VIC†	Protection orders TAS*	Protection orders VIC†
2005-06	750.1	555.7	483.5	214.0
2006-07	756.1	569.6	523.0	216.6
2007-08	684.7	597.6	516.5	223.2
2008-09	688.4	624.4	497.8	238.6
2009-10	614.5	646.6	449.0	257.3
2010-11	528.2	726.1	400.3	282.5
2011-12	495.1	895.9	404.3	325.6
2012-13	445.0	1052.8‡	359.8	590.4‡
2013-14	461.5	1115.3‡	391.2	601.5‡

Sources:

**Department of Justice; ABS, Australian Demographic Statistics, cat. no. 3101.0 (June 2006 – June 2014).*

† Sentencing Advisory Council (Vic), Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention, Monitoring Report (2013) 11, 12; ABS, Australian Demographic Statistics, cat. no. 3101.0 (June 2006 – June 2014).

‡ Crime Statistics Agency (Vic) (18 June 2015) <http://www.crimestatistics.vic.gov.au/home/>; Magistrates' Court of Victoria, Annual Report 2013–14 (September 2014).

Together, Figure 1 and Table 1 show that, not only have the numbers of protection orders issued in Tasmania declined in absolute terms, they have also declined on a per capita basis. Table 1 shows that up until 2012-13 protection order rates in Tasmania were significantly and consistently higher than in Victoria. This may have been due to a less vigorous response to reports of family violence in Victoria or a greater reported incidence of family violence in Tasmania. Several features of the Victorian family violence framework may suggest it was more likely to be the latter: Victoria has been developing an integrated family violence system since 2005; a number of specialist divisions exist within the Magistrates' Court; and a victim safety focus in relation to the handling and prosecution of family violence matters was expressly adopted with the introduction of the *Family Violence Protection Act 2008* (Vic) ('*FVPA*'). The purpose of the *FVPA* is to:

(a) maximise safety for children and adults who have experienced family violence; and

(b) prevent and reduce family violence to the greatest extent possible; and (c) promote the accountability of perpetrators of family violence for their actions.[29]

The commencement of the *FVPA* also saw the introduction of FVSNs which are issued by police without application to the court.[30] Victoria Police publish guidelines for officers for investigating incidents of family violence and these make reference to and promote the purposes of the legislation.[31] Tasmania Police have also developed an internal family violence manual which sets out guidelines for officers.

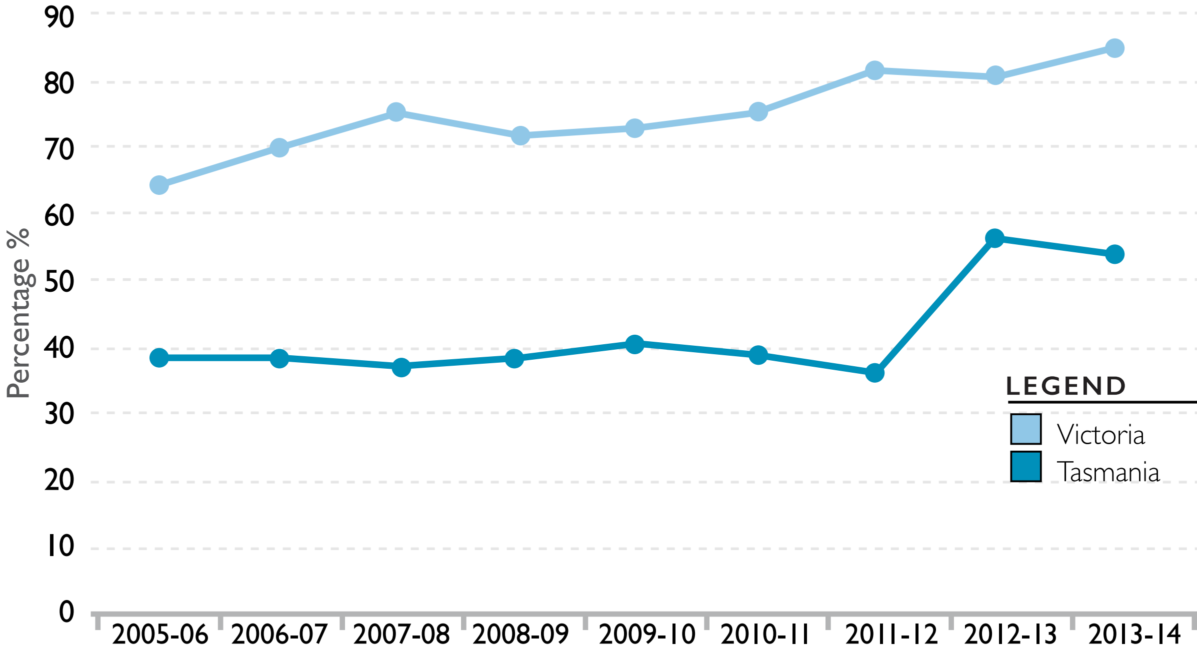
29 *Family Violence Protection Act 2008* (Vic) s 1.

30 Ibid ss 24, 26.

31 Victoria Police, *Code of Practice for Investigation of Family Violence* (2014).

Table 1 shows that, whilst in the early years of the sample the per capita rate of reported FV incidents in Tasmania exceeded that of Victoria, since 2009-10 the Victorian rate has outstripped the rate in Tasmania and have increased significantly in the last two years. A comparison of the data on the relative proportion of family violence incidents which proceed to the imposition of a protection order in these two jurisdictions (see Figure 3) reveals that, despite significant increases in the number of both family violence incidents and orders imposed in Victoria, in Tasmania a greater proportion of family violence incidents ultimately result in the imposition of a protection order. This may be further evidence of a relatively more proactive police response by Tasmania police or it may be due to the fact that in Victoria all intervention orders are court imposed. Although police are able to issue an FVSN at the time of an incident this is a temporary measure made for the purpose of bringing the offender before the court to have the application for an FVIO determined. FVSNs last until the first mention date for the FVIO application which must be within 120 hours of service.[32]

Figure 3: Protection orders issued as a percentage of FV incidents



2.5 CRIMINAL JUSTICE DATA ON NUMBERS OF FAMILY VIOLENCE OFFENCES

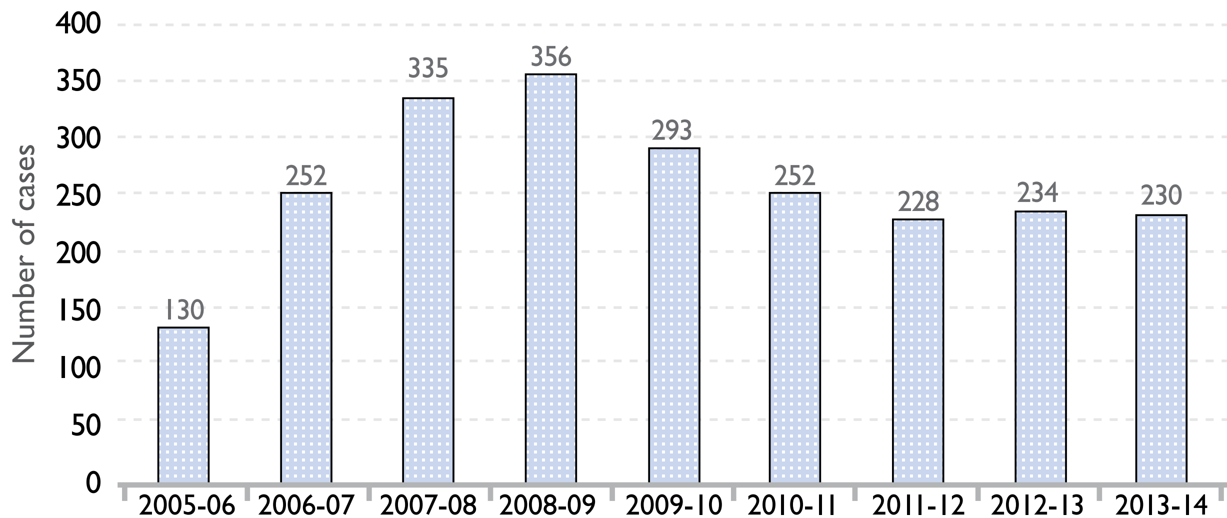
This section provides information on the number and type of family violence offences coming before the courts since the commencement of the *FVA* and, for those offences for which sufficient data is available, changes in annual rates. The *FVA* commenced on 30 March 2005. The figures provided start with the first full year of operation of the *FVA*, ie 2005-06. Data on offences which are committed most frequently is presented in figures 4 and 5. Data on other offences is presented in Table 2. Some more minor offences of which there are fewer than 10 instances over the recording period have not been included.

32 *Family Violence Protection Act 2008* (Vic) ss 30, 31(3).

2.5.1 Breach of FVO, Interim FVO and PFVO

Contravention of an FVO is an offence under s 35 of the *FVA*. This was the most common family violence offence during the period under consideration. Figure 4 provides data on the number of convictions for this offence for the period 2005-06 to 2013-14. It also shows changes over time.

Figure 4: Breach of FVO

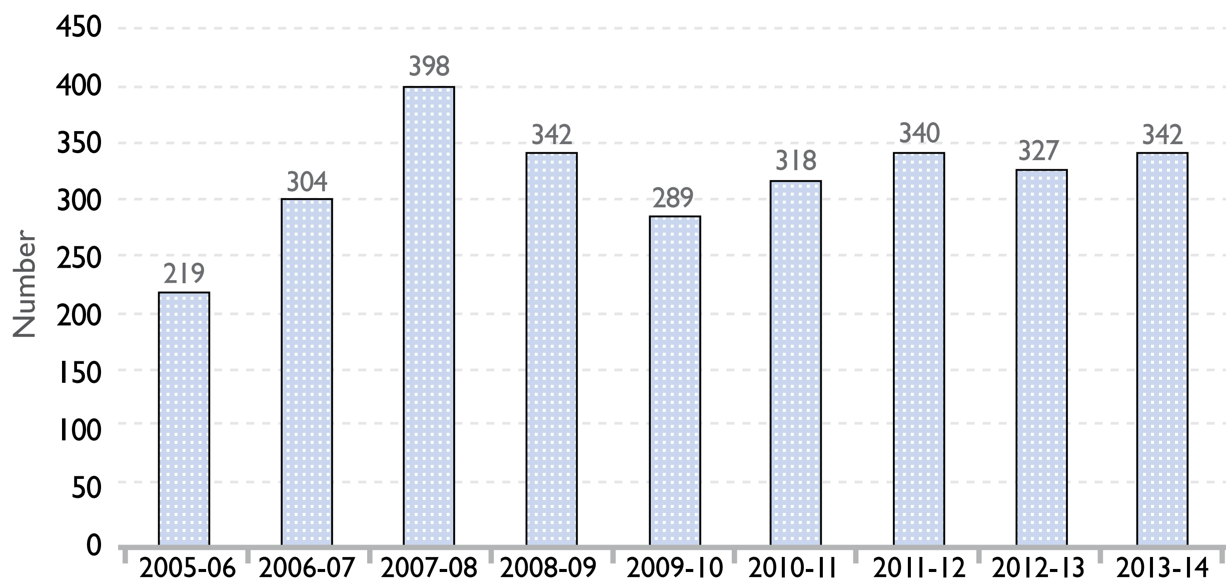


Source: Department of Justice

2.5.2 Common assault – s 35 *Police Offences Act – 2005-06 to 2013-14*

Figure 5 provides data on the number of convictions for family violence instances of common assault for the period 2005-06 to 2013-14. It also shows changes over time.

Figure 5: Convictions for common assault (family violence instance)



Source: Department of Justice

2.5.3 Other offences

Table 2 sets out data on the numbers of other family violence offences.

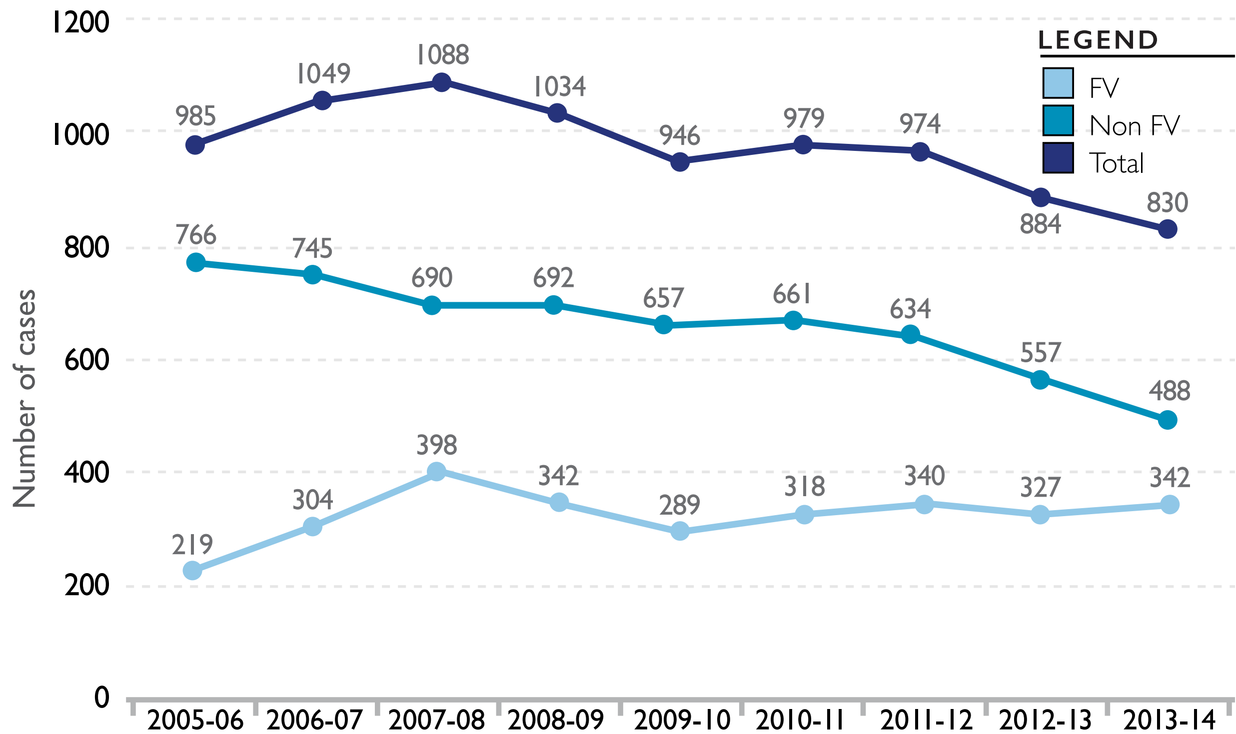
Offence	05-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14	Total
Aggravated burglary (*Code* s 245)		1	3	3	3	2	4	5	4	25
Assault (*Code* s 182)	4	4	5	6	5	4	3	2	2	35
Assault police officer (s 34B(1)(a) POA)	9	9	16	13	11	14	16	14	20	120
Attempted murder (*Code* s 158)			1							1
Burglary (*Code* s 244)	3	3	2	4	5	7	5	2	4	35
Destroy or injure property (s 37(1) POA)	31	35	42	38	36	29	32	31	40	314
Emotional abuse/ intimidation (FVA s 9)				1			4	1	1	7
Indecent assault (*Code* s 127)		3	1		1					5
Indecent assault (s 35(3) POA)	1	1	1			2		1		6
Motor vehicle stealing (s 37B POA)		2		2	4			2	1	11
Murder (*Code* s 158)				1		1				2
Prohibited and regulated weapons offences (Firearms Act)	2	4	9	10	4	10	6	8	12	65
Rape (*Code* s 185)		1	1	1	2					5
Stalking (*Code* s 192)	1	1		3	2	2	2			11
Stealing (*Code* s 234)	3	5	9	9	10	10	9	10	5	70
Threaten police officer (34B(1)(b) POA)	2	4	5	8	6	6	10	8	7	56
Unlawfully possess dangerous article in public place (s 15C(1) POA)	4	2	7	4	6	5	3	2	4	37
Wounding (*Code* s 172)	2	1		3	3	1	1	2	1	14

Source: Department of Justice

2.5.4 Fluctuations in annual rate – FV and non-FV instances of common assault

The Council has also examined FV instances and non-FV instances of specific offences to compare respectively fluctuations in annual rates of the offence. The purpose of such a comparison is to determine whether observed changes were unique to the FV instances of offending, and thus likely to be due to factors operating only in the context of family violence or the criminal justice response to family violence, or whether the observed changes were common to all instances of the offending. Only the offence of common assault (*Police Offences Act 1935* (Tas) s 35(1)) had sufficient numbers to establish a pattern in annual rates.

Figure 6: Convictions for common assault (family violence and non-family violence instance) – 2005-06 to 2013-14

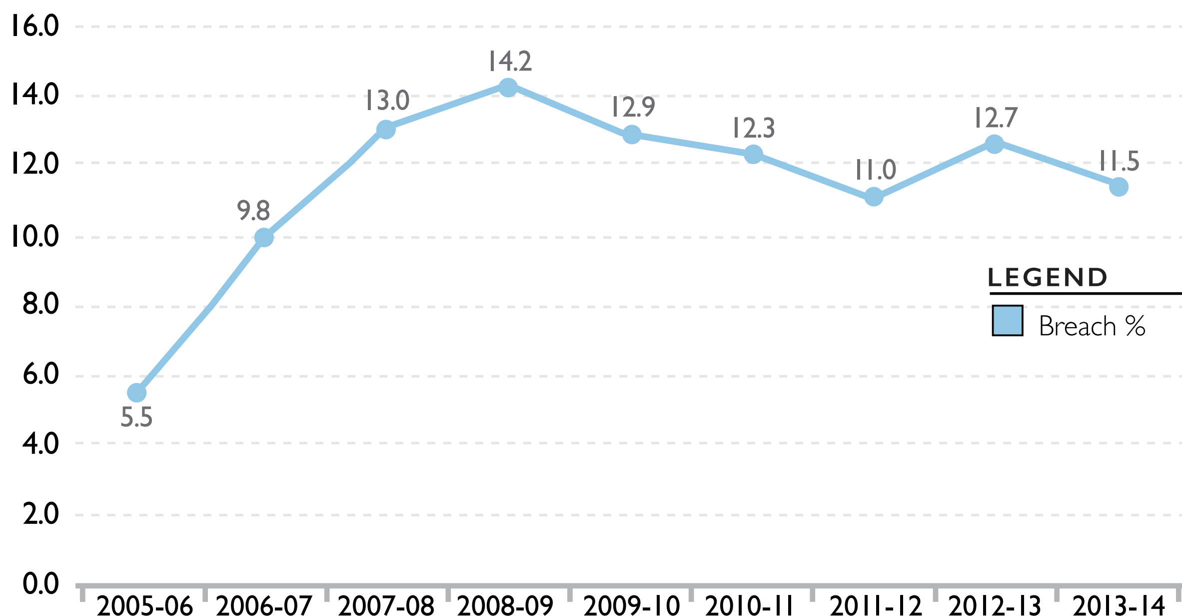


Source: Department of Justice

2.5.5 Breach rates

Figure 7 shows changes in the annual rate of breach of family violence protection orders. The breach rate is calculated as the number of convictions for contravention of an order expressed as a percentage of the total number of orders imposed for each time period.

Figure 7: Breach rates for contravention of PFVOs and FVOs – 2005-06 to 2013-14.



Source: Department of Justice: DPEM

2.6 DISCUSSION

Figure 6 shows a steep rise in the number of convictions for FV assault between 2005-06 and 2007-08. During the same period the number of non-FV assaults witnessed a decline. However, this does not necessarily indicate an increase in real terms in the number of FV assaults. Instead, it may be an indication that victims were more confident that complaints would be taken seriously and were thus more willing to report family violence to police. In addition, before the commencement of the *FVA*, total assault numbers included matters which in later periods would otherwise have been classified as FV assaults. An initial drop in non-FV assault numbers is not unexpected as a proportion of assaults were re-classified as FV assaults after the commencement of the *FVA*. What is perhaps more significant is that since 2009–10 convictions for FV assaults have steadily increased. During the same period the decline in non-FV assault has persisted even after the re-calibration effected by the *FVA*. Total assault numbers show the same downward trend but the decrease is less marked than the decrease in non-FV assaults in isolation — down 23.7% since 2007-08 for total assaults and 29.3% for non-FV assaults. Figure 6 thus suggests that the comparatively smaller decline in the total assault rate is due to persistence in the rate of FV assaults.

2.6.1 Decline in assault rates

The decline in the number of recorded incidents and protection orders issued (see Figure 1) matches the downward trend observed in the annual rate of assault (see Figure 6 above). However, it is not appropriate to conclude that these figures necessarily evidence a decrease in family violence itself.

Key partners in *Safe at Home*[33] suggest that a number of factors may account for this trend. One factor is the pro-arrest, pro-prosecution strategy of *Safe at Home*, a strategy which finds its theoretical justification in the original template for *Safe at Home*, the so-called 'Duluth' model.[34] The strategy is aimed at ensuring the immediate safety of the victim and making the perpetrator accountable for their behaviour. However, it may also have the unintended consequence of making victims more reluctant to involve police. Studies have shown that police may be called to resolve the immediate crisis, but beyond that some victims do not want their partner arrested and charged. For this reason, some claim that the virtual certainty of arrest that the Duluth model introduces may discourage some victims from making the initial call.[35] This is an issue that is outside the scope of this report. In any case it is not possible to substantiate such claims without more empirical evidence.

The figures also indicate that the numbers of non-FV assaults exhibit the same trend as the number of family violence related assaults. So other factors, unrelated to the reforms introduced by *Safe at Home*, may account for the apparent decline in assault rates.

On the other hand, the observed trend may track a change in attitudes towards domestic violence. Representatives of the DPEM noted that there was an expectation that the introduction of *Safe at Home* would lead to an increase in reported family violence incidents. This was due to a practice of police encouraging reports and a more comprehensive system for capturing data. They also predicted that after the initial rise, the number of reports would settle and then fall as *Safe at Home* pro-arrest and pro-prosecution strategies began to work to discourage partner violence.

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33 Police Prosecution, Legal Aid, DPaC, DPEM, Court Support and Victim Liaison Officers.

34 The 'Duluth' model of responding to family violence was established as the Domestic Abuse Intervention Project in 1981 in Duluth, Minnesota. It is a co-ordinated, multi-agency model promoting 'swift consequences for batterers, interveners that don't collude, meaningful sanctions for offenders, consequences for further acts of violence, victim empowerment, counselling that focuses on stopping violence and changing beliefs and community-wide expectations of accountability': M Paymar and G Barnes, *Countering Confusion about the Duluth Model*, Battered Women's Justice Project (2007) 10.

35 See, eg Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) *British Journal of Criminology* 14; Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 442–3. A recognition that a problem exists with victims unwilling to co-operate in pursuing criminal charges against offenders and an increase in 'tender no evidence' cases in the Magistrates' Court led to the creation of the Pro-Arrest, Pro-Prosecution Working Group in 2011. This group is responsible for making recommendations to the *Safe at Home* Steering Committee (see *Safe at Home Annual Report 2012–13*).

2.6.2 Increase in breach rates

At the same time that the number of protection orders being issued is declining, Figure 7 shows that the rate at which offenders are breaching violence orders is increasing. The annual rate climbed to 14.2% in 2008-09 from a low of 5.5% in the first full year of *Safe at Home*. Whilst the rate has declined somewhat since 2008-09 it remains significantly higher than in the early years of the integrated response.

There are a number of factors which may explain the increase in breach rates. The data available to the Council does not distinguish between convictions for breach of an FVO and breach of a PFVO. However it is clear that PFVOs make up the majority of protection orders imposed (see Figure 2 above). Hence it can be assumed that a significant proportion of convictions for breach relate to contraventions of a PFVO. PFVOs are issued by police without the involvement of the court. The court therefore plays no supervisory role. Where protection orders are issued without court supervision it may be that offenders do not adequately comprehend the terms of the order and do not fully appreciate the force that the order carries. The circumstances in which a PFVO is issued are likely to be highly charged and the offender may be affected by alcohol or other drugs and these factors combine to make the task of ensuring that he understands the order challenging for even experienced police officers.

It is suggested that the nature of the conduct giving rise to the breach should also be a factor in fashioning an appropriate response to the persistent rate of breaches of protection orders. Again, the data available to Council does not reveal whether the breach was constituted by a contravention of a condition of the order (eg, that the individual not contact the protected person) or whether it was constituted by the commission of another criminal offence. Not all breaches involve violent activity or threatening behaviour. A not insignificant number may involve a low level of criminality — perhaps where a father visits the family home to deal with problems that a child of the relationship is experiencing. Breaches of this nature may be minimised if the individual clearly comprehends the significance of the order and the specific restrictions it imposes on his behaviour and understands the correct procedure for seeking variation of the order.

Police were granted power to issues PFVOs as a means of securing the safety of the victim in cases where it was not possible to apply to the court for an order. Further research is needed on the comparative rate of breach for FVOs and PFVOs but initial observations suggest that the increased use of PFVOs may be problematic. Whilst any breach of an order is unacceptable, unquestionably some breaches are more objectively serious than others and some don't involve violence or intimidatory behaviour. There is a risk that less serious breaches are occurring for a number of reasons: PFVOs are not able to be tailored to suit the needs of the family unit as a whole in the way that a court supervised order is; there is a greater risk of misunderstanding about the conditions of the order and the weight it carries where the court is not involved; and there is a lack of understanding about the procedure for changing or revoking the order.

Where breaches of orders are commonplace this undermines their usefulness as a protection for victims of domestic violence. They may be breached without compunction if a perception exists that they carry little weight and are not enforced. It may be that a better solution is to adopt the approach of other jurisdictions such as Victoria where the short term safety of the victim is secured by issuing a safety notice (see [2.4.2] above) which also functions as a summons to appear to have an appropriately tailored final order determined by the court. Arguably this would reduce the number of 'unwitting' breaches, reduce the numbers of applications to vary or revoke orders that occupy the court and free up more time to deal with more serious breaches.

Observation 1

There is a need for research into the nature of breaches of protection orders.

Those subject to an order must be fully informed of the content of the order, the obligations it imposes and the consequences of breach.

Consideration could be given to adopting a FVSN system where a PFVO is considered an application for an FVO. This would result in greater court supervision of the process.

3. *Sentencing Practices*

3. TERM OF REFERENCE 2: SENTENCING PRACTICES

INTRODUCTION

3.1 SENTENCING FRAMEWORK

The sentencing of adult offenders in Tasmania is governed by the *Sentencing Act 1997* and to some extent by common law sentencing principles. The *Family Violence Act* also contains specific penalty provisions and provisions setting out factors which are relevant to the sentencing exercise in family violence offence cases. Tasmania is unique in Australia in setting a general maximum penalty of 21 years' imprisonment in the *Criminal Code* s 389 for all indictable offences.[36] Maximum penalties for summary offences are specified in the offence provisions themselves.

3.2 SENTENCING PRINCIPLES AND SENTENCING ORDERS

On a finding or plea of guilt the sentencing officer's task is informed by the aims and purposes of sentencing. In Tasmania, these aims (replicating recognised common law objectives) are set out in s 3 of the *Sentencing Act 1997* and include punishment, deterrence, prevention, denunciation and rehabilitation.[37] The decision on sentence is also shaped by a number of other general common law sentencing principles including the central principle of proportionality, which requires that the punishment imposed be commensurate with the blameworthiness of the offender.

When sentencing for a family violence offence an additional consideration is the fact that the legislation suggests that family violence offences need to be regarded seriously and that victim safety may be a more significant factor in the sentencing exercise. The objects clause of the *FVA* states that the 'safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations.'[38]

36 With the exception of murder and treason.

37 It should be noted that nowhere does the *Sentencing Act* mandate that these objectives must be borne in mind when sentencing.

38 *FVA 2004* (Tas) s 3.

A range of sentencing orders is available generally to the sentencing officer. These are set out in section 7 of the *Sentencing Act 1997* (Tas):

- Imprisonment — (s 7a)
- Drug Treatment Order (magistrates only) — (s 7ab)
- Suspended term of imprisonment (partially or wholly) — (s 7b)
- Community service order — (s 7c)
- Probation order (with or without conviction) — (s 7d)
- Fine (with a conviction) — (s 7e)
- Rehabilitation order (for family violence offences only) — (s 7ea)
- Adjournment with undertakings (with or without a conviction) — (s 7f)
- Discharge the offender (with a conviction) — (s7g)
- Dismiss the charge (without conviction) — (s 7h)
- Impose any other sentence or order (or combination of orders), that the court is authorised to impose by this Act or any other Act — (s 7i)

In addition to these sentencing orders, ancillary orders are provided for in Part 9. These include restitution and compensation orders. Assessment, continuing care, supervision and restriction orders are set out in Part 10. In sentencing for family violence offences, in appropriate cases the judicial officer must also take into account the specific penalty provisions of the *Family Violence Act* (ss 8, 9 and 35).

3.3 SENTENCE AGGRAVATION AND MITIGATION

As part of the sentencing exercise the sentencing judge or magistrate will consider the details of offending conduct and subjective characteristics of the offender which might be considered as either aggravating or mitigating the seriousness of the particular instance of the offence. Unlike sentencing legislation in most jurisdictions[39] Tasmania's *Sentencing Act* provides no general guidance on factors which may aggravate or mitigate the seriousness of an offence, so the question of whether particular factors may legitimately be taken into account in determining the appropriate sentence in all the circumstances is generally governed by the common law. Whilst much will depend on the actual circumstances of the case, there is some consensus that the existence of factors such as premeditation, the use of a weapon and the vulnerability of the victim will aggravate offence seriousness. Evidence of mental ill-health of the offender, remorse or impulsivity in the commission of the offence is generally considered to mitigate offence seriousness.

3.4 SENTENCE AGGRAVATION AND MITIGATION – DOMESTIC VIOLENCE CASES

3.4.1 Legislative prescriptions

The *Family Violence Act* places a number of factors which are relevant in the context of sentencing for family violence offences on a statutory footing. Section 13 of the *FVA* provides that, in determining the appropriate sentence for a family violence offence, the court *may* take into account as an aggravating factor the fact that the offender knew or was reckless as to the fact that a child was present at the time of the offence, or that the victim was pregnant at the time of the offence.[40] Whether these factors should be taken into account only at the court's discretion is perhaps debatable. There is compelling evidence that exposure to family violence can have extremely damaging effects on children. These include an increased risk of psychological, social and emotional problems as well as physical, sexual and emotional abuse.[41] Exposure to violence has also been linked to delayed cognitive development[42] and may have implications for a child's capacity to form secure intimate relationships in later life (see page 64, n 121 below).

39 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

40 See *Allen v Kerr* [2009] TASSC 10.

41 See, eg, C N Wathen, H I MacMillan, 'Children's Exposure to Intimate Partner Violence: Impacts and Interventions' (2013) 18(8) *Paediatric Child Health* 419, 419.

42 Gayla Margolin and Elana B Gordis, 'The Effects of Family and Community Violence on Children' (2000) 51 *Annual Review of Psychology* 445, 462.

The Victorian Sentencing Advisory Council has published guiding principles for sentencing for the offence of breach of protection orders which set out suggested sentencing dispositions based on the presence of particular factors. Where a breach occurs in the presence of children the offence is classified within the medium range for seriousness and where the breach directly involves children it is classified within the high range.[43]

The court *must* take into account evidence placed before it relating to any rehabilitation program assessment undertaken in respect of the offender. Section 13 of the *FVA* states:

> When determining the sentence for a family violence offence, a court or a judge —
>
> (a) may consider to be an aggravating factor the fact that the offender knew, or was reckless as to whether, a child was present or on the premises at the time of the offence, or knew that the affected person was pregnant; and
>
> (b) must take into account the results of any rehabilitation program assessment undertaken in respect of the offender and placed before the court or judge.

In addition, s 35 of the *FVA* sets out incremental increases in maximum penalties for second and subsequent contraventions of FVOs. This penalty framework establishes that recidivism is to be viewed as an aggravating factor.

3.4.2 General factors, victim impact and victims' wishes

Apart from the specific factors noted in s 13 of the *FVA* a number of other factors are commonly present in domestic violence cases and may be considered either to aggravate or mitigate the seriousness of the offence. Indeed, the very fact that the offending occurs in the context of a domestic relationship may be considered aggravating in itself. So, in *R v MFP* [2001] VSCA 96, the Victorian Court of Criminal Appeal noted that an intimate relationship places spouses in a 'privileged position', stating:

> They each know the everyday movements, the habits, the likes and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish (at [20]).

Statements of this nature suggest that the breach of trust involved is an aggravating factor in cases of domestic violence. Denunciation and general deterrence are also likely to be important factors in sentencing for family violence offences. Findings from the latest National Community Attitudes towards Violence against Women Survey (NCAS) reveal that whilst most Australians understand that partner violence is against the law (96%)[44] a sizeable percentage believe that partner violence can be excused in some circumstances.[45]

Criminal offences are prosecuted by the State and are not actions brought on behalf of a wronged individual. As Fox and Freiberg have noted:

> [C]ourts do not regard themselves as obliged to give priority to the wishes of the victim … their function is to serve the broader interests of the community. Sentencing is regarded as a pubic function, not a private dispute between the offender and the victim.[46]

However, it is clear that in an appropriate case the wishes of the victim in relation to sentence may legitimately be taken into account.[47] In the context of family violence offending, questions of the weight, if any, to be given to the wishes of the victim in imposing sentence assume additional complexity. On the one hand, any punishment meted out to the offender may also create significant financial and emotional difficulties for the victim. On the other hand, there are compelling reasons why the court should exercise 'extreme caution'[48] in dealing with evidence of the wishes of a forgiving victim. A vulnerable victim may be induced by threats to plead for a more lenient sentence, she may be susceptible to apologies and promises to reform due to a desire to maintain a relationship with the offender or she may be so damaged by the abuse that her judgment is impaired. In this vein, in *R v Wise* [2004] VSCA 88 at

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43 Sentencing Advisory Council (Vic), *Guiding Principles for Sentencing Contraventions of Family Violence Orders* (2009) 151. The Guiding Principles are set out in Appendix A below.

44 VicHealth, Australians' Attitudes to Violence against Women. Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS) (2014)10.

45 Ibid 12.

46 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 334–5, [4.190]. References omitted.

47 See, eg, *R v Skura* [2004] VSCA 53.

48 *Smith v The Queen* [2010] VSCA 192.

[36] Eames JA stated:

> It it is, of course, an unfortunate fact that victims of violent, drunken partners, to their own cost, often seek to forgive their partner and to resume a dangerous relationship. The courts must offer protection even when the potential victims deny its need.

Moreover, the aims of denunciation and general deterrence require that sentences imposed reflect the truly criminal nature of violence perpetrated in the context of a domestic relationship.

A suggestion that the victim's desire to maintain the family unit justifies a sentence discount is at odds with the focus of *Safe at Home* since it prioritises preservation of the family unit over victim safety, it does not sufficiently declare the seriousness of family violence and it offers a disincentive for the violent partner to reform.

3.4.3 Victim impact statements

If the attitude of the victim is to be taken into account it is likely to be done through the mechanism of a victim impact statement ('*VIS*'). Legislation in all Australian jurisdictions provides for the reception of VISs.[49] In Tasmania this is governed by s 81A of the *Sentencing Act*. The purpose of the VIS is to inform the sentencing court of the consequences of the offending for the victim. It may be that the legislation is drawn sufficiently broadly to permit a victim to speak about the negative consequences that incarceration of the offender is likely to have for her as well. Section 81A only applies to indictable offences. Section 81 which governs the court's reception of information more generally may, however, provide an avenue for the reception of VISs in relation to summary offences.

3.4.4 Victim instigated breach

A number of respondents to the joint Australian Law Reform Commission/New South Wales Law Reform Commission report, *Family Violence — A National Legal Response* ('*Joint Report*')[50] stated that offenders have been permitted to raise the consent of the protected person as a mitigating factor in sentencing for breach of a protection order. It is not clear from the analysis of the CRIMES database for this report whether magistrates in Tasmania view the contravention of an order as less serious where the protected person has consented to, or even instigated the breach, however the submission of the DPAC to the ALRC inquiry and the results of a roundtable consultation with the courts indicate that 'in practice, persons who breach protection orders raise consent of the victim to the breach as a mitigating factor in sentencing, and that courts treat such consent as mitigating.'[51]

In the Tasmanian Supreme Court in *Tasmania v James Mathew Johnson,*[52] in sentencing the offender to 15 days in custody and a fine of $500 for a family violence assault and contravention of an FVO, the court noted that, although an interim FVO was in force when the assault occurred, the victim and the complainant were living together. In imposing sentence the Chief Justice commented that the complainant aided and abetted the breach and thus he did 'not regard the offence of breaching the order as a serious one'.

The joint ALRC/ NSWLRC report notes that treating consent as a mitigating factor in such circumstances is problematic. The Commissions point out that it may be difficult to determine whether or not consent has been secured by intimidation. In any case, to allow the applicant's consent to mitigate sentence is to undermine the respondent's responsibility to abide by the order since the order is a matter between the court and the respondent.[53]

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49 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Sentencing Act 1995* (NT) s 106A, 106B; *Criminal Offence Victims Act 1995* (Qld) s 14; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Victims of Crime Act 2001* (SA) s 10; Sentencing Act 1991 (Vic) ss 95A–95F; *Sentencing Act 1995* (WA) ss 24–26; *Crimes (Sentencing) Act 2005* (ACT) ss 47–53.

50 ALRC/NSWLRC, *Family Violence — A National Legal Response*, ALRC Final Report No 114, NSWLRC Final Report No 128 (2010).

51 Ibid 527.

52 *Tasmania v James Mathew Johnson*, Crawford C J, 16 February 2010 (Sentence).

53 Joint Report, above n 44, 530.

3.5 DISCUSSION

The sentencing process is often more complex where the relationship between offender and victim is ongoing, particularly where the victim wishes to preserve the relationship. Although the imposition of a custodial sentence is likely to adversely affect the relationship in the long term, in many cases the Magistrate must decide that the victim is not in a position to decide what is in her best interests. However, in the absence of the structures that are in place for other specialist courts, such as the drug court, the Magistrate does not have access to information about the background and family situation of the victim and offender which should guide decisions about the most appropriate sentencing option.

> ### Observation 2
>
> The adverse effects of sentence on the victim should be taken into account. However, victims' wishes should not be given undue weight. If an appropriate sentence is to be imposed that prioritises the victim's safety but also promotes the aims of rehabilitation and family reintegration the sentencing Magistrate must be able to call on relevant background information from other agencies.

SENTENCING PRACTICES – SENTENCING OUTCOMES

This section examines the sentencing outcomes for family violence offences. It presents sentencing data on convictions for breach of FVOs, PFVOs and interim FVOs, assault contrary to the *Police Offences Act 1935* s 35 and assault of a pregnant woman contrary to the *Criminal Code* s 184A. These are the only offences for which there was sufficient data for analysis. Overwhelmingly, the majority of 'family violence' convictions are for breach of protection orders. The Council obtained data for sentencing outcomes for summary offences from CRIMES database and for indictable offences from the database of comments on passing sentence held at the Supreme Court.

3.6 SENTENCES FOR BREACH OF FVO, PFVO AND INTERIM FVO

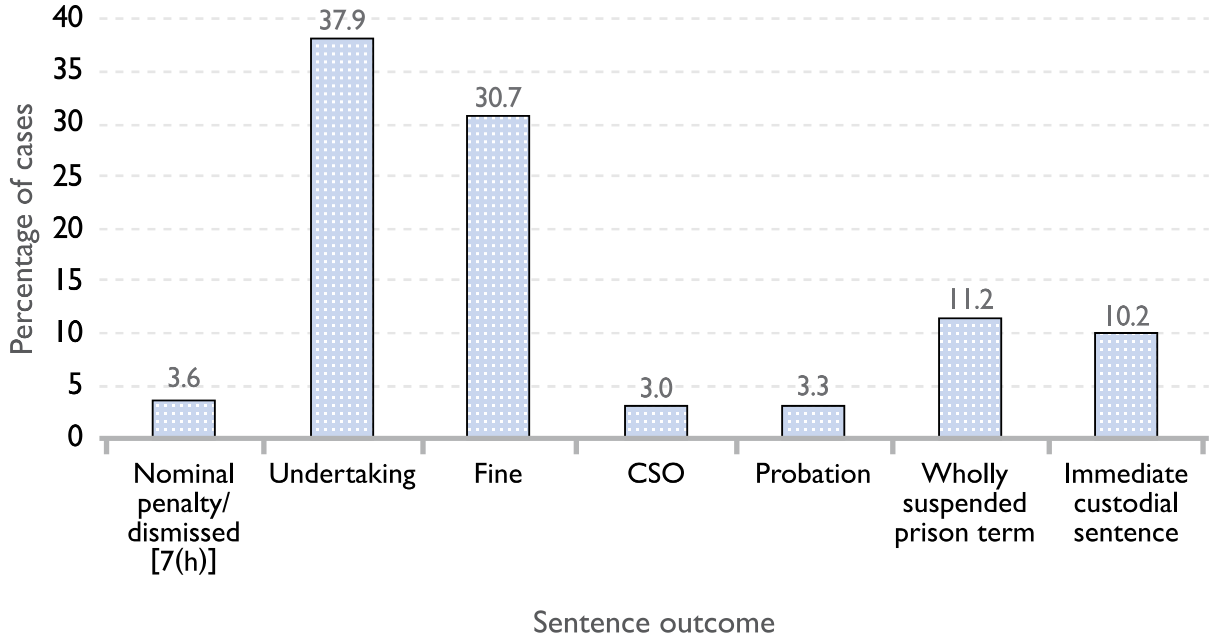
Contravention of a family violence order is an offence under s 35 of the *FVA*. The offence is prosecuted summarily. The legislation provides for incremental increases in penalty for second and subsequent offences.

> S 35. Contravention of FVO or PFVO
>
> (1) A person who contravenes an FVO, PFVO or interim FVO, as made, varied or extended, is guilty of an offence and is liable on summary conviction to —
>
> (a) in the case of a first offence, a fine not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months; or
>
> (b) in the case of a second offence, a fine not exceeding 30 penalty units or to imprisonment for a term not exceeding 18 months; or
>
> (c) in the case of a third offence, a fine not exceeding 40 penalty units or to imprisonment for a term not exceeding 2 years; or
>
> (d) in the case of a fourth or subsequent offence, to imprisonment for a term not exceeding 5 years.

Currently, repeat contraventions of protection orders are not routinely flagged in the CRIMES database. The Council was thus unable to determine whether a practice exists of applying a recidivist premium to second and subsequent convictions for this offence.

Figure 8 shows the sentencing dispositions for defendants finalised for the principal offence of contravention of a protection order since the *FVA* commenced.

Figure 8: Sentencing dispositions for defendants finalised for the principal proven offence of contravention of protection order: 2004-05 to 2013-14.



Source: Department of Justice

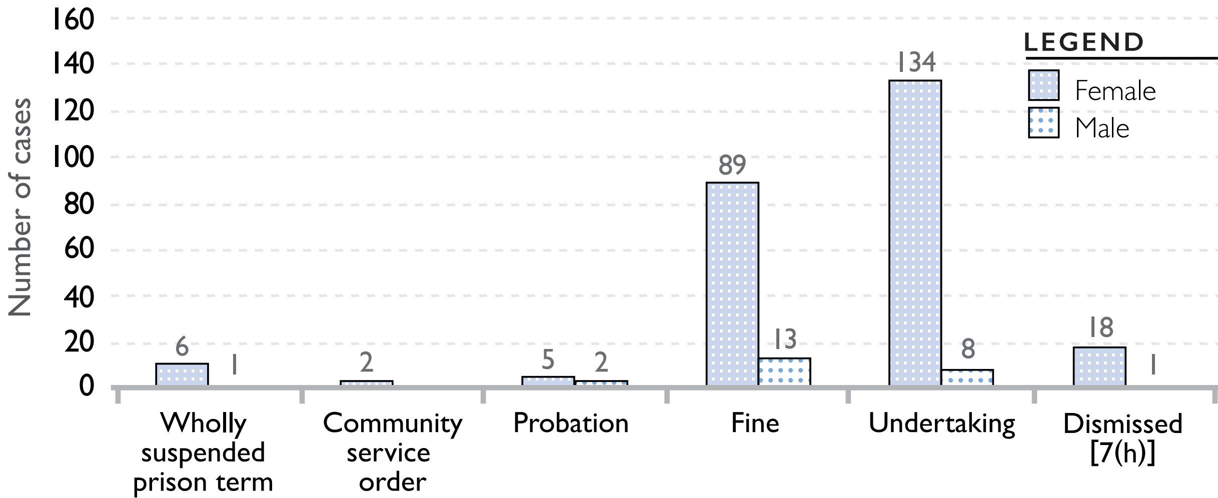
Figure 8 shows that the majority of people sentenced for the principal offence of breach of a protection order (37.9 %) were released on an undertaking (*Sentencing Act* s 7(f)). The next most common sentencing outcome was the imposition of a fine (30.7%). 10.2% received an immediate custodial sentence. No offenders were the subject of a rehabilitative intervention order.[54]

3.6.1 Accessorial liability

Those who are the subject of a protection order may also be charged with contravention of the order where they have instigated or aided and abetted the breach. Since the inception of the FVA there have been 279 convictions for aiding, abetting or instigating a family violence offence (e.g. breach of an FVO). Of the 279 people convicted 254 were women.

54 One offender was the subject of a drug treatment order.

Figure 9: Sentencing dispositions for defendants finalised for the principal proven offence of aiding etc contravention of protection order by sex of defendant: 2004-05 to 2013-14.



Source: Department of Justice

As noted above (see [3.4.4]) it is questionable whether it is appropriate to bring charges against the victim in such cases. Where a victim, in breach of the conditions of an FVO, invites the offender into her home, the risk of being charged herself is likely to act as a disincentive to report an act of violence which subsequently occurs. A better approach, and one which is more likely to advance the *Safe at Home* aim of ensuring the protection of victims, is to explain to the victim the procedure for applying to vary or revoke orders.

Observation 3

The practice of charging a victim as an accessory may discourage the victim from reporting an incident to police. A clearer understanding of the process for applying to vary or revoke orders is likely to reduce instances of victim precipitated breaches of protection orders.

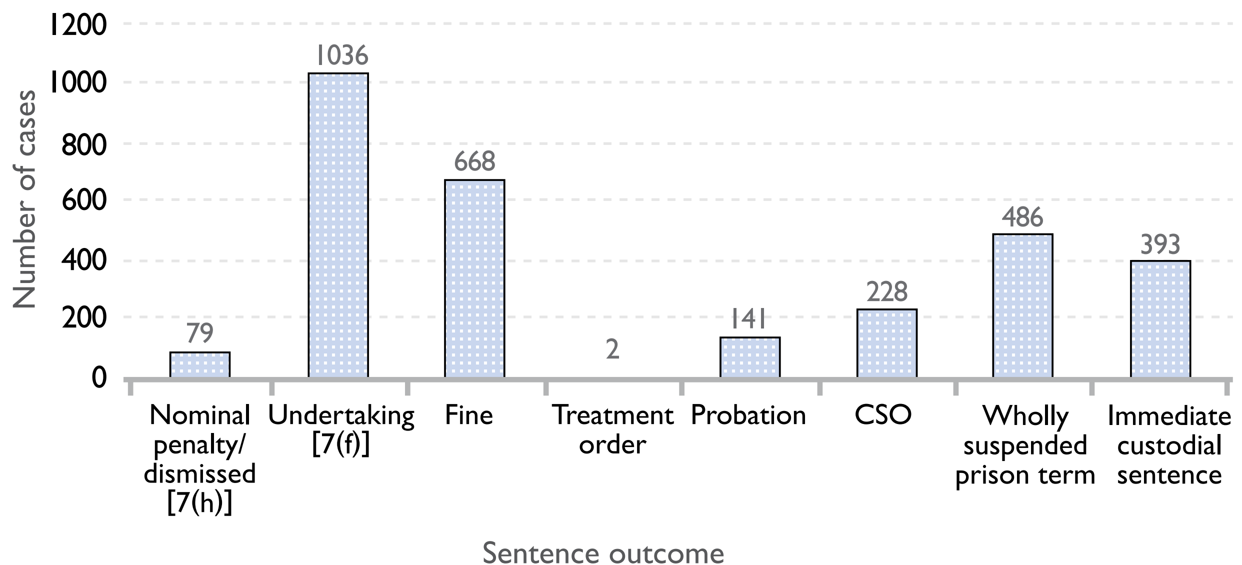
3.7 SENTENCES FOR OTHER OFFENCES

The following section presents data for the most common family violence offences other than breach of protection orders.

3.7.1 Common assault – s 35 *Police Offences Act 1935*

Assault is a summary offence in s 35 of the *Police Offences Act* and an indictable offence in s 184 of the *Criminal Code*. Figure 10 shows the sentencing dispositions for defendants finalised for the summary offence of common assault since the *FVA* commenced.

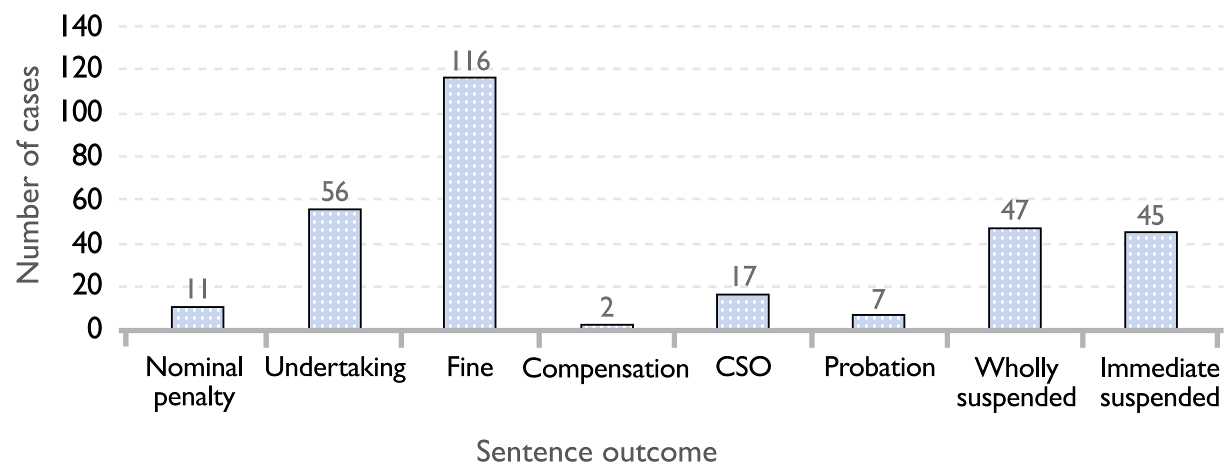
Figure 10: Sentencing dispositions for defendants finalised for the principal proven offence of common assault (family violence instance): 2004-05 to 2013-14



Source: Department of Justice

3.7.2 Property damage - s 37(1) *Police Offences Act 1935*

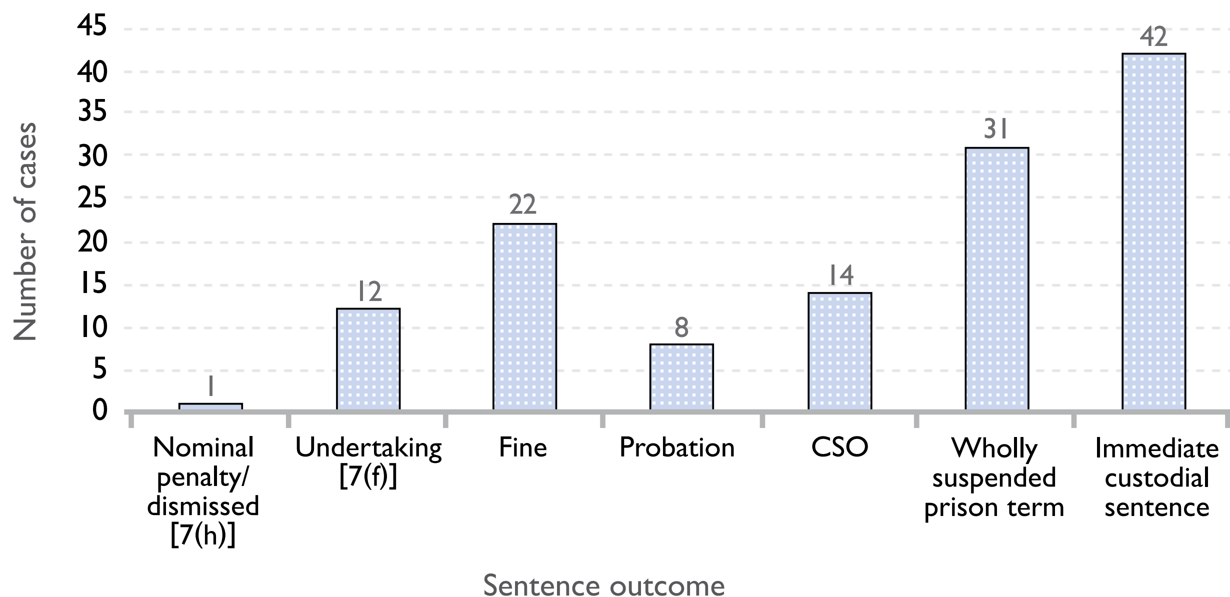
Figure 11: Sentencing dispositions for defendants finalised for the principal proven offence of destroy or injure property (family violence instance): 2004-05 to 2013-14



Source: Department of Justice

3.7.3 Assault a police officer – s 34B(1)(a) *Police Offences Act 1935*

Figure 12: Sentencing dispositions for defendants finalised for the principal proven offence of assault a police officer (family violence instance) for the period 2004-05 to 2013-14



Source: Department of Justice

3.7.4 Economic abuse and emotional abuse and intimidation – ss 8 and 9 *Family Violence Act 2004*

Since the commencement of the FVA there have been 8 convictions for emotional abuse (s 9 FVA). All were combined with other charges and formed part of a global sentence. It is not possible to disaggregate the sentences. To date there have been no charges for economic abuse (s 8 FVA).

3.7.5 Sentences for assault on pregnant woman - *Criminal Code s184A*

Section 184A of the *Criminal Code* provides:

> Any person who unlawfully assaults a woman, knowing that woman to be pregnant is guilty of a crime.

This offence may be committed in the absence of the existence of a family relationship between the offender and the victim which characterises other family violence offences. It has been included in this Report as it formed part of the package of reforms introduced by *Safe at Home* (see [2.3.2] above).

This offence is prosecuted on indictment. For the period March 2005 (the commencement of the FVA) to June 2014 there were 26 convictions in the Supreme Court for the principal offence of assault on a pregnant woman. An immediate custodial sentence was imposed in 50 per cent (n = 13) of these. An immediate custodial sentence does not include instances where a sentence of imprisonment is wholly suspended. In 9 cases a wholly suspended sentence was imposed, and there were single instances of a community service order, a fine, an adjournment with conviction and an adjournment without conviction.

Table 3 combines sentencing data for single and global sentences imposed for the offence of assault on a pregnant woman for the period March 2005 to December 2014.

Table 3: Custodial sentence length for convictions for assault on a pregnant woman (Criminal Code s184A): 2004-05 to 2013-14

Years	No of cases	Median (months)	Max	Min	Mean	Custodial %
2005–14	26	8	36	1.75	11	50.0

3.8 DISCUSSION

3.8.1 The use of s 7(f)

Attaching conditions to the undertaking

Figures 8 and 9 show that the majority of offenders were dealt with by means of a good behaviour bond under s 7(f) of the *Sentencing Act 1997.* Section 7(f) provides that the court may:

> with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender.

Section 59 sets out the conditions of the undertaking given by an offender released under s 7(f). These include appearing before the court when requested to do so and being of good behaviour. Section 60 sets out the procedure for bringing an offender before the court. Whilst these sections establish a legal framework by which the court can undertake a supervisory role over offenders there is no corresponding administrative mechanism in place to enable this to happen. One of the means of calling upon an offender to appear is by way of notice issued by the 'proper officer' of the court (s 60(1)(b)). 'Proper officer' is defined in s 4 as 'the officer or officers of that court prescribed by the rules of that court for the purpose of the provision in which the term is used'. To date no proper officers have been appointed and no-one is allocated to supervise the conditions of the order.

Section 58 of the *Sentencing Act* provides guidance as to the purposes for which an order under s 7(f) may be made although it grants the court a wide discretion to make an order 'as the court thinks fit'. One of the purposes is to provide for the rehabilitation of the offender (s 58(a)). That rehabilitation was intended as an important purpose of a conditional release is underlined by the express inclusion of a rehabilitation treatment program order, which may be imposed only for a family violence offence, in the list of sentencing orders provided in the *Sentencing Act* (s 7(ea)). Legislative provision for offender treatment reflects one of the express objectives of *Safe at Home*, ie, to change the offending behaviour of those responsible for family violence.[55] Although the majority of offenders are released on a good behaviour bond it is clear that release is not made conditional on attending a rehabilitation program. The figures above show that between 2004 and 2014 no treatment orders were imposed.

Referral to a treatment program under s 7(ea) was intended as a separate sentencing option but it is not currently used as such because there are no treatment programs available and there is no administrative framework within the Department of Community Corrections to support such referrals. Currently the only behaviour change program offered to offenders is the Family Violence Offender Intervention Program ('*FVOIP*') and eligibility for that program is restricted to those at high risk of re-offending (see Part 3 below). The court has no capacity to monitor offenders subject to conditional release so they are returned to the community without supervision and with no support or incentive to address their offending behaviour. The advantage of court monitoring is that the offender can be held to account, compelled to confront his offending behaviour and called upon to appear before the court to demonstrate observance of the conditions of the undertaking.

Observation 4

The widespread use of release on an undertaking under s 7(f) of the *Sentencing Act 1997* for contravention of a protection order is problematic where there are no conditions attached to the undertaking and where the court lacks the capacity to monitor released offenders. Without further research into the type of cases which attract conditional release orders it is not possible to determine whether they are being utilised appropriately but in any case the capacity to monitor released offenders should be developed.

55 See *Success Works*, above n 21, 3.

History of protection orders

Conditional release represents a more lenient sentencing outcome when compared to other alternatives in the suite of sentencing options. It might therefore be considered to be appropriate where an offender is in some sense deserving of more lenient treatment. If an offender has previously failed to abide by a conditional release order, depending on the particular circumstances, there may be little cause for optimism that he or she will abide by the conditions imposed in the instant case. The inclusion of a 'recidivist premium' in s 35 of the FVA also suggests that repeated contraventions should be viewed more seriously. It is important therefore, if such orders are to be made appropriately, that information about the offender's previous compliance with such orders is placed before the sentencing Magistrate. Where an offender has previously been subject to a protection order the sentencing Magistrate will normally have notification of that if the earlier order was breached but not otherwise.

The existence of previous protection orders does not constitute criminal history for the purposes of sentencing, so the application of sentencing principles would suggest that they should not be taken into account. However, if the offender has been subject to a protection order in the past it may be very relevant to the question of bail and to decisions about the appropriate sentencing disposition in the instant case of breach. Information about previous protection orders, although relevant, is likely to be highly prejudicial in an adversarial context, and therefore its admission is quite rightly resisted by the defendant. In a more therapeutic or solution-focused court environment however, there may be a greater preparedness to accept that this aspect of prior history should be acknowledged if sentencing outcomes are to secure justice for the victim and promote the longer term goal of rehabilitation of the offender.

Together, the presumption against bail and the sentencing options available suggest that the orientation of the legislation is punitive rather than therapeutic. In some cases this is entirely appropriate but in other cases a more therapeutic response may be more effective in reducing repeat offending.[56] The data set out in Figures 10 and 11 below indicate that a more punitive response does not correlate with a reduction in reoffending.

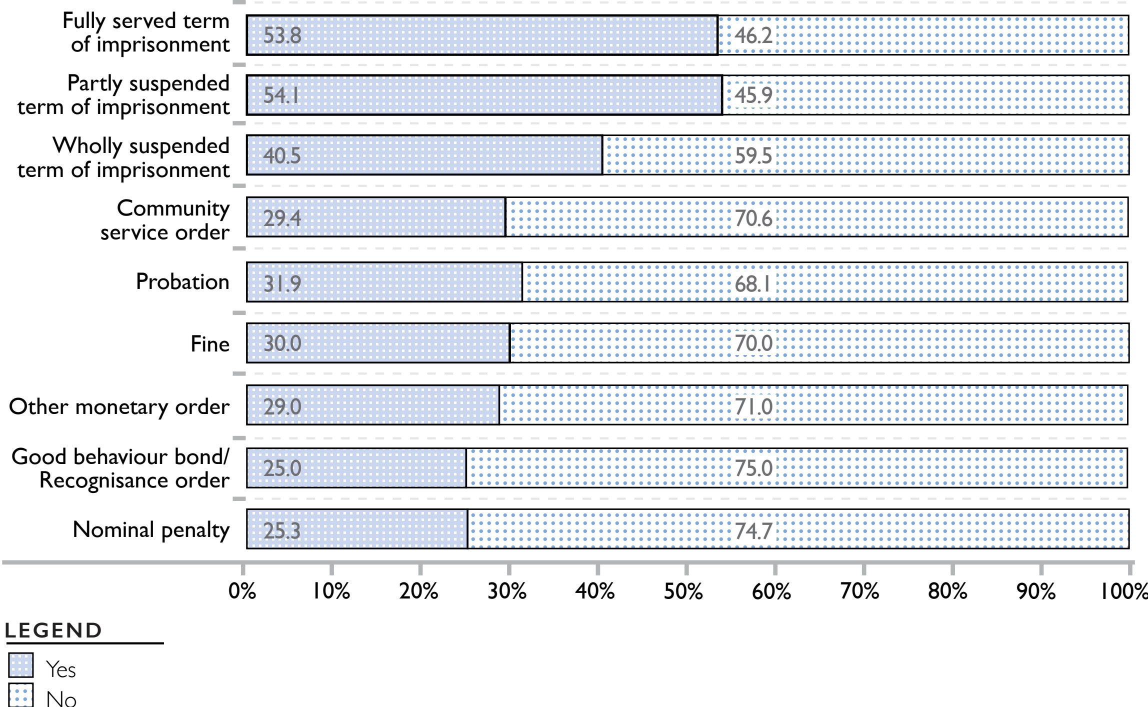
3.8.2 Section 7(f) and subsequent offending history

Some indication of the effectiveness of conditional release orders in the context of family violence offences may be gleaned from examination of the statistics on subsequent offending. Data on repeat offending for offenders discharged on conditional release for contravention of an FVO, interim FVO or PFVO were compared with data on repeat offending for offenders released on a good behaviour bond for other, non-family violence offences.

Figure 13 shows re-offending rates for offenders sentenced for contravention of a family violence order. In this instance a snapshot of all defendants with cases finalised not more than two years before October 2013 was considered. The table shows the proportion of offenders charged with contravention of a protection order who have been charged with a similar offence within two years of finalisation of the earlier offence.

56 There is some evidence that treatment programs are effective in reducing reoffending and that community-based programs are more effective than programs delivered in custodial settings: see Victorian Sentencing Advisory Council, *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014) 5 and the studies cited therein.

Figure 13: Defendants sentenced for breach of protection order — by sentence and by whether appearing before court on a similar charge within two years of their original sentence

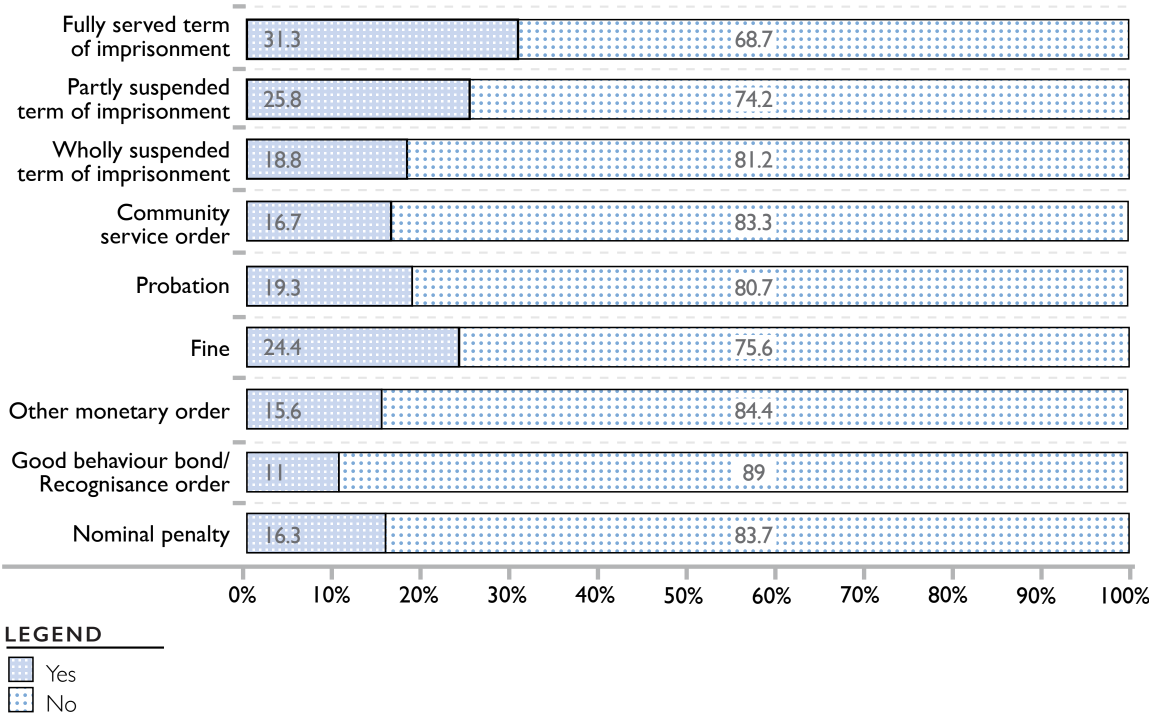


Source: Department of Justice

Figure 13 indicates that the re-offending rate was lowest for those discharged on a good behaviour bond. Of those offenders discharged under 7(f) 25 per cent were before the court on a similar charge within two years of finalisation of the original offence compared with 54 percent of those sentenced to a partially suspended term of imprisonment.

Figure 14 shows re-offending rates for offenders discharged on conditional release for all offences other than breach of FVO heard in the Magistrates' Court. All defendants with cases finalised not less than two years before October 2013 were considered. The data show the proportion of offenders charged with a similar offence within two years of finalisation of the original offence.

Figure 14: Defendants sentenced for offences other than breach of protection order — by sentence and by whether appearing before court on a similar charge within two years of their original sentence



Source: Department of Justice

Figure 14 indicates that the re-offending rate was lowest for those discharged on a good behaviour bond. Of those offenders discharged under 7(f) less than 11 per cent were before the court on a similar charge within two years of finalisation of the original offence compared with 31 per cent of those sentenced to a determined term of imprisonment.

Figures 13 and 14 indicate that re-offending rates are lowest for all offenders who are conditionally released pursuant to s 7(f) of the *Sentencing Act,* regardless of the original offence. This is perhaps not unexpected as it can be assumed that these cases are likely to constitute some of the least serious examples of the offending behaviour. They also reveal that offenders who are conditionally released after contravention of an FVO re-offend at more than twice the rate of other offenders with the same sentencing outcome. However, this pattern of re-offending is evident across the board — those sentenced for breach of an FVO exhibit considerably higher rates of re-offending regardless of the original sentence imposed.

It is clear that breach rates for protection orders are increasing (see 2.6.3) and it is also clear that rates of re-offending exceed the rates for other types of offences. The data does not provide a basis for claiming that harsher penalties would reduce recidivism rates since, within the population of offenders convicted of breach of a protection order, those receiving an immediate custodial sentence had the highest rates of re-offending and comparatively higher rates of re-offending are evident for this population as a whole regardless of the original sentence outcome. However, together with the data on increasing rates of breach, the statistics on re-offending reveal that current sentencing practices are not effective in securing the safety of those women who are the subject of protection orders.

Observation 5

The imposition of sanctions alone is not bringing about a change in offender behaviour. It may be that a greater investment in rehabilitative interventions and the adoption of a more therapeutic approach to sentencing should be considered.

3.8.3 The use of fines

The statistics from the CRIMES database indicate that 26.3 per cent of offenders who are sentenced for contravention of a family violence order are sentenced to a fine pursuant to s 7(e) of the *Sentencing Act 1997* (Tas).

The purpose of a fine is 'generally said to be to be to punish the offender and to act as a deterrent to future offending by the offender and others.'[57] However, in the context of family violence, a fine may also in effect punish the victim as well. The Victorian Sentencing Advisory Council has considered the use of fines for breaches of family orders and suggests that they are 'generally an inappropriate sanction.'[58] The Council noted that they do not address the offending behaviour and in any case it is often the victim who ends up with the burden of paying the fine. The offender may threaten or coerce the victim into paying the fine for him. Funds which would otherwise be used to satisfy the needs of the family — food, clothing, rent or child support — are directed instead to paying the fine. The Victorian Council recognised that 'sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition)' which are structured to ensure that the burden of the penalty falls on the offender are more appropriate for this offence.[59]

57 Sentencing Advisory Council (Vic), *Guiding Principles for Sentencing Contraventions of Family Violence Orders* (2009) 3.

58 Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009) 51.

59 Ibid ix.

4. Sentencing Standards

4. TERM OF REFERENCE 3: SENTENCING STANDARDS

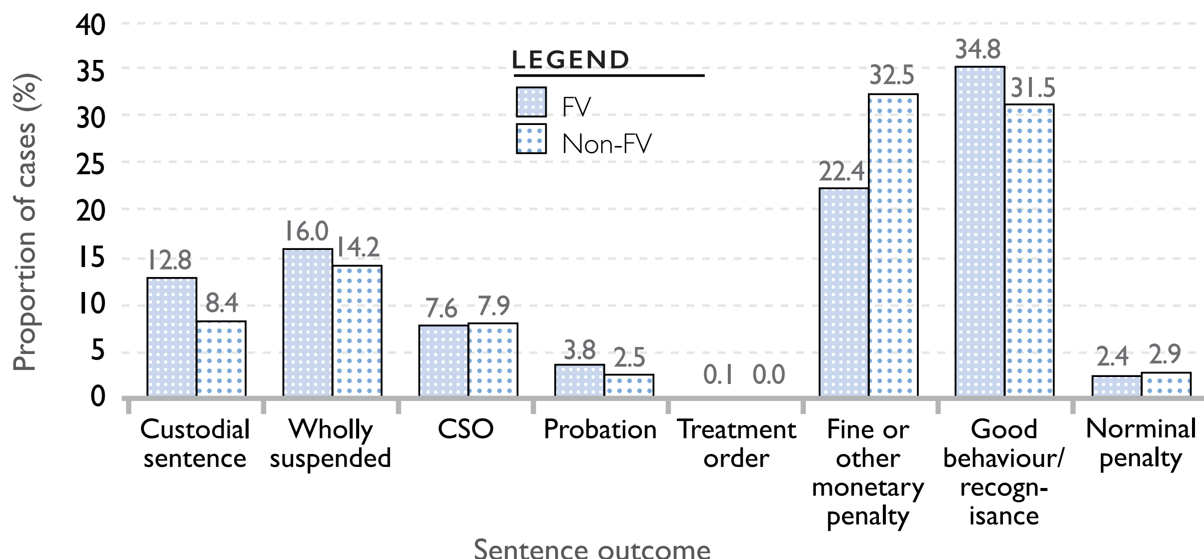
4.1 COMPARATIVE SENTENCING STANDARDS

This section of the Report examines sentencing standards by comparing sentences imposed where an offence is committed in the context of family violence with those imposed for the same offence committed in a non-family violence context. The most common of these (and the only one for which sufficient data exists to enable a meaningful comparison) is the offence of assault contrary to the *Police Offences Act 1935*.

4.1.1 Common Assault s 35 *Police Offences Act 1935*

Figure 15 shows sentencing dispositions for defendants found guilty of assault by whether the assault constituted a family offence or a non-family violence since the commencement of the *FVA*.

Figure 15: Sentencing outcomes for convictions for common assault (s 35 of the ***Police Offences Act 1935***) — family violence and non-family violence instances: 2004-05 to 2013-14.



Source: Department of Justice. Note: 'Custodial sentence' includes a partially suspended sentence of imprisonment. There were two treatment orders imposed for both FV and non-FV assault respectively.

Figure 15 indicates a degree of similarity in the relative proportions of the different sentencing options for convictions for the principal offence of assault as a family violence offence and as a non-family violence offence. However there are significant differences in relation to the proportion of immediate custodial sentences (12.8% for family violence convictions compared to 8.4% for non-family violence convictions), fines (22.4% for family violence convictions compared to 32.5% for non-family violence convictions) and probation orders (3.8% for family violence convictions compared to 2.5% for non-family violence convictions). These differences suggest that FV assault is treated more severely than non-FV assault. A custodial sentence is more likely, offenders are more likely to be subject to post-release supervision, and fines, which occupy a more lenient position in the sentencing hierarchy, are less likely to be imposed.

However, a comparison of custodial sentence shows no significant difference between FV assault and non-FV assault. Table 4 compares statistics on the length of custodial orders for family violence and non-family violence offenders convicted of the principal proven offence of assault pursuant to the *Police Offences Act 1935* s 35(1) and sentenced to an immediate term of imprisonment (as opposed to a wholly suspended sentence). Median and mean terms were equivalent but the maximum length of imprisonment was longer for non-FV assault.

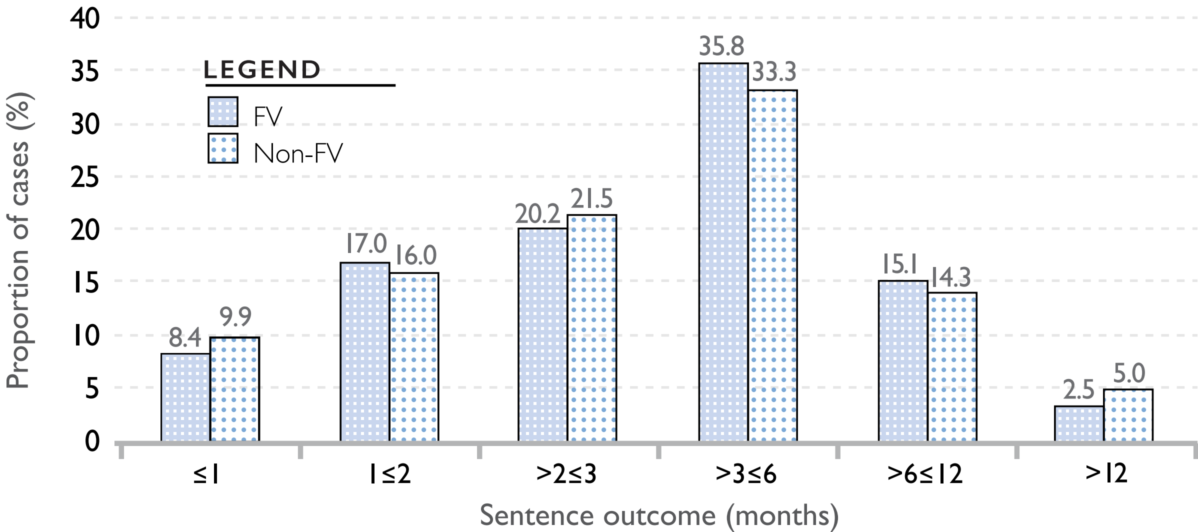
Table 4: Custodial sentence length for convictions for common assault (s 35 of the Police Offences Act 1935) — family violence and non-family violence instances: 2004-05 to 2013-14.

	No of cases	Minimum (months)	Maximum	Median	Mean
FV assault	371	0.25	27	4	4.7
Non-FV assault	624	0.25	36	4	5.0

Source: Department of Justice

Figure 16 compares imprisonment terms for family violence and non-family violence offenders sentenced for assault. It shows the proportion of offenders falling within defined sentence ranges.

Figure 16: Length of imprisonment term for assault (s 35 of the ***Police Offences Act 1935***) — family violence and non-family violence instances: 2004-05 to 2013-14.



Source: Department of Justice

Figure 16 reveals that the majority of people sentenced to imprisonment for the principal offence of common assault, whether a family violence offence or not, were sentenced to a period of imprisonment of 6 months or less. It also reveals a degree of concurrence in the relative proportions of offenders for each sentence range.

4.2 DISCUSSION

The *Success Works* review and some *Safe at Home* partners claim there is a predominance of sanctions at the lower end of the sentencing hierarchy for family violence offences, with a particular emphasis on releasing the offender without recording a conviction or a fine.

Figure 14 shows that, for the offence of common assault, there is a greater use of good behaviour bonds for FV instances of the offence (34.5%) than for non-FV instances (31.5%). The proportion of offenders receiving a wholly suspended sentence is also greater for FV instances. On the other hand fewer non-FV offenders receive an immediate custodial sentence. Any discussion of the appropriateness of sentencing practices in this context must take account of the exceptional nature of family violence. For this reason it is probably misleading to simply compare respective sentence outcomes for FV and non-FV offending.

Sentencing of family violence offenders involves different considerations because of the domestic nature of the relationship that exists or previously existed between offender and victim. Punishments imposed on the offender may have detrimental effects for the victim and her children as well as for the extended members of the family. If there are hopes that the relationship can be repaired or that the offender can fill a valuable role as parent to any affected children the imposition of a good behaviour bond may represent a more satisfactory outcome than incarceration. Courts have shown a preparedness to take this into account in particular cases. In *R v Garry Clarke*, (Underwood CJ, 4 July 2006) the balance of the sentence not yet served in pre-sentence custody was suspended, partly due to the victim's desire to resume the relationship and her wish not to see the offender punished further. In *R v Marcus Hansch*, (Evans J, 15 November 2005) the offender had a prior conviction for assaulting the same girlfriend. In passing sentence Evans J stated that, in light of the victim's expressed intention to marry the offender and her plea that he not be incarcerated, he would wholly suspend the sentence. However, his Honour also voiced concern about 'taking a course that lends support to her continuing her relationship with him.'

It is critical, if a sentencing option such as a good behaviour bond is to be used frequently, that it is accompanied by the requirement to undertake a rehabilitation programme.[60] To this end, the question of whether discretion not to record a conviction should be retained in ss 7(ea) and (f) should also be considered.

Some stakeholders expressed concern that s 184A had been unduly narrowed by a decision handed down in the Supreme Court in 2006.[61] The DPP's office has formulated internal guidelines governing charging practices relating to s 184A and in the first instance the indictable offence of assault on a pregnant woman is reserved for situations where the assault itself is sufficiently serious to warrant charging as an indictable crime. In such cases the accused's knowledge that the woman is pregnant is an aggravating factor. Section 184A might also be charged where the assault was directed at the pregnancy and/or in circumstances where the assault had a realistic chance of compromising the pregnancy.[62]

Some indication of the view of offence seriousness can be gained by comparing statistics for sentence lengths for 184A with those for 184 — the indictable form of common assault.

60 See Robyn Holder, *Domestic and Family Violence: Criminal Justice Interventions*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 3 (2001) 23–4.

61 *State of Tasmania v Danny Roy Taylor,* Tennent J, 1 February 2006 (Sentence).

62 Personal communication with Linda Mason, Principal Crown Counsel, Office of the Director of Public Prosecutions.

Table 5: Custodial sentence length for convictions for s 184A and s 184: March 2005 to 2013-14

Years	Offence	No of cases	Median (months)	Max	Min	Mean	Custodial %
2005–14	184A	26	8	36	1.75	11	50.0
2005–14	184	216	8	36	0.5	10	55.5

Source: TLRI Sentencing Database

Table 5 shows that there is little difference in sentencing practices for common assault and assault on a pregnant woman. The only exception is the higher rate of immediate custodial sentences imposed for convictions for common assault. The creation of the separate assault was intended to signal that the infliction of violence on a pregnant woman was a particular, and objectively more serious offence species of assault. Conviction numbers for the offence are relatively low and much may turn on the particular circumstances of each case. However, one interpretation of the figures in Table 5 is that the offence under s 184A is not treated as an aggravated form of assault.

Observation 6

Consideration should be given to inserting an express sentence aggravating provision in the summary offence of common assault (s 35 POA) which applies in cases where the person assaulted was a pregnant woman.

4.3 SENTENCING ISSUES

4.3.1 History of domestic violence incidents

Instances of offending which meet the definition of a family violence offence (see 1.6 above) are identified as such at several different stages of the criminal justice process. They are recorded separately as family violence offences in the DPEM's FVMS and they are flagged as family violence offences in the Department of Justice's CRIMES database.[63]

Notwithstanding the administrative recording of these offences the history of prior offending that is presented to a sentencing Magistrate does not indicate whether any specific instances of prior offending were family violence offences. For example, an offender charged with assault where it constitutes a family violence offence is charged under s 35 of the *Police Offences Act 1935*. The offence then appears as common assault on the record of prior convictions, with no indication of the circumstances in which it occurred.

Unless the sentencing officer has access to a complete record of offending, including the fact that it constituted family violence, he or she cannot obtain a true picture of the seriousness of the instant offence or the seriousness of the family violence offending as a course of conduct. In light of research which indicates that family violence offending escalates over time[64] evidence of a pattern of relationship violence should be an important consideration in sentencing so it is imperative that the history of family violence offending is available to the sentencing officer.

63 An integrated case management system which builds a case record for *Safe at Home* clients is facilitated by the *Safe at Home* Information Management System ('SIMS'). SIMS is accessed by all relevant government *Safe at Home* service providers.

64 Tracy Cussen and Mathew Lyneham, *ACT Family Violence Intervention Program Review*, Technical and Background Paper 52 (Australian Institute of Criminology, 2012) 52.

In this regard, the Joint Report contains a recommendation about the permissible use of course of conduct evidence. Recommendation 13–1 reads:

> **Recommendation 13–1** The national family violence bench book (see Rec 31–2) should include a section that:
>
> (a) provides guidance about the potential relevance of family-violence related evidence to criminal offences and defences — for example, evidence of a pre-existing relationship between the parties, including evidence of previous violence; and
>
> (b) addresses sentencing in family violence matters.

Observation 7

It is important that the sentencing officer has access to a complete record of prior family violence convictions and protection orders imposed. This requires a reliable and accessible database and may require development of information sharing protocols. The SIMS database may be useful in this regard as it contains information organised on an individual case basis.

4.3.2 Plea negotiation

Plea negotiation is a process whereby an accused agrees to plead guilty in exchange for concessions from the prosecution. These concessions may relate to reductions in the seriousness and/or number of charges presented; the agreed summary of facts upon which the accused will be sentenced by the court and agreements on the jurisdiction of the offence — for example, having the case heard summarily rather than on indictment. Negotiations may occur in circumstances where a complainant is unwilling to give evidence and where the prosecution cannot prove the matters independently of the complainant, or where the prosecution otherwise faces legal difficulties in securing a conviction. The Council emphasises that there is no evidence that plea negotiations are being conducted in other, inappropriate circumstances.

One purpose of plea negotiation is to avoid a lengthy criminal trial and possibly to downgrade the offence so that the court may make a drug treatment order ('*DTO*') in favour of the offender. An offender is ineligible for a DTO if found guilty of an offence involving the infliction of bodily harm that the court considers is not minor harm (*Sentencing Act* s 27B(1)(a)(ii)). An examination of sentences imposed for drug offences flagged as FV offences in the CRIMES database does not reveal a pattern of downgrading charges to facilitate eligibility for a DTO. Between 2005–06 and 2012–13 there were 124 such cases and a DTO was imposed in only 5 instances. If there were such a practice, a greater number of DTOs would be expected.

Plea negotiation can have adverse consequences in the family violence context if the offences to which the offender agrees to plead guilty do not adequately reflect the seriousness of the offending conduct. This may be particularly problematic where, in cases involving multiple charges, no evidence is tendered on some charges as part of a plea negotiation. Effectively, these charges are dismissed. As a consequence, should the offender come before the court for similar offences in the future, evidence of the earlier violence may not be led by the Crown. This is entirely appropriate since the accused may in fact be innocent of the allegations and in any case is entitled to the benefit of the acquittal on those charges. However, there is a risk that potentially relevant relationship evidence is excluded and the court may receive a distorted picture of the extent of the history of offending. An agreement to plead to a lesser offence will also somewhat artificially diminish the severity of the record of prior offending which a sentencing officer will have before them in sentencing for subsequent offending.

Observation 8

Whilst there is no evidence of a practice of downgrading charges it is important that plea negotiations do not ultimately result in the imposition of sentences which do not adequately reflect the seriousness of the offender's conduct.

4.3.3 Mandatory sentencing

The Terms of Reference also requested the Council to examine whether mandatory sentencing was appropriate in the context of family violence offences. Mandatory sentencing refers to the legislative prescription of specific penalties for criminal offences. Strictly speaking, a mandatory sentence prescribes the penalty type rather than the quantum or length. However, the term is usually understood to refer to the legislative imposition of a mandatory minimum penalty length for the commission of an offence or where an offence is committed in particular circumstances, eg where it constitutes an instance of repeat offending.[65] Although it remains open to impose a more severe sentence, much of the discretion as to appropriate sentence type or quantum is transferred from the sentencing officer. Whilst it may not be unconstitutional for the legislature to mandate sentences in this way,[66] it is an approach to the sentencing exercise that is not without its critics.

Advocates of mandatory sentencing regimes claim for them the virtues of certainty and consistency, arguing that together the severity and certainty of sanction will deter crime and that a 'hard line' approach reflects parliamentary and community denunciation of certain types of crime.[67] There is some political support for mandatory minimum sentences for child sex offenders in Tasmania on the basis that they are 'in line with community expectations and national standards'.[68]

There is little in the criminological literature to support claims that the imposition of mandatory penalties acts as a deterrent.[69] The Victorian Sentencing Advisory Council conducted a literature review of the effectiveness of imprisonment as a deterrent.[70] The Council found that whilst increases in the certainty of apprehension and punishment provided significant deterrent effects,[71] imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome.[72]

Opponents also claim that mandatory sentencing schemes entail an array of undesirable consequences. Perhaps the chief criticisms are that they undermine the independence of the court and hand the determination of cases to the prosecution. The sentencing discretion may be exercised at stages of the process where there is much less transparency about decision-making — by a reduction of charges at the prosecution stage or by a jury reluctance to convict in the knowledge that the defendant faces mandatory imprisonment. Admittedly, this criticism is less germane in the context of FV offences as the vast majority of cases are dealt with in the Magistrates' Court. Where the circumstances of the offence and attributes of the offender are irrelevant to punishment, the penalty imposed in an individual case may constitute an injustice. They treat unlike cases alike and so produce an unjustifiable disparity between offenders. As Zimring states:

> we (simply) lack the capacity to define into formal (statutory) law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts.[73]

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65 Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Victorian Sentencing Advisory Council, 2008) 2.

66 See Freiberg, above n 46, [1.185].

67 Hoel and Gelb, above n 65, 12.

68 David Killick, 'Sex Offenders in Libs' Sights', *The Sunday Tasmanian*, 17 February 2013, 9; Tasmanian Liberals, *Minimum Mandatory Sentencing for Serious Sexual Offences Against Children*, <https://www.tas.liberal.org.au/sites/default/files/policy/Mandatory%20minimum%20sentences%20for%20offences%20against%20children.pdf>; cited in Sentencing Advisory Council (Tas), *Sex Offence Sentencing: Final Report* (forthcoming). The Tasmanian Government has recently amended the *Sentencing Act* to provide for a mandatory minimum penalty of 6 months' imprisonment for an assault on a police officer in the course of their duty where serious bodily harm is caused: *Sentencing Act 1997* (Tas) s 16A inserted by *Sentencing Amendment (Assaults on Police Officers) Act 2014* (Tas) s 4.

69 See Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* 37, 38 and the sources cited therein.

70 Donald Ritchie, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence* (Victorian Sentencing Advisory Council, 2011).

71 Ibid 2.

72 Ibid 23.

73 F Zimring, 'Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform' in A Duff and D Garland (eds), *A Reader on Punishment*, (Oxford University Press, 1994) 169.

In addition there is substantial evidence that such schemes do not act as a deterrent.[74]

Moreover:

- they impose additional costs on the criminal justice system through increasing the number of defended trials
- they increase court delays and hence delay resolution for victims
- offenders who might otherwise have avoided a custodial sentence are exposed to more serious criminal behaviours and habits
- incarceration is a more costly option than all other sentencing options.

4.3.3.1 Mandatory schemes for FV offences

Debate about the rationale for mandatory schemes is brought sharply into focus in the context of FV offences. On the one hand, calls for mandatory sentences are sparked by the view that judges are soft on criminals and too much emphasis is placed on factors that mitigate the seriousness of the offending conduct rather than on the effect the criminal behaviour has on victims. This must be especially true for victims of domestic violence who may feel trapped in a cycle of recurring abuse. Incarceration of the offender offers at least a short-term solution to the violence. On the other, incarceration of the offender is unlikely to provide any *more* than a short-term solution to the problem. Given the absence of evidence that mandatory sentences act as a deterrent, if the goal is to secure the safety of the victim and affected children for the long term then rehabilitation and interventionist measures should be encouraged.

As an alternative to a mandatory minimum penalty regime, consideration could be given to developing a set of principles to guide the sentencing exercise in family violence cases. These principles would canvas the purposes of sentencing in this context, the relevance of specific victim and offender related factors and provide guidance on the relationship between particular features of the offending and offence seriousness. The development of such guidelines is likely to foster greater understanding of offending in the family violence context and to enhance public confidence by giving greater transparency to the sentencing process.

In its guidelines for sentencing for the offence of breach of protection orders the Victorian Sentencing Council notes '[p]unitive outcomes are not necessarily the right answer. … Rehabilitative or interventionist measures with offenders should be encouraged where they can lead to long term protection of victims and the community more generally'.[75]

The reality is that imprisonment is a relatively little used sentencing option for family violence offences (see Figures 8 and 10 above in relation to the offences of breach of protection order and common assault respectively). If family violence offences (mainly breach of orders and assault) are to be accompanied by mandatory sentences the question arises what that sentence type should be. If it is to be a mandatory minimum term of imprisonment, how long should that term be? Any move to impose a mandatory minimum term of imprisonment will have significant cost implications. It is difficult to predict additional prison costs without conducting sophisticated economic modelling but, based on a net operating expenditure per prisoner per day in 2013–14 of $332.36,[76] if all non-custodial sentences for breach of an FVO in 2013–14 (n = 205) were replaced with a mandatory minimum term of three months' imprisonment the projected additional costs are likely to be substantial.

Observation 9

The complexities of family violence including the likelihood that incarceration of the offender will incur negative consequences for the victim, together the absence of evidence that mandatory regimes are effective in deterring offending and the certain increase in prison budgets flowing from an expected increase in imprisonment rates indicate that mandatory sentencing regimes are not appropriate in the context of family violence offending. Instead, consideration could be given to developing set of principles to guide the sentencing exercise in family violence cases.

74 Gray and Elmore, above n 69, 38.

75 Sentencing Advisory Council (Vic), above n 44, 1.

76 Productivity Commission, *Report on Government Services*, 'Corrective Services – Table 8A.59' (2015).

5. Rehabilitation Programs and Family Violence Courts

5. TERM OF REFERENCE 4: SENTENCING OPTIONS & FAMILY VIOLENCE OFFENDER REHABILITATION PROGRAMS

5.1 INTRODUCTION

Rehabilitation programs for male domestic violence offenders have emerged alongside the other developments in the criminal justice response to domestic violence. They are a recognition that arrest alone is unlikely to produce a reduction in family violence but that intervention programs are also necessary to change abusers' behaviour.[77] Some argue that intervention or treatment programs are a soft penalty substitute[78] and offenders may be motivated to attend, not with the aim of changing their behaviour but in order to escape harsher punishment.[79] Others claim that criminal justice responses alone are ineffective at best and counter-productive at worst. Salter argues that:

> incarceration may temporarily incapacitate repeat offenders but it also exposes them to the various criminogenic and deviancy amplifying effects of prison. Upon release their mental and physical health may be (further) compromised by the prison environment, complicating the psychological and psychosocial issues underlying their propensity for violence and potentially contributing to recidivism.[80]

In those jurisdictions which offer such programs, there are wide variations in program structures and the legal mechanisms by which offenders are directed to attend. Programs may be delivered in a group setting or may rely on individualised interventions. They may be court-mandated or they may be voluntary. Studies evaluating the effectiveness of such programs have produced inconsistent results.[81] However there is some evidence that integrated treatment programs with court monitoring of compliance and prompt response to cases of non-compliance may secure better outcomes in terms of long-term reductions in violent behaviour.[82] Timely intervention also seems to be linked to more effective outcomes.[83] The Tasmanian family violence offender intervention program is based on the 'Risk–Need–Responsivity' (RNR) model.[84] This model stresses the importance of matching the level of intervention to the level of the offender's risk of recidivism. It also emphasises that treatment programs must address

77 See Katreena Scott et al 'Intervening to Prevent Repeat Offending among Moderate-to-High Risk Domestic Violence Offenders: A Second-Responder Program for Men' (2015) 59(3) *International Journal of Offender Therapy and Comparative Criminology* 273, 274; C Feazell, R Mayers and J Deschner, 'Services for Men Who Batter: Implications for Programs and Policies' (1984) 33 Family *Relations,* 217–223.

78 The National Council to Reduce Violence against Women and Children, *Domestic Violence Laws in Australia* (2009) 162.

79 Australian Law Reform Commission, *Domestic Violence*, Report No 30 (1986), cited in The National Council, ibid. See too M Pyke, South Australian Attorney-General's Department, *South Australian Domestic Violence Laws: Discussion and Options for Reform*, Discussion Paper (2007), cited in The National Council, ibid.

80 Michael Salter, Australian Domestic and Family Violence Clearinghouse, *Managing Recidivism amongst High Risk Violent Men*, Issues Paper 23 (2012).

81 See, eg, L Feder, D B Wilson and S Austin, 'Court Mandated Interventions for Individuals Convicted of Domestic Violence Offences' (2008) 4 (12) *Campbell Systematic Reviews*.

82 J Edleson, *Promising Practices with Men who Batter: Report to King County Domestic Violence Council* (2008).

83 Scott et al, above n 77, 275 citing E W Gondolf, *The Future of Batterer Programs: Reassessing Evidence-Based Practice* (Northeastern University Press, Lebanon NH, 2012).

84 See, eg, D A Andrews and J Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16(1) *Psychology, Public Policy, and Law* 39–55; D A Andrews, J Bonta and R Hoge, 'Classification for Effective Rehabilitation' (1990) 17 *Criminal Justice and Behavior* 19–52.

offenders' criminogenic needs, including substance abuse or mental health issues.[85] More recent perspectives on offender rehabilitation, however, recognise the limitations of the traditional risk management approach and are supportive of the incorporation of a 'Good Lives Model' which posits that 'offenders will desist from crime if given the opportunities and experiences necessary to develop the skills and knowledge to meet their needs in socially acceptable ways.'[86]

Perhaps the central underlying concern with offender treatment programs is that they divert funding from victims' services.[87] If this is the case, (which is not necessarily conceded), then it is critical that investment in programs such as the FVOIP reaps tangible rewards in reducing recidivism amongst family violence offenders.

5.2 DOMESTIC PROGRAMS

All Australian States and Territories have rehabilitation programs as part of their response to family violence but not all have made legislative provision for referral to such programs.[88] Some of the key differences in the programs are

- when a treatment order may be made;
- whether a counselling order is mandatory, voluntary, or made in connection with sentencing;
- the type of treatment available; and
- the effect of a counselling order.[89]

A summary of all available family violence offender rehabilitation programs is outside the scope of this Report. Instead, the rehabilitation frameworks in Victoria and Western Australia are discussed as examples of approaches in other jurisdictions.

5.2.1 Victoria

The Victorian legislation, (*Family Violence Protection Act 2008*), provides for mandatory 'counselling orders'. Pursuant to Part 5 of the Act orders are made at the time the court makes a protection order. They are not sentencing orders. The counselling order is separate from the protection order so it remains in place in the event the protection order is revoked. The court hearing an application for a protection order must order a report on the offender's eligibility to attend counselling and order the offender to attend an interview for that purpose (s 129(1)). The report must find the offender eligible unless he does not have the ability or capacity to attend due, amongst other things, to severe psychiatric or psychological problems or issues with substance abuse (s 129(3)). Criminal sanctions are attached both to failure to attend the eligibility assessment interview and failure to attend counselling as directed by the court (ss 129(5), 130(4).[90] The Victorian Act does not define counselling. In practice, the Men's Behaviour Change Counselling Program is a 40 hour, 20 week group program which encourages participants to understand why they have acted abusively and how they might develop non-violent strategies to deal with relationship conflict. It may also include a component of individual counselling if needed.[91]

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85 See M Coulter and C VandeWeerd, 'Reducing Domestic Violence and Other Criminal Recidivism: Effectiveness of a Multilevel Batterers Intervention Program' (2009) 24(2) *Violence and Victims* 139–52; Andrew Day et al, 'Programs For Men Who Perpetrate Domestic Violence: An Examination of the Issues Underlying the Effectiveness of Intervention Programs' (2009) 24(3) *Journal of Family Violence*, 203–12; L M Jewell and J S Wormith, 'Variables Associated with Attrition from Domestic Violence Treatment Programs Targeting Male Batterers: A Meta-Analysis' (2010) 37(10) *Criminal Justice and Behavior* 1086–113.

86 Department of Justice (Tas), *Breaking the Cycle — Tasmanian Corrections Plan (2010-2020): Best Practice in Offender Rehabilitation* <http://www.justice.tas.gov.au/__data/assets/pdf_file/0004/129523/Background_Paper_-_Best_Practice_in_Offender_Rehabilitation.pdf>.

87 See D Chung D and L Zannettino, 'Feminists Researching Domestic Violence Perpetrator Programs: Improving Women's and Children's Safety or Misplaced Effort?' (2006) 18 *Women Against Violence* 37, 43; Donna Justo et al, 'What's in it for the Women?' in Andrew Day et al, *Domestic Violence — Working With Men: Research, Practice Experiences and Integrated Responses* (Federation Press, 2009) 35.

88 Those jurisdictions that have are Victoria, Western Australia, Tasmania, the ACT and the Northern Territory.

89 The National Council, above n 78, 155.

90 An offender is liable to a penalty not exceeding 10 penalty units for failing to attend counselling as ordered, without reasonable excuse: *Family Violence Protection Act 2008* (Vic) s 130(4).

91 Magistrates' Court of Victoria, *Counselling Orders for Men — Men's Guide* (2015) <https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs/counselling-orders/counselling-orders-men-mens-guide>.

5.2.2 Western Australia

At the other end of the scale are jurisdictions such as Western Australia where treatment programs are voluntary. The West Australian legislation (*Restraining Orders Act* 1997) provides as part of the process of making a court-ordered restraining order and a police order that, where appropriate, the respondent may be referred to services for counselling.[92] A referral may also be made as part of the court's broad discretion to make a pre-sentence order (PSO) in Part 3A of the *Sentencing Act 1995* (WA) although it is not strictly a sentencing order. The PSO may include a programme requirement "to provide an opportunity for the offender to recognise, to take steps to control and, if necessary, to receive appropriate treatment for" personal factors which led to the violent offending.[93] Although no criminal sanctions apply to non-compliance with the PSO, if an offender abides by the order the court might refrain from imposing a sentence of imprisonment to which he might otherwise have been exposed.[94]

5.3 TASMANIA

5.3.1 Family Violence Offender Intervention Program

The FVOIP is the only state government funded rehabilitative program for family violence offenders in Tasmania.[95] It is a cognitive-behavioural program targeted at male offenders who are assessed as having a high risk of re-offending or escalating violence. There is no program for offenders assessed as medium-risk or low-risk nor for female offenders. The FVOIP was adapted from violent offender programs offered by the New Zealand Department of Corrections. It is an intensive 50-hour, 10 week group program facilitated by Community Corrections probation officers with specialist training in family violence cases. The Tasmanian family violence legislation[96] is the only domestic legislation that does not provide for treatment prior to the sentencing process.

The FVOIP was developed to further the *Safe at Home* objective of changing offenders' violent behaviours. Offenders appearing before the court for family violence matters may be referred to Community Corrections to determine their eligibility to attend the program. The assessment process takes 6 weeks after which period the offender appears before a Magistrate again and is either sentenced accordingly if unsuitable for the program or directed to attend the program as a condition of a probation order. In all other jurisdictions referral to a counselling program is made at the time the court imposes a protection order.[97] The Tasmanian legislation provides that offenders may be directed to the program as a condition of bail, as a condition of an FVO (*Bail Act 1994* (Tas) s 5(3A)(ba)) or as an element of sentencing (*Sentencing Act 1997* s 7(ea)). Section s 7(ea) states that the court may, 'in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order'. Together with s 9(3)(ab) which provides that a rehabilitation program order may be made in addition to a probation order, this suggests that referral to a rehabilitation program was intended as a separate sentencing option. The *Sentencing Act* also contains a series of provisions which apply to contraventions of a rehabilitation order.[98] Progress of offenders on the program is considered at *Safe at Home* agencies case management meetings and feedback is provided to victims through the Court Support and Victim Liaison Service.

In principle, there is no legislative requirement for a probation order to be in place to direct attendance and the mechanisms appear to be in place for assessment and direction to attend as a condition of bail and as a condition of an FVO. However, in practice, referral to the FVOIP is not made by means of the power to make such orders provided in s 7(ea). Instead referrals must be attached to a probation order which in turn may be imposed as a condition of a suspended sentence. The Council understands that unless the referral is linked to a probation order Community Corrections lacks the necessary administrative mechanism to direct offenders to rehabilitation. The high criminogenic needs of the offenders on the program require that they be supervised while participating and there must be the capacity to hold offenders accountable if they breach the conditions of the referral. Hence, probation orders underpin the delivery of the FVOIP.

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92 *Restraining Orders Act 1997* (WA) ss 8, 30E(3).

93 Ibid s 33G.

94 Ibid s 33A(3)(c).

95 The Defendant Health Liaison Service is the other offender service provided through *Safe at Home* but it has no rehabilitative component (see [5.3.3]).

96 The 'Tasmanian Family Violence Legislation' consists of the *FVA 2004* (Tas) and the *Sentencing Act 1997*(Tas).

97 The National Council, above n 78, 155.

98 *Sentencing Act 1997* (Tas) s 54A.

The FVOIP has been operating since 2005. The Internal Performance Review Report 2014 of *Safe at Home* indicates that 47 offenders commenced the FVOIP in 2013-14 with 39 offenders completing the program.[99] Although participation rates have increased from the previous year (32 offenders referred with 25 completions) the numbers represent only a very small proportion of the total number of offenders. Thus far, the only formal evaluation of the effectiveness of the FVOIP has been an Honours thesis completed by University of Tasmania post-graduate Nicole Sale.[100] She reported that at an individual level '[o]ffenders demonstrated a greater acceptance of responsibility, reported less victim blaming and minimisation following completion of the program' but that 'the FVOIP is less efficacious at targeting offender attitudes, with attitudes that endorse family violence increasing at post program.'[101]

5.3.2 Substance abuse programs

One of the objectives of *Safe at Home* is to change the offending behaviour of those responsible for family violence. Some in the family violence sector have been reluctant to engage with the association between substance abuse and domestic violence fearful that ascribing the behaviour to the effects of substance abuse may reduce perpetrator responsibility for their violence and fail to recognise the real causes.[102] However, while a causal link between substance abuse and family violence has never been claimed the correlation between the two has been long recognised. Substance abuse has also been implicated in increased seriousness of violence and greater harm to victims.[103] Based on an analysis of the ABS's 2005 *Personal Safety Survey* Laslett et al concluded 'it can be estimated that alcohol contributes to 50.3% of all partner violence, and 73.0% of physical partner assaults'.[104] Recent 2012 research by Salter noted that amongst the most serious domestic violence offenders there was also a common pattern of substance abuse.[105]

The Court Mandated Diversion scheme (CMD) delivered through the Magistrates' Court allows for the diversion of eligible offenders into treatment for illicit substance abuse. The scheme provides a pre-sentence bail programme for eligible offenders (sexual offences and offences occasioning more than minor bodily harm are excluded) and a Drug Treatment Order as a distinct sentencing option. Part 3 of the *Sentencing Act* provides the legislative basis for the court's ongoing supervisory role over offenders' progress. This supervisory capacity is absent from the family violence legislative scheme. Eligibility for CMD extends to family violence offenders who otherwise fulfil the eligibility requirements in s 27B(1)(a)[106] which accords with research indicating that low risk or occasional violence may be ameliorated by substance abuse treatment.[107] At one stage 43% of CMD participants were *Safe at Home* offenders.[108] Eligibility is restricted to those whose abuse of illicit substances is implicated in their offending. This means that a large proportion of offenders who have problems with alcohol abuse are ineligible.

Observation 10

Given the evidence of a correlation between alcohol abuse and family violence there is a strong case for extending the eligibility criteria for CMD to also include offenders who abuse legal substances.

99 Department of Justice, *Safe at Home Internal Review Report* (2014) 15.

100 Nicole Sale, *The Tasmanian FVOIP: An Evaluation* (Honours Thesis, University of Tasmania, 2014).

101 Ibid 41.

102 R Braff, *Elephant in the Room: Responding to Alcohol Misuse and Domestic Violence* (Australian Domestic Violence Clearinghouse, 2012) <http://www.adfvc.unsw.edu.au/PDF%20files/IssuesPaper_24.pdf>.

103 Ibid.

104 A Laslett et al, AER Centre for Alcohol Policy Research, Turning Point Alcohol and Drug Centre, Eastern Health, *The Range and Magnitude of Alcohol's Harm to Others* (2010).

105 Salter, above n 80.

106 *Sentencing Act 1997* (Tas) s 27B(1)(a) provides: (1) A court may make a drug treatment order in respect of an offender if – (a) it finds the offender guilty of one or more imprisonable offences other than — (i) sexual offence; or (ii) offences involving the infliction of actual bodily harm that, in the court's opinion, was not minor harm'.

107 E E McCollum and S M Stith, 'Couples Treatment for Interpersonal Violence; A Review of Outcome Research Literature and Current Clinical Practices', (2008) 23(2) *Violence and Victims* 187, cited in Salter, above n 80, 2–3.

108 Success Works, *Tasmania's Court Mandated Drug Diversion Program*, Evaluation Report (2008) 70.

5.3.3 Defendant Health Liaison Service

Funding from *Safe at Home* has enabled the DHHS to offer a defendant health liaison service ('*DHLS*') to family violence offenders with health and/or welfare needs. Referrals to the DHLS are made at the bail hearing and progress reports on those who choose to engage with the service are taken into account in the final disposition of the case. Only those offenders who plead guilty are eligible to be referred to the service. There are no other formal eligibility criteria as such but individuals with serious drug problems or mental health issues are likely to be referred to CMD instead. It is a voluntary service run solely to link offenders with appropriate support services. The service does not have contact with victims of family violence.

The way that referrals are made is potentially problematic for a number of reasons. Since referrals are made at the bail hearing rather than as a component of sentencing there may be uncertainty about the extent of the court's coercive power to direct offenders to the service. In addition, the requirement of a guilty plea will preclude those offenders who dispute aspects of the prosecution's account whilst not necessarily denying that the incident took place. The service is staffed by two officers state-wide and does not have the capacity to station an officer at court. The program's voluntary nature sets it apart from more strictly legal processes and as such there is a risk that it enjoys a lower profile within the court. As only one of a number of services to which offenders generally may be directed it may be overlooked by the presiding judicial officer.

Often family violence occurs against a backdrop of severe family stress — problems with alcohol and other substance abuse, unemployment, poverty, mental health issues — and the DHLS provides the therapeutic space to address the criminogenic needs of offenders. The other notable advantage of this service is that it is relatively unencumbered by restrictive operating and reporting procedures and can target offenders at an early stage. Research suggests that for low and moderate risk offenders the benefits of rehabilitative interventions are likely to be lost if they are not timely.[109] It is a voluntary program and in that regard avoids some of the criticisms of coercive approaches. Winick suggests that, '[i]nstead of the negative psychological reaction that judicially coerced rehabilitation can produce, [voluntary] strategies can succeed in motivating the offender to attempt rehabilitation.'[110]

5.4 DISCUSSION

Key stakeholders in *Safe at Home* and the Urbis and Success Works reviews have identified some limitations of the FVOIP.

5.4.1 Program eligibility

As mentioned, the FVOIP is the only court mandated program in Tasmania and is designed to cater for high-risk offenders only. The particular model adopted and the intense therapeutic process that it involves may not be suitable for low risk offenders.[111] There is also a danger that the risk profile of these offenders might increase from exposure to high-risk offenders. However, the limited availability of rehabilitation programs is problematic for a number of reasons. First, in the 2012-13 financial year there were a total of 2283 family violence incidents recorded.[112] Of those 2283 incidents 307 were determined as being high risk according to the Risk Assessment Screening Tool ('*RAST*').[113] Given that there will inevitably be a degree of attrition through the criminal justice process, only a percentage of these high-risk cases will proceed to conviction for a criminal offence. This means that only a small pool of offenders will be eligible for referral to the FVOIP, leaving a significant number without access to an interventionist program.

Second, there are questions about the efficacy of programs for high risk offenders with suggestions that achieving change amongst dedicated violent recidivists is likely to require intensive, long term effort and

[t]his raises questions about resource allocation and priorities, particularly since the health and social and economic security of victims of domestic violence has often been seriously compromised, and there remains numerous deficiencies in the manner in which their needs are addressed in the health, welfare and legal systems.[114]

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109 See generally Leslie Tutty et al, Resolve, *The Justice Response to Domestic Violence: A Literature Review* (2008).

110 Bruce Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri-Kansas City Law Review* 33, 42.

111 Interview with Amy Washington, Head of Programs, Tasmanian Department of Community Corrections (Telephone Interview, 19 June 2015).

112 Department of Police and Emergency Management, *Annual Report 2013-14*, 24.

113 Communication from DPEM.

114 Salter, above n 80, 17.

Research shows that persistently violent, high-risk offenders often have co-morbid issues of substance abuse, mental ill health, criminal history, low socioeconomic status and poor literacy skills.[115] Low literacy skills are also likely to present a significant barrier to engaging with the FVOIP. In common with criminal offenders more generally, high-risk offenders are more likely to confound attempts at rehabilitation.[116] Research suggests intervention programs are likely to be more effective in reducing recidivism amongst lower risk offenders. It may be more effective to target resources at this group where timely, less intensive interventions may be sufficient. Thus, there is an acknowledgement that a lacuna exists in interventions for offenders in the more moderate range.[117]

Third, instances of offending that exhibit low risk in terms of criminality where a FVOIP order is not appropriate may nevertheless involve peripheral aspects that elevate the seriousness of the conduct to a level that calls for some form of behavioural change intervention. For example, the fact that children were present should be a central concern of the court and education programs offer an effective way to direct attention to the impact of their offending and the risk that violence in the home will have a damaging effect on the child's future intimate relationships.[118]

Fourth, the violent incident may have erupted as a consequence of an accumulation of stressful life events which prove more than the individual can cope with.[119] A timely intervention might head off future violence by teaching coping skills or non-violent ways to defuse tension.

In cases of serious violence where an offender is not eligible for the FVOIP imprisonment may be the only alternative sentencing option that is appropriate. As has been noted a number of times in this Report (see pages 43 and 62 above) part of the focus of *Safe at Home* is to change the offending behaviour of those responsible for family violence. Incarceration without more is unlikely to change an offender's mindset and it risks the eventual release of an even angrier and more embittered individual.

Finally, the sentencing officer has limited sentencing options available. There will be some offenders who are assessed by Community Corrections as insufficiently high-risk for referral to the FVOIP but who nevertheless have been convicted of offences involving serious violence. The sentencing officer, whilst not legally bound by the risk assessment, will ordinarily respect the determination of those qualified to undertake the assessment. A decision must then be made between imposing a term of imprisonment or release in the community either supervised or unsupervised. What should also be borne in mind are the implications of imposing a supervision order where the purpose is primarily deterrent rather than rehabilitative. A number of studies have shown a negative relationship between supervision and re-offending, particularly where the supervision is primarily deterrent focused. In its examination of the relationship between the imposition of community based orders (such as probation orders) and re-offending the Victorian Sentencing Advisory Council cites research showing that the time to re-conviction for those on supervision orders without a rehabilitative component was shorter than those on unsupervised release.[120] The authors concluded that 'inadequate treatment and support of offenders were most likely to account for these patterns.'[121]

5.4.2 Program frequency and availability

It is clear that current funding levels cannot deliver the number and range of rehabilitative programs required to further the behavioural change component of *Safe at Home*. There are a number of problems that can be directly linked to the lack of funding. Staffing levels are one of the major issues for delivery of the FVOIP, particularly in the North West of the State. At different times either three or four specialised probation officers deliver the program in the South with two each in the North and North West. Whilst the numbers of referrals in the South are sufficient

115 See eg, R C Serin and D L Preston, 'Managing and Treating Violent Offenders' in JB Ashford, BD Sales and W Reid (eds), *Treating Adult and Juvenile Offenders with Special Needs* (*American Psychological Association*, 2001).

116 Salter, above n 80, 3.

117 Interview with Amy Washington, Head of Programs, Tasmanian Department of Community Corrections (Telephone Interview, 19 June 2015).

118 See, eg, Danielle C Kuhl, David F Warner and Tara D Warner, 'Intimate Partner Violence Risk among Victims of Youth Violence: Are Early Unions Bad, Beneficial, or Benign?' *Criminology*. doi: 10.1111/1745-9125.12075.

119 See Andrew Day et al, 'Integrated Responses to Domestic Violence: Legally Mandated Intervention Programs for Male Perpetrators' (2010) *Trends and Issues in Crime and Criminal Justice* No 404 cited in Hayley Boxall, Jason Payne and Lisa Rosevear, 'Prior Offending among Family Violence Perpetrators: A Tasmanian Sample' (2015) *Trends and Issues in Crime and Criminal Justice* No 493, 7.

120 D Weatherburn and L Trimboli, NSW Bureau of Crime Statistics and Research, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (2008) 112 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* cited in Joe Clare and Geoff Fisher, Sentencing Advisory Council (Vic), *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014) 6.

121 Ibid.

to conduct a rolling program this is not the case elsewhere. There is a risk therefore that the probation order, which is the vehicle for referral, may lapse before a place in a program becomes available. There is also great difficulty in delivering the program to remote regions.[122]

The limited availability of programs also has an impact on the presumption against bail contained in s 12 of the *FVA*. One of the matters to be taken into account in the exercise of the discretion to grant bail is the availability of a rehabilitation program assessment. In light of the fact that referral for assessment is currently only undertaken as part of a pre-sentence report there is no provision for such an assessment to be taken into account to inform the discretion to grant or deny bail.

The requirement that FVOIP referrals are always attached to a probation order presents a dilemma for the sentencing officer when an offender is an appropriate candidate for the FVOIP but a probation order is not appropriate in the circumstances of the case. Although rehabilitation orders were intended as separate sentencing options there are no Community Corrections personnel available to implement them outside the pre-existing framework for monitoring probation orders. There are also difficulties at the other end of the offence seriousness spectrum. Low or moderate risk offenders may seek help for their violent behaviour but there are no existing programs to which they may be directed by the court.

Debate about the effectiveness of behaviour change programs continues[123] but there are indications of a growing recognition that programs that are tailored to the criminogenic needs of the individual as well as the social and cultural factors that contribute to violence are an improvement on traditional inflexible, one-size fits all approaches.[124] Participation in an appropriately targeted program hinges in the first instance on the offender's assessed risk. This highlights the importance of administering a reliable risk assessment tool. An evaluation of the RAST was undertaken in 2009.[125] The authors concluded that whilst the use of the tool was an improvement over informal, subjective assessments of risk the tool offered only modest predictive utility. A number of recommendations were made for improving its predictive validity including revising the RAST schedule to reflect the cumulative effect of the separate items.

5.5 CONCLUSION

Sentencing practices outlined above continue to reflect traditional criminal justice responses and the data presented earlier (see Figures 6, 7 and 13 above) suggest they have minimal deterrent effect on re-offending. It is critical that traditional criminal justice system practices are supported by therapeutic interventions and that interventions are designed and implemented in accordance with current evidence on what works — ie, that program eligibility is not restricted to a small cohort of the most serious offenders.

Observation 11

Safe at Home has three major foci. Foremost is victim and child safety but behavioural change in offenders is also prominent. Victim safety in any case will often depend on effecting a change in the attitude of violent partners and a change in social attitudes more broadly. Despite its championing of rehabilitation, there are shortcomings in the legislation and in the framework of services which support the legislation which seriously restrict the ability of the court and other agencies from delivering on the rehabilitative aspects of *Safe at Home*.

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122 Interview with Amy Washington, Head of Programs, Tasmanian Department of Community Corrections (Telephone Interview, 19 June 2015).

123 See eg, D A Andrews and J Bonta, *The Psychology of Criminal Conduct* (Taylor and Francis, 2014); A Day and K Howells, 'Psychological Treatments for Rehabilitating Offenders: Evidence-based Practice Comes of Age' (2002) 37 *Australian Psychologist* 39–47; Day et al, above n 85; Day et al, above n 87.

124 See eg, Day et al, above n 85.

125 Ron Mason and Roberta Julian, Tasmanian Institute of Law Enforcement Studies, *Analysis of the Tasmania Police Risk Assessment Screening Tool (RAST)* Final Report (2009).

6. A Specialist Court

6. TERM OF REFERENCE 5: A SPECIALIST COURT

6.1 INTRODUCTION

This term of reference requires the Council to consider the role of specialist family violence lists or courts in dealing with family violence offences. Specialist problem-solving courts,[126] including specialist family violence courts, were first established in the United States in the late 1980s amidst a growing recognition of the limitations of the conventional criminal justice response which fails to account adequately for the social, physical and psychological context of offending. It is recognised that the practice of these courts is underpinned by the philosophy of therapeutic jurisprudence.[127] Therapeutic jurisprudence 'examines the effect of laws, legal processes and legal actors … on the wellbeing of those involved.'[128] Some commentators have suggested that a therapeutic approach is inappropriate in the family violence context, as it is primarily offender-oriented.[129] However, others defend the implementation of therapeutic practices in this area. King and Batagol, for example, argue:

> The application of therapeutic jurisprudence principles to a family violence context should not be confused with the notion that a therapeutic 'cure' for family violence is possible — it is not an attempt to reduce the causes of family violence to a medical condition or a defective personality. Rather, the combination of therapeutic jurisprudence and feminist approaches engenders practices in family violence courts which recognise the socio-political context of family violence and which focus on the psychological needs of individual victims and offenders through the legal process.[130]

The first specialist family violence jurisdiction in Australia was set up in South Australia, in 1997. Family violence courts are more victim-centred than other varieties of problem-solving courts and their primary focus is on victim protection.[131] The focus on the victim sets them apart from other specialist courts (such as drug courts or mental health courts) where offender rehabilitation as a path to reduction in reoffending is the paramount concern. King and Batagol note that 'the principal focus of [such] courts is to enhance the safety and wellbeing of victims and to hold offenders accountable for their behaviour'[132] and in that sense they are not as therapeutic as other problem solving courts.[133] Included in their tool kit are procedures for improving the victim experience of the court process, such as

126 King et al note the distinction between 'specialised' courts and 'problem-oriented' or 'problem-solving' courts. 'A specialised court is a court with limited or exclusive jurisdiction in a field of law presided over by a judge with expertise in that field': Michael King et al, *Non-adversarial Justice* (Federation Press, 2nd ed, 2014) 156 (citations omitted). In contrast, a problem-oriented court 'attempt[s] to deal with the problems that may have contributed to an offender's criminal behaviour': at 157.

127 See, eg, B Winick and D Wexler, 'Introduction' in B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 3, 7.

128 Michael King and Becky Batagol, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 *International Journal of Law and Psychiatry* 406, 407.

129 See, eg, Julie Stewart, Australian Domestic and Family Violence Clearinghouse, *Specialist Domestic/Family Violence Courts within the Australian Context*, Issues Paper 10 (2005) 17; Robyn Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30, 37–40.

130 King and Batagol, above n 128.

131 S Goldberg, Canada National Judicial Institute, *Judging for the 21st Century; A Problem–solving Approach* (2005) 25, cited in Stewart, above n 128, 4.

132 King and Batagol, above n 128, 406.

133 Arie Freiberg, 'Innovations in the Court System' (Paper presented at Australian Institute of Criminology International Conference, Crime in Australia; International Connections, Melbourne, 29–30 November 2004).

facilities for giving evidence remotely, and powers to order offenders into treatment.

Family violence involves a multiplicity and complexity of issues. Offending behaviours are often accompanied by deep-seated social, psychological, emotional or psychiatric problems. Conventional criminal justice responses, such as the imposition of harsher sentences for recidivist offenders, do not adequately deal with the causes of violence. It is for this reason that such matters are better suited to adjudication by a specialist or problem-oriented court.[134] The Joint Report concluded that 'the specialisation of key individuals and institutions is crucial to improving the interaction in practice of legal frameworks governing family violence'.[135]

6.2 CHARACTERISTICS OF SPECIALIST COURTS

Specialist family violence courts, however they are set up, share a number of common elements. These were identified in the Joint Report as follows:[136]

- *Specialised personnel*: These will include specialised judicial officers, but may also involve specialised prosecutors, lawyers, victim support workers, and community corrections officers. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family *violence.*
- *Specialised* procedures: These will include special days in court dedicated to family violence matters ('dedicated lists'). They may also include 'case coordination mechanisms' to 'identify link, and track cases related to family violence', such as integrated case information systems, or the use of 'specialised intake procedures' (specialised procedures that apply when the victim first enters the court system).
- *Emphasis on specialised support services*: There will be someone, employed by the court or another organisation available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling. There may also be specialised legal advice or representation available for both the victim and defendant.
- *Special arrangements for victim safety*: Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.
- *Offender programs*: Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. Some courts have offender support workers to engage and refer offenders to behavioural change programs.
- *Problem solving or therapeutic approaches*: Some courts adopt broader approaches aiming to 'solve problems' and achieve therapeutic outcomes.

134 The terms 'problem-oriented' and 'problem-solving' are used interchangeably. Both descriptions are applied to courts which transcend conventional criminal justice processes in order to bring about beneficial outcomes for both victim and offender: Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23(2) *Law & Policy* 125. 'Problem-solving courts use their authority to forge new responses to chronic social, human and legal problems — including problems like family dysfunction, addiction, delinquency and domestic violence — that have proven resistant to conventional solutions': at 126.

135 Joint Report, above n 44, 1485.

136 Ibid 1489–90 (citations omitted).

6.3 TYPES OF SPECIALISED JURISDICTION

Specialist jurisdiction may be instituted by convening a stand-alone court with exclusive jurisdiction over family violence matters, by establishing a specialist court within the existing court structure by scheduling a separate family violence list day within the regular court or by the development of specialist practices through administrative mechanisms. In Australia, all the existing specialised family violence courts are constituted as part of the local or magistrates' court.[137] Family violence courts operate in all states and territories with the exception of Tasmania and the Northern Territory.[138] Some have jurisdiction only over protection orders, others are solely concerned with criminal matters related to family violence. The Family Violence Court Division of the Magistrates' Court of Victoria has the most comprehensive jurisdiction with responsibility for protection orders, summary criminal offences, committals for indictable offences, compensation, restitution and civil injury claims and, to a limited extent, family law and child support.[139]

6.4 THE VALUE OF A SPECIALISED FAMILY VIOLENCE JURISDICTION

The advantages of a specialised family violence jurisdiction were identified in the Joint Report as follows:

> judicial officers working in the area acquire specialised knowledge and a greater understanding of the nature, features and dynamics of family violence. They are thus better able to help victims navigate the legal, social, and health systems by connecting legal frameworks and social services.
>
> specialisation attracts those with an interest and aptitude in family violence work, and education, training and other resources can be more effectively targeted at a select group. In turn these individuals can hasten the process of systemic behavioural change.
>
> specialisation can improve consistency and efficiency in the interpretation and application of laws as a result of shared understandings and experience among a smaller number of decision makers.
>
> the efficiency gains through specialisation may have a holistic effect, producing flow-on effects that generate substantial savings elsewhere in the system. For example, earlier and more effective legal intervention may reduce the need for intervention by child protection agencies and fewer demands on medical and psychological services.[140]

The Joint Report also identified a number of problems associated with the establishment of separate family violence courts, however constituted. These include:

- resource constraints which limit opportunities for offering specialised services,
- problems associated with the proper selection of specialised judicial officers,
- the risk that specialists will suffer 'burnout' due to the traumatic nature of the work, and
- the risk that the practice of the specialised courts will become disconnected from the general court system.[141]

137 See Joint Report, above n 44, 1485–6 and Appendix B for a table of specialised family violence courts in Australia.

138 Ibid 1488–9.

139 Ibid 1494.

140 Ibid 1486–7.

141 Ibid 1487–8.

6.5 RECOMMENDED BEST PRACTICE IN SPECIALIST FAMILY VIOLENCE COURTS

Ultimately, the Joint Report concluded that there are benefits in adopting a specialist jurisdiction for family violence matters. Specialised courts offer:

- greater sensitivity to the context of family violence and the needs of victims through the specialised training and skills of staff;
- greater integration, coordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list, case tracking, inter-agency collaboration, and the referral of victims and offenders to services;
- greater consistency in the handling of family violence cases both within and across legal jurisdictions;
- greater efficiency in court processes;
- development of best practice, through the improvement of procedural measures in response to regular feedback from court users and other agencies; and
- better outcomes in terms of victim satisfaction, improvement in the response of the legal system (for example, better rates of reporting, prosecution, convictions and sentencing in the criminal context), better victim safety, and — potentially — changes in offender behaviour.[142]

The Commissions recommended that state and territory governments establish or further develop specialised courts within existing courts. These courts should be vested with broad jurisdiction over protection orders, criminal matters and family law matters as constitutionally permitted. They should include specialised judicial officers who receive regular training, victim support services, and provision for victim safety. A dedicated family violence list day should be identified and all matters, whether involving protection orders, criminal matters or family law matters, should be heard on that day. Finally, specialised family violence police units should be fostered with training, quality assurance of police responses to family violence incidents and career progression identified as key components.[143]

6.6 THE FAMILY VIOLENCE COURT SYSTEM IN TASMANIA

There is no specialist family violence court in Tasmania. Specialist court models were considered by the Department of Justice and the Magistrates' Court at the time *Safe at Home* was implemented. Some of the components introduced as part of the integrated response exist as elements of specialist family violence courts in other jurisdictions. For example, *Safe at Home* established specialist prosecutor positions, the provision of victims' services at court, (limited) mandated offender treatment programs, advocacy for victims and measures to ensure victims' safety at court.

In addition, extra funds were allocated to the Magistrates' Court in anticipation of increased pressure on the court's resources due to the pro-arrest pro-prosecution policies of the program. The Magistrates' Court response was to create 'special family violence sessions'.[144] These sessions are created in the Magistrate's calendars for listing and consolidating family court proceedings. The purpose is to enable better management of family violence matters, and to facilitate better access to specialist court support services.

In practice the Magistrates' Court runs family violence lists in each of its registries. The lists include dedicated prosecutors and (mostly) legal aid defence lawyers. The philosophy behind the establishment of a specialist list is that when exercising that jurisdiction the court will operate in a different way to the regular court and in a way that is responsive to the unique problems posed by family violence matters. To date, the indications are that this is not happening.

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142 Ibid 1490.

143 The recommendations are set out in full in Appendix C.

144 Magistrates' Court of Tasmania, Criminal and General Division, Family Violence General Information <http://www.magistratescourt.tas.gov.au/divisions/family_violence>.

6.7 CRITICISMS OF THE FAMILY VIOLENCE LIST

There has been growing acceptance of the importance of a behavioural change focus in the Magistrates' Court, evidenced by such initiatives as the drug court and the mental health lists. Unlike these specialist jurisdictions, however, the family violence list is restricted in its ability to invest in a behavioural change agenda because of a lack of sentencing options and limited resources. For example, the drug treatment order model enables the court to bring offenders back before the court to monitor progress, something which does not exist in the family violence jurisdiction. With its pro-arrest focus and presumption against bail the family violence legislation remains essentially punitive and while such initiatives may be justified in the interests of short term victim safety, the legislative framework does not promote the long term goals the community expects it to secure ¾ ie, to stop violence in the home and to prevent the intergenerational transmission[145] of family violence. Within the family violence jurisdiction there is an absence of a therapeutic space for offenders to access the necessary supports to enable them to change.

Criticisms have also been expressed that court facilities and practices fail to secure witness safety and risk victims disengaging with the court process. For example, the *Safe at Home* Internal Performance Review Report notes that the remote witness facilities which exist in each Magistrates' Court registry are an under-utilised resource and victims are forced to give evidence in the presence of the offender.[146]

6.8 RECOMMENDATIONS: IMPROVING THE OPERATION OF THE TASMANIAN FAMILY VIOLENCE COURT LIST

There is widespread support for investment in a specialist family violence jurisdiction within the Magistrates' Court which combines punitive and rehabilitative options. The desirability of a specialist jurisdiction was flagged in the *Urbis Report*, the *Success Works Report* and in the *Safe at Home* Internal Performance Review Report. The advantages of specialist family violence courts were extensively canvassed in the Joint Report and the Commission recommended their more widespread use in Australia.[147] Importantly, if a specialist court is to be effectively adapted to the complexities of family violence matters it must operate in a way that is distinctly different from a regular court.

Although the Magistrates' Court operates a separate family violence list its practices are largely indistinguishable from a regular court. A specialist list should exhibit three essential features if it is to be adapted to the complexities of family violence: (a) a range of services should be integrated within the court; (b) there should be ongoing court supervision of offenders; and (c) specialist expertise of personnel should be fostered.

The insistence on integrated service provision recognises that, whilst the traditional response to family violence has been disjointed with separate and largely autonomous initiatives for victims, offenders and children, 'a strategy is needed for … services to work together with a common ethos.'[148] A team approach is required to address not only the violence itself but a range of criminogenic factors such as housing, physical and mental health and employment that contribute to offending or the risk of offending. Such an approach can be seen in the collaborative practices of the Mental Health Diversion List, the drug court and the Youth Justice Division of the Magistrates' Court. There are important features of these initiatives which would also deliver a more effective specialist family violence list, in particular:

- in-court presence of support workers and relevant agencies — including but perhaps not limited to support persons for both victim and defendant, an officer with responsibility for referring the defendant to appropriate services and child protection personnel.
- regular and consistent dialogue between the court, prosecution and defence and service providers.
- comprehensive case management and the formulation of an offender support plan.

145 David S Black, Steve Sussman and Jennifer B Unger, 'A Further Look at the Intergenerational Transmission of Violence' (2010) 25(6) *Journal of Interpersonal Violence*, 1022.

146 Internal Performance Review Report, above n 99, 24–5.

147 See Recommendation 32-1: 'State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions': Joint Report, above n 44, vol 2, 1505.

148 Donna Chung and Patrick O'Leary, 'Integrated Response to Perpetrators of Domestic Violence: Good Practice Directions' in Day et al, above n 87, 9.

Interagency coordination can provide judicial officers with the type of contextual information that is vital to a targeted and appropriate disposition of individual cases but if a collaborative process is to be successful it is critical that a formal operating structure is created and that participating agencies commit to 'a shared philosophy and understanding of violence … [and] a respectful and inclusive culture'.[149]

Another essential requirement for an effective specialist jurisdiction is ongoing supervision by the court. Central to the process of collaboration between different agencies is the formulation of a support plan for the offender, and an accountability mechanism, with the capacity to reward compliance and punish non-compliance, is likely to provide encouragement to the offender to fulfil the obligations of the plan. This might be achieved by the use of deferred sentencing and targeted bail orders[150] or legislative amendments to expand the range of sentencing options available.[151] The monitoring procedure should involve a series of court appearances involving direct interaction with a Magistrate and progress reports from relevant agencies but need not be a formal process. The ultimate decision on sentence should take into account the extent of compliance with the support plan and the outcome of any rehabilitative interventions.

Finally, an effective specialist jurisdiction relies on professional development for officers of the court and well-articulated career trajectories to encourage the retention of skilled personnel. The court must be staffed by specialist officers with detailed knowledge of the complexity of family violence offending, sensitivity to the needs of vulnerable witnesses and awareness of the range of therapeutic options available.

Development of a truly specialist jurisdiction requires primarily an investment in systems but the models on which a family violence jurisdiction can be built already exist within the Magistrates' Court. The prevention of male violence against women involves no less than a transformation of 'the relations, norms, and systems that sustain gender inequality and violence.'[152] It is clear therefore that the benefits of a specialised jurisdiction are not likely to be achieved in the short-term. Instead a long-term perspective is needed coupled with ongoing data collection, monitoring and evaluation and a preparedness to be guided by research into best practices.

Observation 12

Resource limitations are likely to confound attempts to create a separate family violence court however the operation of the family violence list could be improved by adopting the collaborative therapeutic models of, eg the Youth Justice Division.

149 Ibid 10.

150 This is the practice in the Youth Justice Division. See Michael Daly, 'Hobart Youth Justice Pilot' (Paper presented at AIJA Conference: Doing Justice for Young People - Issues and Challenges for Judicial Administration in Australia and New Zealand, Brisbane, August 23–25, 2012) 7.

151 The Council examines in detail the range of sentencing options available to courts in Tasmania in two forthcoming publications: *Phasing out Suspended Sentences: Background Paper*, and *Phasing out Suspended Sentences: Consultation Paper*.

152 Rachel Jewkes, Michael Flood and James Lang, 'From Work with Men and Boys to Changes of Social Norms and Reduction of Inequities in Gender Relations: A Conceptual Shift in Prevention of Violence against Women and Girls' (2015) 385 *The Lancet* 1580, 1580, citing C Sweetman, 'Introduction: Working with Men on Gender Equality' (2013) 21 *Gender and Development* 1; A Grieg, M Kimmel and J Lang J, United Nations Gender in Development Programme, *Men, Masculinities and Development: Broadening our Work towards Gender Equality* (2000).

Appendix A

GUIDING PRINCIPLES FOR SENTENCING CONTRAVENTIONS OF FAMILY VIOLENCE INTERVENTION ORDERS

Sentencing Range and Factors	Considerations for Each Sanction
Low • Nature of the breach is not serious and it has minimal impact on the victim • Single instance offending • Offender has no prior family violence convictions (or very few non-family violence convictions) •	**Adjourned Undertaking with/without Conviction (Low)** In considering whether it is appropriate to attach a program condition, the court should take into account whether there are adequate mechanisms in place to ensure compliance. If there are no adequate mechanisms in place to ensure compliance, the court should consider ongoing court supervision of the undertaking. The court should also consider attaching a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim.
	Fine (Low) The court should consider whether a fine will impact negatively on the victim, for example if imposing a fine may affect the offender's ability to pay child support payments or provide other financial support that the offender would normally provide to the household.
Medium • Nature of breach is moderate and it has a moderate impact on the victim • More than one instance of offending • Breach occurs in or near the victim's home • Breach is in the presence of children • Breach occurs only a short time after the making of the order or an earlier breach • Offender has some relevant prior convictions • Victim is particularly vulnerable	**Community-Based Order (Low and Medium)** When imposing a community-based order, a court could consider attaching: • a condition directed at the offender's conduct such as a men's behavioural change program; • the possibility of a community service order, fixing the number of hours (up to 20 hours per week) according to the gravity of the offence; • a supervision order, for those offenders who demonstrate a high risk of re-offending; or • a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim.
	Intensive Correction Order (Medium) When imposing an intensive correction order, a court could consider attaching a special condition directed at the offender's conduct such as a men's behavioural change program; programs that are not based within Corrections Victoria may be attached to the order.

<table>
<tr><th>Sentencing Range and Factors</th><th>Considerations for Each Sanction</th></tr>
<tr><td rowspan="2">High
Nature of breach is serious and it has a serious impact on the victim (not limited to physical violence)
Persistent or regular offending
Breach occurs only a short time after the making of the order or an earlier breach
Breach directly involves children
Offender has many relevant previous convictions
Victim's ongoing safety is compromised
Breach involves a home invasion
Victim is particularly vulnerable</td><td>Wholly (Medium) and Partially (High) Suspended Sentence
In deciding whether a suspended sentence is an appropriate sanction for a breach of an intervention order, the court should consider whether the offender requires some level of intervention to prevent further offending (such as a men's behavioural change or other rehabilitative or treatment program). If so, a suspended sentence would not be the appropriate sanction.
Further, if the court is of the view that the immediate safety of the victim is an issue, a suspended sentence is unlikely to be an appropriate sanction.</td></tr>
<tr><td>Immediate Custodial (High)
Given the potentially serious and long-lasting effects of both physical and non-physical breach behaviour, immediate terms of imprisonment should not be confined to breaches involving physical violence. Where any non-physically violent behaviour caused or was intended to cause a high degree of harm and anxiety, a court should consider an immediate custodial sentence.</td></tr>
</table>

Source: Sentencing Advisory Council (Vic), Guiding Principles for Sentencing Contravention of Family Violence Intervention Orders (2009) 7.

Appendix B

SPECIALISED FAMILY VIOLENCE COURTS IN AUSTRALIA

Features Locations	ACT Canberra	NSW Campbelltown; Wagga Wagga	Qld Rockhampton	SA Elizabeth; Port Adelaide; Adelaide	VIC Ballarat; Heidelberg	WA Joondalup; Fremantle; Rockingham; Midland; Armadale; Perth
Jurisdiction	Criminal matters pre-trial	Criminal matters pre-trial	Criminal matters	Criminal matters; protection orders	Criminal matters; protection orders; civil and statutory compensation; family law	Criminal matters (with some trials) and protection orders
Specialised personnel	Judicial officers; prosecutors; police	None specified	Prosecutors	Judicial officers	Judicial officers; prosecutors; registrars; legal aid lawyers for victims and defendants	Judicial officers; police prosecutors; defendant lawyers
Specialised training	Prosecutors and police	None specified	None specified	None specified	All	None specified
Special procedures	Dedicated list; case tracking; practice direction	Case tracking; practice direction	Dedicated list	Dedicated list	Dedicated list	Dedicated list; case management
Victim support services	Witness assistant; Domestic Violence Crisis Service	Victim advocate; referrals to services	Victim support workers; referrals to services	Support workers for victim, defendant and children; counselling for children and victims	Victim and defendant support workers; family violence outreach workers; referrals to services	Victim support worker; referrals services
Victim safety arrangements	None specified	'Safe' waiting rooms	Remodelling of facilities	None specified	Extra security officers; remote witness rooms	None specified
Offender programs	Yes	Yes	Yes	Yes	Yes	Yes

Source: ALRC/NSWLRC, Family Violence — A National Legal Response, ALRC Final Report No 114, NSWLRC Final Report No 128 (2010) vol 2, 1496.

Appendix C

RECOMMENDATIONS FOR SPECIALISED FAMILY VIOLENCE COURTS

Recommendation 32–1 State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

Recommendation 32–2 State and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.

Recommendation 32–3 State and territory governments should ensure that specialised family violence courts have, as a minimum:

(a) specialised judicial officers and prosecutors;

(b) regular training on family violence issues for judicial officers, prosecutors, lawyers and registrars;

(c) victim support, including legal and non-legal services; and

(d) arrangements for victim safety.

Recommendation 32–4 State and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:

(a) identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;

(b) training judicial officers in relation to family violence;

(c) providing legal services for victims and defendants;

(d) providing victim support on family violence list days; and

(e) ensuring that facilities and practices secure victim safety at court.

Source: ALRC/NSWLRC, Family Violence — A National Legal Response, ALRC Final Report No 114, NSWLRC Final Report No 128 (2010) 75–6

References

ABS, 'Experience of violence since the age of 15, relationship to perpetrator', table 4, Personal Safety Survey, cat. no. 4906.0, (ABS, Canberra, 2012).

Achilles, M and H Zehr, 'Restorative Justice for Crime Victims: The Promise and the Challenge in G Bazemore and M Schiff (eds) *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson Publishing Co, Cincinnati, 2001).

Andrews, D A and J Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16(1) *Psychology, Public Policy, and Law* 39.

Andrews, D A and J Bonta, *The Psychology of Criminal Conduct* (Taylor and Francis, 2014).

Andrews, D A, J Bonta and R Hoge, 'Classification for Effective Rehabilitation' (1990) 17 *Criminal Justice and Behavior* 19.

Australian Law Reform Commission, *Domestic Violence*, Report No 30 (1986)

Australian Law Reform Commission/NSW Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Final Report No 114, NSWLRC Final Report No 128 (2010).

Berman, Greg and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23(2) *Law & Policy*.

Black, David, Steve Sussman and Jennifer Unger, 'A Further Look at the Intergenerational Transmission of Violence' (2010) 25(6) *Journal of Interpersonal Violence*, 1022.

Boxall, Hayley, Jason Payne and Lisa Rosevear, 'Prior Offending among Family Violence Perpetrators: A Tasmanian Sample' (2015) *Trends and Issues in Crime and Criminal Justice* No 493.

Braff, R, *Elephant in the Room: Responding to Alcohol Misuse and Domestic Violence* (Australian Domestic Violence Clearinghouse, 2012) <http://www.adfvc.unsw.edu.au/PDF%20files/IssuesPaper_24.pdf>.

Birdsey, E and N Smith, 'The Domestic Violence Intervention Court Model: A Follow-up Study' (2012) *Contemporary Issues in Crime and Justice* Number 155. NSW Bureau of Crime Statistics and Research.

Campbell, Rosa, *General Intimate Partner Violence Statistics* (Australian Domestic & Family Violence Clearinghouse, 2011).

Centre for Forensic Behavioural Science at Swinburne University and the Victorian Institute of Forensic Mental Health (Forensicare) (Submission to Victorian Royal Commission into Family Violence, May 2015, 5).

Chung, D and L Zannettino, 'Feminists Researching Domestic Violence Perpetrator Programs: Improving Women's and Children's Safety or Misplaced Effort?' (2006) 18 *Women Against Violence* 37.

Cissner, A, M Labriola and M Rempel, *Testing the Effects of New York's Domestic Violence Courts: A Statewide Impact Evaluation* (Centre for Court Innovation, 2013).

Clare, Joe and Geoff Fisher, Sentencing Advisory Council (Vic), *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014).

Coulter, M and C VandeWeerd, 'Reducing Domestic Violence and Other Criminal Recidivism: Effectiveness of a Multilevel Batterers Intervention Program' (2009) 24(2) *Violence and Victims* 139.

Cussen, Tracy, and Mathew Lyneham, *ACT Family Violence Intervention Program Review,* Technical and Background Paper 52 (Australian Institute of Criminology, 2012).

Daly, Michael 'Hobart Youth Justice Pilot' (Paper presented at AIJA Conference: Doing Justice for Young People - Issues and Challenges for Judicial Administration in Australia and New Zealand, Brisbane, August 23–25, 2012).

Day, Andrew et al, 'Integrated Responses to Domestic Violence: Legally Mandated Intervention Programs for Male Perpetrators' (2010) *Trends & Issues* No 404.

Day, Andrew et al, *Domestic Violence — Working With Men: Research, Practice Experiences and Integrated Responses* (Federation Press, 2009).

Day, Andrew et al, 'Programs for Men who Perpetrate Domestic Violence: An Examination of the Issues Underlying the Effectiveness of Intervention Programs' (2009) 24(3) *Journal of Family Violence*, 203.

Day, A and K Howells, 'Psychological Treatments for Rehabilitating Offenders: Evidence-based Practice Comes of Age' (2002) 37 *Australian Psychologist* 39.

Department of Justice, *Safe at Home Internal Review Report* (2014).

Department of Justice, *Safe at Home: An Integrated Response to Family Violence*, Review (Phase 2) — Draft Terms of Reference (2008).

Department of Justice (Vic), *Victorian Family Violence Database Volume 5: Eleven Year Trend Analysis 1999–2010* (2012).

Department of Police and Emergency Management, *Annual Report 2013-14* (October 2014).

Douglas, Heather, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439.

Edleson, J, *Promising Practices with Men who Batter: Report to King County Domestic Violence Council* (2008).

Feazell, C, R Mayers and J Deschner, 'Services for Men who Batter: Implications for Programs and Policies' (1984) 33 *Family Relations*.

Feder, L, D B Wilson and S Austin, 'Court Mandated Interventions for Individuals Convicted of Domestic Violence Offences' (2008) 4 (12) *Campbell Systematic Reviews.*

Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014).

Freiberg, Arie, 'Innovations in the Court System' (Paper presented at Australian Institute of Criminology International Conference, Crime in Australia: International Connections, Melbourne, 29–30 November 2004).

Freiberg, Arie, *Pathways to Justice: Sentencing Review 2002* (Department of Justice, 2002).

Golberg, S, *Judging for the 21st Century: A Problem–solving Approach* (Canada National Judicial Institute, 2005).

Gondolf, E, *Batterer Intervention Systems: Issues, Outcomes and Recommendations* (Sage, 2002).

Gondolf, E, 'Mandatory Court Review & Batterer Program Compliance', (2000) 15(4) *Journal of Interpersonal Violence*, 428.

Gray, Anthony and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* 37.

Grieg A, M Kimmel and J Lang, United Nations Gender in Development Programme, *Men, Masculinities and Development: Broadening our Work towards Gender Equality* (2000).

Hoel, Adrian, and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Victorian Sentencing Advisory Council, 2008).

Holder, Robyn, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30.

Hopcroft, Robyn, 'Report of the Tasmanian Review on Domestic Violence' (Occasional Paper No 2, Department for Community Welfare (Tas), 1984).

Hoyle, Carolyn and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) *British Journal of Criminology* 14.

Jewell, L M and J S Wormith, 'Variables Associated with Attrition from Domestic Violence Treatment Programs Targeting Male Batterers: A Meta-Analysis' (2010) 37(10) *Criminal Justice and Behavior* 1086.

Jewkes, Rachel, Michael Flood and James Lang, 'From Work with Men and Boys to Changes of Social Norms and Reduction of Inequities in Gender Relations: A Conceptual Shift in Prevention of Violence against Women and Girls' (2015) 385 *The Lancet* 1580.

Justo, Donna et al, 'What's in it for the Women?' in Andrew Day et al, *Domestic Violence — Working With Men: Research, Practice Experiences and Integrated Responses* (Federation Press, 2009).

Killick, David, 'Sex Offenders in Libs' Sights', *The Sunday Tasmanian*, 17 February 2013.

King, Michael et al, *Non-adversarial Justice* (Federation Press, 2nd ed, 2014).

King, Michael, and Becky Batagol, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 *International Journal of Law and Psychiatry.*

Knaggs, T, Ministry of Justice, New Zealand, *The Waitakere and Manukau Family Violence Courts: An Evaluation and Summary*, Research Report, (2008).

Kuhl, Danielle, David Warner and Tara Warner, 'Intimate Partner Violence Risk among Victims of Youth Violence: Are Early Unions Bad, Beneficial, or Benign?' *Criminology*. doi: 10.1111/1745-9125.12075.

Laslett, A et al, AER Centre for Alcohol Policy Research, Turning Point Alcohol and Drug Centre, Eastern Health, *The Range and Magnitude of Alcohol's Harm to Others* (2010).

Magistrates' Court of Tasmania, Criminal and General Division, Family Violence General Information <http://www.magistratescourt.tas.gov.au/divisions/family_violence>.

Magistrates' Court of Victoria, *Counselling Orders for Men — Men's Guide* (2015) <https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs/counselling-orders/counselling-orders-men-mens-guide>.

Margolin, Gayla, and Elana Gordis, 'The Effects of Family and Community Violence on Children' (2000) 51 *Annual Review of Psychology* 445.

Mason, Ron, and Roberta Julian, Tasmanian Institute of Law Enforcement Studies, *Analysis of the Tasmania Police Risk Assessment Screening Tool (RAST)*, Final Report (2009).

Mazur, Robyn and Liberty Aldrich, 'What Makes a Domestic Violence Court Work? Lessons from New York' (2003) 42(2) *Judges' Journal*.

McCollum, E E and S M Stith, 'Couples Treatment for Interpersonal Violence: A Review of Outcome Research Literature and Current Clinical Practices' (2008) 23(2) *Violence and Victims* 187.

Meyer, S, 'Responding to Intimate Partner Violence Victimisation: Effective Options for Help Seeking' (2010) *Trends and Issues in Crime and Criminal Justice*, No 389, Australian Institute of Criminology.

Miller, M, E Drake and M Nafziger, Washington State Institute for Public Policy, What *Works to Reduce Recidivism by Domestic Violence Offenders?* (2013).

The National Council to Reduce Violence against Women and Children, *Domestic Violence Laws in Australia* (2009).

Tasmanian Liberals, *Minimum Mandatory Sentencing for Serious Sexual Offences against Children* <https://www.tas.liberal.org.au/sites/default/files/policy/Mandatory%20minimum%20sentences%20for%20offences%20against%20children.pdf>.

Paymar, M and G Barnes, Battered Women's Justice Project, *Countering Confusion about the Duluth Model* (2007).

Phelan, Andrew, 'Solving Human Problems or Deciding Cases? (Paper presented at Promising Practices in Justice Responses to Victims and Witnesses: National Conference, Canberra, ACT, 2003).

Plotnikoff, J and R Woolfson (Lexicon Limited), Department for Constitutional Affairs (UK), *Review of the Effectiveness of Specialist Courts in Other Jurisdictions* (2005).

Productivity Commission, *Report on Government Services* (2015).

Pyke, M, South Australian Attorney-General's Department, *South Australian Domestic Violence Laws: Discussion and Options for Reform*, Discussion Paper (2007).

Ritchie, Donald, Victorian Sentencing Council, *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence* (2011).

Rodwell, L and N Smith, NSW Bureau of Crime Statistics and Research, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008.

Safe at Home Steering Committee, *Annual Report 2012–13*.

Sale, Nicole, *The Tasmanian FVOIP: An Evaluation* (Honours Thesis, University of Tasmania, 2014).

Salter, Michael, Australian Domestic and Family Violence Clearinghouse, *Managing Recidivism amongst High Risk Violent Men*, Issues Paper 23 (2012).

Schneller, E, *Family Violence Courts*, NSW Parliamentary Research Service e-brief 12/2012 (2012).

Scott, Katreena et al 'Intervening to Prevent Repeat Offending among Moderate-to-High Risk Domestic Violence Offenders: A Second-Responder Program for Men' (2015) 59(3) *International Journal of Offender Therapy and Comparative Criminology* 273.

Sentencing Advisory Council (Tas), *Sex Offence Sentencing: Final Report* (forthcoming).

Sentencing Advisory Council (Vic), *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014).

Sentencing Advisory Council (Vic), *Guiding Principles for Sentencing Contraventions of Family Violence Orders* (2009).

Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009).

Sentencing Advisory Council (Vic), *Suspended Sentences*, Final Report — Part 2 (2008).

Serin, R C and D L Preston, 'Managing and Treating Violent Offenders' in J B Ashford, B D Sales and W Reid (eds), *Treating Adult and Juvenile Offenders with Special Needs* (*American Psychological Association*, 2001).

Special Taskforce on Domestic and Family Violence (Qld), '*Not Now, Not Ever' — Putting an End to Domestic and Family Violence in Queensland'* Final Report (2015).

Stewart, Julie, Australian Domestic & Violence Clearinghouse, *Specialist Domestic/Family Violence Courts within the Australian Context,* Issues Paper 10 (2005).

Stewart, Julie, Australian Domestic & Family Violence Clearinghouse, *Specialist Domestic Violence Courts: What we Know — How Far Have Australian Jurisdictions Progressed,* Topic Paper 2011 Reissue, (2011).

Stubbs, J, Australian Domestic and Family Violence Clearinghouse, *Restorative Justice, Domestic Violence and Family Violence*, Issues Paper 9 (2004).

Success Works, *Tasmania's Court Mandated Drug Diversion Program*, Evaluation Report (2008).

Sweetman, C, 'Introduction: Working with Men on Gender Equality' (2013) 21 *Gender and Development*.

Tutty, Leslie, et al, Resolve, *The Justice Response to Domestic Violence: A Literature Review* (2008).

Urbis, Review of *the Family Violence Act 2004 (Tas)* (2008).

Ursel, J and C Hagyard, 'The Winnipeg Family Violence Court' in Jane Ursel, Leslie M Tutty and Janice leMaistre (eds), *What's Law Got to Do With It?* The Law, Specialized Courts and Domestic Violence in Canada (Cormorant Books, 2008).

Van de Veen, S L, 'Therapeutic Jurisprudence Sentencing Principles in a Canadian Context' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, Western Australia, 7-9 June 2006).

VicHealth, Australians' Attitudes to Violence against Women. Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS) (2014).

Victoria Police*, Code of Practice for Investigation of Family Violence (2014).*

Wathen, C N and H I MacMillan, 'Children's Exposure to Intimate Partner Violence: Impacts and Interventions' (2013) 18(8) *Paediatric Child Health* 419.

Weatherburn, D and L Trimboli, NSW Bureau of Crime Statistics and Research, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (2008) 112 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice.*

Department of Justice (Tas), *Breaking the Cycle — Tasmanian Corrections Plan (2010-2020): Best Practice in Offender Rehabilitation* <http://www.justice.tas.gov.au/__data/assets/pdf_file/0004/129523/Background_Paper_-_Best_Practice_in_Offender_Rehabilitation.pdf >.

Winick, Bruce 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri-Kansas City Law Review* 33.

Winick, B and D Wexler, 'Introduction' in B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

Zimring, F, 'Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform' in A Duff and D Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994).