



Magistrates' Court of Victoria

SENTENCING IN FAMILY VIOLENCE CASES

**MAGISTRATE KATE HAWKINS
DEPUTY CHIEF MAGISTRATE FELICITY BROUGHTON
MAGISTRATES' COURT OF VICTORIA**

**'CURRENT ISSUES IN SENTENCING'
NATIONAL JUDICIAL COLLEGE OF AUSTRALIA
CONFERENCE**

6 – 7 FEBRUARY 2016

1. Introduction

Family violence is the leading cause of death and disability for Australian women aged 15 to 44.¹ Every day Magistrates' Courts and Children's Courts across Victoria witness the devastating impact family violence has on the safety and well-being of women and children in our community.² Women and children affected by family violence are a defining feature of all jurisdictions within the Magistrates' Court of Victoria (MCV) and the Children's Court of Victoria (CCV).³ In the past decade, the overwhelming increase in the number of family violence matters has perhaps more than any other single factor, shaped the MCV's workload.⁴ The number of finalised family violence intervention order applications nearly doubled for the MCV from 16,889 applications in 2000/01 to 35,135 applications in 2013/14.⁵ The total number of interim family violence intervention orders heard also increased from 2,042 orders in 2000/01 to 15,073 in 2013/14.⁶ The number of contraventions of intervention orders⁷ being heard by the MCV has increased at a pronounced rate, more than tripling since 2004/05 to 6,331 matters in 2013/14.⁸

In response to the growing demand of applications coming through the Court, most Magistrates' Court venues have dedicated family violence intervention order lists and have made changes to its workforce, culture and staffing structures to meet the increase in the number of family violence related matters coming before the Courts.⁹ All headquarter courts have family violence intervention order lists operating across multiple days a week. Data capturing the average list sizes for major metropolitan court venues show average list sizes of 55 intervention order matters a day. On occasion, there have been lists in excess of 80 intervention order matters.¹⁰

In response to the significant growth in the number of family violence related matters coming before the MCV, the Court has been pivotal in developing integrated, specialist family violence court reforms, which aim to enhance the safety of women and children, improve access to and the quality of services for women and

¹ Katherine Farrell, *'Let the sentence fit the crime'* (2015) 89 (10) *Law Institute Journal* 32, 32. ("LIJ 89 (10)")

² Victoria, Royal Commission into Family Violence, *Submission by the Magistrates' Court of Victoria and Children's Court of Victoria* (2015), Foreword (i). ("MCV and CCV's Submission to the Royal Commission into Family Violence")

³ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive summary (iii).

⁴ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive summary (iii).

⁵ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 20.

⁶ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 20.

⁷ Charges for contravention of an intervention order are a specific type of family violence related offending. This does not capture all of the family violence criminal offending, such as other types of charges including assaults and property damage.

⁸ MCV and CCV's submission to the Royal Commission into Family Violence, p. 21. Note that other than charges for contraventions of intervention orders, the court cannot collect accurate data on criminal offences which take place in a family violence context. The most accurate data that the Court has is from the Family Violence Court Division venues. The number of criminal cases finalised across the FVCD venues remained steady between 2004/05 and 2010/11. Between 2010/11 and 2013/14, there was a steep increase in the number of criminal cases finalised in the FVCD venues (82%). See MCV and CCV's Submission to the Royal Commission into Family Violence, p.21.

⁹ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 7.

¹⁰ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 2.

strengthen the accountability of perpetrators of family violence.¹¹ These improvements are expected to increase women's confidence in the system and make it easier for them to report family violence.¹² In recent years the courts have made great progress in improving the way in which they respond to those affected by family violence.¹³ The most significant and effective of these reforms is the Family Violence Court Division.

2. Specialist Family Violence Courts in Victoria

In June 2005, as part of the Victorian Government's reforms to the family violence service system, the Family Violence Court Division (FVCD)¹⁴ and the Specialist Family Violence Service (SFVS)¹⁵ were developed in the MCV to address the fragmented court-based response to family violence. These programs were implemented in targeted locations and involved comprehensive expansion of necessary components of the court system to deliver an integrated and specialist court response to family violence.¹⁶ Aspects of the Division model have been rolled out at selected Court sites across Victoria.

Aims of the FVCD

The aims of the FVCD are to:¹⁷

- Make access to the Court easier, including the process of applying for a family violence intervention order.
- Promote the safety of women and children who have experienced family violence.
- Increase the accountability of persons who have used violence against family members and encourage them to change their behaviour through the provision of:
 - court-directed counselling to male respondents against whom an intervention order is made in response to their violence toward their partner/former partner; and
 - support programs and services to affected family members (AFMs) who are the partner/former partner of the respondent and any child of the family affected by the respondent's violence.
- Increase the protection of children exposed to family violence.

¹¹ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive Summary (iii).

¹² MCV and CCV's Submission to the Royal Commission into Family Violence, p. 8.

¹³ MCV and CCV's Submission to the Royal Commission into Family Violence, Foreword (i).

¹⁴ At Ballarat and Heidelberg Magistrates' Courts.

¹⁵ At Melbourne, Frankston, Sunshine and Werribee Magistrates' Courts.

¹⁶ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 8.

¹⁷ MCV and CCV's Submission to the Royal Commission into Family Violence, pp. 10 - 11.

Key Features of the FVCD

The FVCD provides specialist magistrates, dedicated family violence court registrars, court based applicant support workers and respondent support workers, family violence outreach workers, comprehensive family violence legal services, dedicated police prosecutors and additional safety measures at the two locations where the Division operates. The FVCD model enables the Division's magistrate to hear related matters simultaneous to dealing with the family violence intervention application. The model also empowers the magistrate to direct perpetrators to attend counselling programs. Together, these measures serve to enhance the focus on acknowledging and responding to the experiences and needs of vulnerable woman and children.¹⁸

The FVCD has been described as “the closest example of a ‘one stop shop’ model for victims of family violence in Australia”. It provides a holistic, therapeutically based model to ensure the best possible outcomes for those affected by family violence, and incorporates all the features of a best practice family violence court response.¹⁹

Key features of the FVCD include:²⁰

- Specially-appointed and gazetted magistrates (based on their knowledge and experience in responding to family violence matters).
- Dedicated family violence registrars, applicant support workers and respondent support workers, family violence outreach workers, additional legal services from Victoria Legal Aid and Community Legal Centres, dedicated police prosecutors and additional security guards who have received specialist family violence training.
- Magistrates hearing other related matters at the same time as hearing family violence intervention order matters, including summary criminal proceedings (such as breaches of family violence intervention orders), committal proceedings for indictable charges, family law and child support matters (including Parenting Orders), VOCAT matters involving family violence, civil personal injury claims, and compensation and restitution cases.
- Providing alternative arrangements for people to give evidence, such as via video link from another location, through written affidavits or by using screens to ensure the respondent is not in the AFMs line of sight.
- Increased focus on recognising and responding to the needs of AFMs from culturally and linguistically diverse (CALD) communities, Koori AFMs, and AFMs with a disability, as well as children affected by family violence.
- In practice, the FVCD provides support, information on court processes and referral to legal services for both AFMs and respondents. The FVCD also

¹⁸ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive Summary (iii).

¹⁹ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive Summary (iv).

²⁰ MCV and CCV's submission to the Royal Commission into Family Violence, p. 10.

provides referrals to address longer term needs such as housing, community care, Centrelink benefits, and children's support programs.

Promoting safety for the victim/family

In order to improve the safety of, and provide support for victims it is paramount they have access to appropriate services and feel physically safe while attending court.

Specialist Applicant Family Violence Support Workers

In this regard, Specialist Family Violence Support Workers play an important role. The Applicant Support Workers (ASWs) are critical to enhancing the safety of women and children (through safety planning and information provision) and ensuring that appropriate information and support is provided to applicants to assist them to navigate their way around the Court and understand court processes.²¹

Video conferencing pilot project

The MCV has commenced a pilot with the Womens' Legal Service and a specialist family violence service whereby high risk AFMs can attend the Court from a remote location via videolink. This avoids potential contact with their perpetrator at Court during hearings, improving safety and enhancing their ability to participate in the proceedings in a supported environment. This project has the potential to flexibly allow access to Courts from undisclosed locations and improve access to justice for women in regional and remote locations. It aims to decrease the number of people physically attending court at any one time, improving general safety.²²

Holding Perpetrators of Family Violence Accountable

It is also important that the Court provides holistic, therapeutically based support services which hold perpetrators to account, while addressing the range of underlying issues including mental illness, drug and alcohol addiction, homelessness, unemployment and social and economic disadvantage.²³ Access to case management support services helps address co-existing factors which may impact on the respondents' ability to comply with orders and the likelihood of further offending.²⁴

Specialist Respondent Family Violence Support Workers

In the same way as ASWs, the RSWs play an important role at the Courts. The RSWs provide respondents with information and support to assist them in navigating the court process. The emotional support offered to respondents is also critical for containing respondents who are distressed or angered by the court process and assists respondents to understand the terms of any orders imposed. In terms of accountability, the RSWs are in a position to send out strong messages about the

²¹ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 29.

²² MCV and CCV's Submission to the Royal Commission into Family Violence p. 15.

²³ MCV and CCV's Submission to the Royal Commission into Family Violence, Executive Summary (iv).

²⁴ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 36.

unacceptable nature of using violence and respondents needing to take responsibility and accountability for their behaviour.²⁵

Court Support Programs

The MCV has a number of court support programs which provide support and access to treatment for underlying issues which contribute to offending. Programs such as the Court Integrated Services Program (CISP), the Assessment and Referral Court List (ARC list), the Drug Court and the Koori Courts are increasingly dealing with family violence related offending and are effective mechanisms in addressing the needs of perpetrators, which if left untreated can leave victims at greater risk.²⁶

Accountability of the offender to the court is the key component of these programs. Accountability includes weekly meetings between the court case manager and the accused, monitoring of attendance at appointments with treatment providers and regular reporting to the magistrate. Accused who are participating in programs are usually required to appear before a magistrate on a regular basis to review their program compliance and any other emerging issues. If case managers become aware of further offending, breaches of court orders or heightened risks of offending behaviour then appropriate actions are taken such as notifying the police informant or requesting police assistance.²⁷

Court support programs including CISP, ARC List and Drug Court have been evaluated by independent consultants in recent years. Each of the programs has demonstrated effectiveness by reducing offending during and post participation and delivers a positive cost benefit on investment. In addition, the programs have been shown to improve a range of health and welfare indicators.²⁸ In addition, programs that are attached to a swift, certain response for non-compliance, as well as ongoing contact with the same judge, are noted as particularly effective.²⁹

Family Violence Court Intervention Program - Men's Behaviour Change Program

Magistrates sitting at certain specified Court locations can order eligible respondents to attend a court-directed *Men's Behaviour Change Program*³⁰ (MBCP) to increase their accountability and promote the safety of women and children.³¹

²⁵ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 29. The CIJ Report sets out that the face to face contact with respondent workers at court can increase the likelihood that perpetrators will take responsibility for their behaviour and calm them down sufficiently to engage effectively with the terms of any orders imposed: see CIJ Report pp. 56-57. However, in addition to court support workers, access to a lawyer/legal representation is an important factor in the process. Interaction with a lawyer is another opportunity for the respondent to hear that his behaviour will not be tolerated by the justice system; that he must comply with any intervention order made; and that he should consider referral to a relevant service agency for any associated problems he may have. Legal advice also means that perpetrators are more likely to negotiate terms of an order with which they are able to comply: see CIJ Report, p.58.

²⁶ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 36.

²⁷ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 36.

²⁸ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 36.

²⁹ CIJ Report, p. 34.

³⁰ Programs that provide education and rehabilitation for perpetrators of family violence.

³¹ MCV and CCV's Submission to the Royal Commission into Family Violence, pp. 10-12.

A key feature of the MBCP is that the service provider maintains contact with the man's (ex) partner/s where safe and possible to do so. This contact fulfils a number of functions, including ongoing assessment of risk to the AFM and the opportunity to validate men's reports in group discussions.³²

Timely access to MBCPs is central to the courts holding perpetrators to account for their behaviour. Courts are of the view that failure to engage men beyond the making of an intervention order is likely to increase the risk to the safety and wellbeing of women and children.³³

The Court can also order an offender to attend a MBCP under a Community Corrections Order (CCO) upon sentence.

3. The Legal Framework: Family Violence Intervention Orders and Contravention Offences

Since 1987, a victim of family violence in Victoria has been able to apply to the Magistrates' Court (or the Children's Court) for an FVIO.³⁴

In 2008, the *Family Violence Protection Act 2008* was introduced, broadening the definition of family violence and the grounds on which an FVIO could be obtained. The *FVP Act* also introduced police-issued family violence safety notices (FVSN) which are issued by police without application to the court,³⁵ enabling police to provide short-term protection for a victim until an FVIO is obtained.³⁶ A FVSN is taken to be an application for an FVIO³⁷ and lasts until the FVIO application is adjourned or determined by the court at the first mention date³⁸ which must be within five working days of the FVSN being served.³⁹ Accordingly, two types of protection measures are available to victims of family violence under the *FVP Act*:

- An interim⁴⁰ or final⁴¹ family violence intervention order made by either the Magistrates' Court or the Children's Court; and
- a family violence safety notice, which is a temporary measure issued by police until an FVIO application is decided by the court.

³² MCV and CCV's Submission to the Royal Commission into Family Violence, pp. 10-12.

³³ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 37.

³⁴ *Crimes (Family Violence) Act 1987*; Sentencing Advisory Council 'Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report' (2015), p.1 [1.1]. ("SAC Report")

³⁵ *Family Violence Protection Act 2008*, ss. 24 and 26.

³⁶ SAC Report, p.1, [1.2].

³⁷ *Family Violence Protection Act 2008*, s. 31.

³⁸ *Family Violence Protection Act 2008*, s. 30.

³⁹ *Family Violence Protection Act 2008*, s. 31(3).

⁴⁰ Pursuant to s.53 of the *Family Violence Protection Act 2008*, the court may make an interim FVIO where it is satisfied, on the balance of probabilities, that protection is necessary pending a final decision about the FVIO application.

⁴¹ Pursuant to s.74 of the *Family Violence Protection Act 2008*, the court may make a final FVIO where it is satisfied, on the balance of probabilities, that the respondent has committed family violence against a family member and is likely to continue to do so or do so again.

The contravention of an FVIO is a criminal offence with a maximum penalty of Level 7 imprisonment (two years) and/or a Level 7 fine (240 penalty units).⁴²

In addition to the general contravention offences, three indictable aggravated contravention offences, which commenced on 17 April 2013,⁴³ target repeated, persistent, or particularly harmful contraventions of FVIOs and FVSNs.⁴⁴ The aggravated forms of contravention are:

- contravention of notice intending to cause harm or fear for safety;⁴⁵
- contravention of order intending to cause harm or fear for safety;⁴⁶ and
- persistent contravention of notices and orders.⁴⁷

The maximum penalty for contravention of an order or a notice intending to cause harm or fear for safety or for the persistent contravention of notices and orders is Level 6 imprisonment (five years) and/or a Level 6 fine (600 penalty units).⁴⁸ However, all of the aggravated offences are indictable offences triable summarily. The Director of Public Prosecutions' policy on breaches of FVIOs stipulates that only the most serious of the new aggravated offences will be prosecuted in the higher courts, and that the majority of the breach offences will be tried summarily by police prosecutors.⁴⁹

4. Sentencing Principles

The sentencing of adults in Victoria is governed by the provisions of the *Sentencing Act 1991* (Vic) and sentencing principles developed at common law. The *FVP Act* does not set out sentencing principles specific to FVIO or FVSN contraventions.⁵⁰ The full range of sentencing dispositions under the *Sentencing Act 1991*, up to and

⁴² *Family Violence Protection Act 2008*, ss. 37 and 123(2). Note that as at 1 July 2015, 240 penalty units equate to approx. \$36,400.

⁴³ *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012*. The provisions apply to contraventions alleged to have been committed on or after 17 April 2013, regardless of when the FVIO or FVSN was issued: s.29.

⁴⁴ SAC Report, p. 17, [3.1].

⁴⁵ *Family Violence Protection Act 2008*, s.37A.

⁴⁶ *Family Violence Protection Act 2008*, s.123A.

⁴⁷ *Family Violence Protection Act 2008*, s.125A.

⁴⁸ *Family Violence Protection Act 2008* (Vic) ss. 37A, 123A, 125A. As at 1 July 2015, 600 penalty units equate to \$91,002.

⁴⁹ Director of Public Prosecutions Victoria, 'Director's Policy on Breaches of Family Violence Intervention Orders – New Indictable Offences' (DPP Prosecution Policies, 2015) pp.10-11, [9.2]. The SAC Report sets out that the overwhelming majority (approximately 96%) of proven FVIO contravention charges are sentenced by the Magistrates Court and only 10 cases were sentenced in the County or Supreme Court between the commencement of the aggravated contravention offences on 17 April 2013 and the end of the reference period for the report on 30 June 2015. In each of these cases, the aggravated contravention offence was sentenced alongside other offences. In most of the cases examined, the aggravated contravention offence occurred in the context of an episode of violent offending against the protected person and in none of the cases was the aggravated contravention offence the principal proven offence: see SAC Report, p. 4, [1.17]; p. 34, [4.56] – [4.57]. It is also to be noted that the superior courts also deal with family violence offences although family violence is not specified on the record as the charges may simply concern charges of various levels of assault or grievous bodily harm: see CIJ Report, p.19.

⁵⁰ SAC Report, p.25, [4.2].

including the maximum penalty provided in the *FVP Act*, is available for the general contravention offences and the aggravated offences.⁵¹

The Court of Appeal in Victoria has recently provided greater guidance on sentencing for offences committed in a family violence context.⁵² As is set out in Ms Katherine Farrell's article '*Let the sentence fit the crime*', published in the *Law Institute Journal* in October 2015⁵³, the key principle for sentencing offenders for crimes committed within a family violence context is general deterrence.⁵⁴ In *DPP v Meyers* [2014] VSCA 314 (*Meyers*), the Court of Appeal stated that general deterrence is a sentencing principle of great importance in family violence cases and "those who might, in a mood of anger or frustration or bitterness, contemplate [...] violent entry into the home of a former spouse or former partner must realise that, if they do so, they will almost certainly be spending a long time in prison".⁵⁵

Other important sentencing principles are:⁵⁶

- the sentence must strongly denounce and punish family violence;⁵⁷
- offending committed in breach of existing FVIOs is an aggravating factor⁵⁸ that may require considerable weight to be accorded to specific deterrence;⁵⁹
- offending committed in a domestic environment where the victim is entitled to feel safe, is an aggravating feature;⁶⁰ and
- in accordance with *Hogarth v The Queen* (2012) 37 VR 658 (*Hogarth*), sentences imposed for "confrontational aggravated burglary" have generally been too low, and need to be increased to properly reflect the objective gravity of such offending – this applies to all serious aggravated burglaries.⁶¹ Aggravated burglaries which include confrontation and violence, or threats of violence, should be viewed very seriously.⁶²

In *El Tahir v R* [2011] VSCA 46, Mandie JA (with whom Buchanan JA and Redlich JA agreed) said: "In my opinion, the sentence was not manifestly excessive and, indeed, properly reflected the gravity of the offence after taking into account all mitigatory factors including the plea of guilty. The Court rightly treated with the utmost seriousness the appellant's knife attack on his defenceless wife in the

⁵¹ SAC Report, p.27, [4.12].

⁵² LJ 89 (10), p. 32.

⁵³ Much of the commentary on the recent case law concerning sentencing principles applicable to offences committed within a family violence context is directly drawn from Ms Katherine Farrell's succinct summary of recent Court of Appeal cases outlined in her article '*Let the sentence fit the crime*' published in the *Law Institute Journal* in October 2015. We thank Ms Farrell for this contribution.

⁵⁴ LJ 89 (10), p. 35; *Paisins* [57]; *Marrah* [25]; *Filiz* [21]; *Meyers* [46]; *Portelli* [30].

⁵⁵ *Meyers*, [45] – [46]; LJ 89 (10), p. 35.

⁵⁶ LJ 89 (10), p. 35.

⁵⁷ *Marrah* [25]; *Gale v The Queen* [2014] VSCA 168 [40]; *Meyers* [46].

⁵⁸ *Marrah* [25]; *Filiz* [21].

⁵⁹ *Gale* [40].

⁶⁰ *Marrah* [20]; *Portelli* [29] – [30].

⁶¹ *Anderson v The Queen* [2014] VSCA 255 [31] – [36]; *Gale* [40]; *Filiz* [15]; *Meyers* [6], [36] – [44].

⁶² *Meyers*, [6].

presence of their children and in circumstances, which included the invasion of her home in breach of a court order.”

In *Pasinis v The Queen* [2014] VSCA 97 a case that concerned two charges of intentionally causing serious injury, the VSCA dismissed the appeal against the total effective sentence of eight years with a non-parole period of six years holding that the sentences “properly reflected the seriousness of the offences, the aggravating features of the offences and their devastating effect on [the victim] in the context of a violent, domestic relationship”.⁶³ The VSCA emphasised the importance of general deterrence in sentencing for family violence offences. The Court of Appeal stated that “The key to protection lies in deterring the violent conduct by sending an unequivocal message to would be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm”.⁶⁴ The Court further stated that when sentencing for multiple offences, the preferred method is to impose appropriate individual sentences and then moderate orders for cumulation in order to account for totality.

In *DPP v Johnson* [2011] VSCA 288 the VSCA resented Mr Johnson on the grounds that the total effective sentence imposed by the County Court was ‘manifestly inadequate’. Neave JA stated that “...offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them. As was recognised during parliamentary debates on the *Family Violence Protection Bill 2008*, intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. The Victorian Law Reform Commission, in its report which ‘underpin[ed]’ many of the changes in the Bill, observed: ‘The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – ‘not worth the paper they are written on’ – by victims and perpetrators alike.’ ”⁶⁵

In *Maher v The Queen* [2011] VSCA 136, Ashely JA further held that where a person is sentenced for both contravention of an intervention order, along with other distinct offences related to that contravention, it is important that the sentence for the contravention offence has a ‘real impact’ upon the total sentence imposed.⁶⁶

In *Wati Marrah v The Queen* [2014] VSCA 119 the VSCA held that the fact that the applicant was at the time of the offending subject to an FVIO was an aggravating factor and again emphasised the need of general deterrence and stated that “The sentence must convey the unmistakable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship”.⁶⁷

⁶³ *Pasinis*, [2].

⁶⁴ *Pasinis*, [57].

⁶⁵ *Johnson*, [5].

⁶⁶ *Maher*, [16].

⁶⁷ *Marrah*, [25], LIJ 89 (10), p. 33.

The Court further held that the objective gravity of the applicant's offending was greater because the victim's injuries were inflicted in a domestic setting.⁶⁸

In *Hester v R* [2007] VSCA 298 at [27] Neave JA cautioned that "evidence of forgiveness of the victim of domestic violence should be treated with extreme caution".

In *Filiz v The Queen* [2014] VSCA 212 the appellant had broken into his ex-partner's house and attacked her and her current partner whilst subject to an FVIO. The Court again emphasised the significance of general deterrence in sentencing for violent offending against a former domestic partner. The fact that the appellant was subject to an FVIO at the time of the offending was considered by the Court to be particularly significant and the Court stated that "such offending will attract serious consequences and even harsher penalties where it involves the breach of an order which exists for the victim's protection".⁶⁹

The Court rejected the appellant's argument that the sentence [3 years and 6 months] for one charge of aggravated burglary with intention to assault, two charges of intentionally causing serious injury, one charge of theft and a summary charge of contravening an FVIO was manifestly excessive, referring to *Hogarth*, in which the Court held that "the sentences generally imposed for "confrontational aggravated burglary" were too low, and needed to be increased to properly reflect the objective gravity of such offending"⁷⁰ and stated that as a consequence, "a significantly higher sentence than that imposed on the appellant would have been within range".⁷¹ The Court also rejected the appellant's argument that the victim's level of fear when being attacked by the appellant was less than if she had been attacked by a stranger, and explicitly acknowledged that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners.⁷²

In *Meyers*⁷³ the Court stated that *Hogarth* applies to all serious aggravated burglaries and "a particular serious aggravated burglary does not need to be classified as a "confrontational aggravated burglary" in order for *Hogarth* to apply. "Intimate relationship aggravated burglary" is a subset of "confrontational aggravated burglary".⁷⁴

The prevalence of domestic violence was most recently recognised by the Court of Appeal in *Portelli v The Queen* [2015] VSCA 159 where the Court endorsed the sentencing Judge's statement that "women in domestic situations are entitled to feel safe from the violently abusive behaviour of their ex-partners. This circumstance is an aggravating feature of the offending".⁷⁵

⁶⁸ *Marrah*, [20], LIJ 89 (10), p. 33.

⁶⁹ *Filiz*, [21], LIJ 89 (10), p. 33.

⁷⁰ *Hogarth*, [58]-[59], LIJ 89 (10), p. 34.

⁷¹ *Filiz*, [15], LIJ 89 (10), p. 34.

⁷² *Filiz*, p. [23], LIJ 89 (10), p. 34.

⁷³ [2014] VSCA 314

⁷⁴ *Meyers*, [6], [36]-[37]; LIJ 89 (10), pp. 34-35.

⁷⁵ *Portelli*, [29] - [30]; LIJ 89 (10), p. 35.

5. Sentencing Practices/Patterns for Contravention Offences

The Sentencing Advisory Council of Victoria (SAC) released, in December 2015, a report on sentencing patterns for offences involving contravention of an FVIO made under the *FVP Act*, comparing two three years periods: 1 July 2009 to 30 June 2012 and 1 July 2012 to 30 June 2015.⁷⁶ It is to be noted that a number of legislative reforms in Victoria over the past few years have substantially changed the sentencing landscape in Victoria, consequently influencing the sentencing trends in FVIO and FVSN contraventions.⁷⁷ In Victoria, Community Correction Orders have replaced not only the former community sentences⁷⁸ but also suspended sentences that were available in the Magistrates' Court for the general and aggravated contravention offences until 1 September 2014.⁷⁹

CCO's may be ordered as a standalone sentence⁸⁰ or may follow a term of immediate imprisonment.⁸¹ Following the abolition of suspended sentences in September 2014, the maximum term of imprisonment with which a CCO can be combined was increased from three months to two years.⁸² Further, the overall sentence (that is, the total length of the term of imprisonment and the length of the CCO) must not exceed five years.⁸³

In accordance with the SAC Report, the use of combined imprisonment and CCO sentences remained relatively small from 2011–12 to 2014–15, but grew from 2.0% of all contravention cases receiving imprisonment in 2011–12 to 25.6% in 2014–15.⁸⁴ In 2014–15, a CCO accompanied 34.7% of imprisonment sentences for FVIO

⁷⁶ Sentencing Advisory Council *'Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report'* (2015). The Report is a continuation of the Sentencing Advisory Council's previous work on monitoring sentencing patterns for contravention of FVIOs and FVSNs:

- *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), which examines sentencing practices for the offence of breaching an FVIO under the *Crimes (Family Violence) Act 1987* (Vic) from July 2004 to June 2007 and includes a discussion on guiding principles for sentencing this offence; and
- *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* (2013), which examines sentences for contravention of an FVIO over two periods (2004–05 to 2006–07 and 2009–10 to 2011–12) and contravention of an FVSN (from 2009–10 to 2011–12).

⁷⁷ SAC Report, p. 27, [4.13].

⁷⁸ CBOs and ICOs were abolished under the *Sentencing Amendment (Community Correction Reform) Act 2011* and replaced with community correction orders (CCOs). CBOs and ICOs were available until 16 January 2012, and CCOs have been available since this date: see SAC Report, pp. 27-28, [4.15 - 4.21].

⁷⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General); SAC Report, p.29, [4.30].

⁸⁰ In the Magistrates' Court, a CCO may be up to a maximum of two years for one offence, four years for two offences and five years in respect of three or more offences, i.e. the maximum aggregated sentence of imprisonment that can be ordered by a magistrate in a case with multiple charges is five years: see *Sentencing Act 1991*, s.38, 113B.

⁸¹ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 38.

⁸² SAC Report, p.28, [4.22].

⁸³ *Sentencing Act 1991*, s.44(1B).

⁸⁴ SAC Report, p.48, [4.121]. Note that it was only very recent legislative reforms that saw CCOs replace former community sentences and suspended sentences and therefore sentences of imprisonment combined with a CCO are not observed until 2011–12 for contraventions of FVIOs and FVSNs. Also, they are not observed until 2013–14 for the three aggravated offences that came into effect in 2013.

contravention intending to cause harm or fear for safety, 28.6% of imprisonment sentences for FVSN contravention, 27.6% of imprisonment sentences for persistent contravention, and 24.9% of imprisonment sentences for FVIO contravention.⁸⁵

In its earlier Report, published in 2009, the SAC found that there was a predominance of low-end orders such as fines and adjourned undertakings for FVIO breach offences between July 2004 and June 2007. Mid- to high-end sentences such as community-based orders and custodial orders were less common.⁸⁶ At the time of the 2009 Report, it was a general view among stakeholders⁸⁷ consulted during the consultation process that the sentencing outcomes rarely reflected the seriousness of the breach offence,⁸⁸ and the Council cautioned against the use of fines as a sentencing disposition in the context of FVIO and FVSN contraventions, concluding that fines were generally unable to fulfil the purposes of community protection and rehabilitation in relation to FVIO contravention.⁸⁹ Further, fines may compound the harm experienced by the victim. Where the offender and victim are in a relationship of financial interdependence, a fine is likely to punish the victim as well as the offender by withdrawing resources from the family as a whole.⁹⁰

In response, the Council produced *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders*.⁹¹ The Guiding Principles recommend that community protection – which includes victim protection – should be the primary purpose of sentencing for contravention, as the function of an intervention order is to protect the victim from future harm.⁹²

The Council's analysis in 2013 revealed that sentencing outcomes had changed considerably since the 2009 report. The Council reported that across most categories of sentencing for FVIO contravention, the use of fines had declined and the use of adjourned undertakings and community sentences had increased. The Council also found an increase in the imposition of custodial sentences in the case of repeat contravention offences.⁹³

In the 2015 Report, SAC found that there was a large increase in the number of cases sentenced for non-aggravated FVIO contraventions from 2009–10 to 2014–15 (from 1,949 cases to 4,423 cases). This increase occurred despite the new aggravated offences introduced on 17 April 2013.⁹⁴

Across all FVIO contravention cases, the use of imprisonment, community sentences (including the current CCO and the repealed ICO and CBO) and fines⁹⁵ increased in

⁸⁵ SAC Report, p.48, [4.121].

⁸⁶ SAC Report, p.1, [1.6].

⁸⁷ Magistrates, Victoria Police, legal practitioners and specialist service providers.

⁸⁸ SAC Report, p.1-2, [1.6].

⁸⁹ SAC Report, p. 49, [4.127]. See SAC Report (2009), pp. 50-55.

⁹⁰ SAC Report, p. 49, [4.127]. Also see SAC Report (2013), p. 47.

⁹¹ Sentencing Advisory Council, *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (2009).

⁹² SAC Report, p.2, [1.7].

⁹³ SAC Report, p.2, [1.9].

⁹⁴ SAC Report, p.31, [4.37].

⁹⁵ "One possible explanation for the prevalence of fines for the non-aggravated contravention offences is that, as there has been a decline in the notion of the 'technical contravention' through the influence of the

the period between 2009–10 and 2014–15, while suspended sentences, low-end orders (including adjourned undertakings, convicted and discharged, and dismissals), and diversion plans declined.⁹⁶ It is to be noted that fines remain one of the most frequently used sentences for FVIO contravention and appear to be replacing low-end orders, such as adjourned undertakings.⁹⁷

The use of sentences of imprisonment increased over the reference period, particularly between 2011–12 and 2012–13 (from 11.3% to 14.2%) and between 2013–14 and 2014–15 (from 13.8% to 16.2%). This latter increase is likely due to the phase-out of partially and wholly suspended sentences.⁹⁸

While some suspended sentences are likely to have been replaced by sentences of imprisonment in 2014–15, others appear to have been replaced by CCOs, the use of which increasing between 2013–14 and 2014–15 (from 20.7% to 24.7%).⁹⁹ The start of the increase in use of community sentences, however, occurred in 2012–13 and 2013–14 and therefore preceded the phase-out of suspended sentences. It is likely that the increase in 2013–14 occurred because of the greater flexibility provided by the CCO than by the community sentences it replaced on 16 January 2012. It appears that the CCO was used as an alternative to a range of other sentences in small numbers, including imprisonment, fines, and suspended sentences, all of which declined in use between 2012–13 and 2013–14.¹⁰⁰

Aggravated Contravention Offences

As is to be expected, the aggravated offences of contravening an intervention order intending to cause harm or fear for safety and persistent contravention of notices and orders were more likely to receive sentences of imprisonment (28%–29% of cases with these offences) or a CCO (29%–31% of aggravated offences) than the non-aggravated FVIO contraventions. The imposition of higher end penalties for the aggravated contravention offences reflects the added criminality encompassed by those charges and the likely need for sentencing dispositions involving an intervention that may prevent further offending.¹⁰¹ Non-aggravated FVIO contraventions sentenced during 2013–14 and 2014–15 were more likely to receive a fine (27.0% compared with a lower rate of 17%–18% for aggravated

Family Violence Code of Practice, there may have been a corresponding increase in the number of relatively less serious contravention offences coming before the courts. This may account for the large proportion of fines and low-end orders, particularly where the contravention offence is not accompanied by co-sentenced offending”: SAC Report [4.128] fn 182 Roundtable (7 October 2015).

⁹⁶ SAC Report, p.32, [4.40] and [4.45]. Note that the sentencing data in the SAC Report refers to both interim and final FVIOs as the Council was not able to separate the sentencing data. The Council notes in its report that an interim FVIO is more likely to be contravened in close proximity to the making of the order. A proximate contravention is likely to be regarded as an aggravating factor in sentencing, which may result in a greater proportion of mid- to high-end orders for interim FVIO contravention than for final FVIO contravention: see SAC report, p. 32, [4.47].

⁹⁷ SAC Report, p.50, [4.134].

⁹⁸ SAC Report, p.32, [4.41].

⁹⁹ SAC Report, p.32, [4.42].

¹⁰⁰ SAC Report, p.32, [4.43].

¹⁰¹ SAC Report, p.36, [4.61].

contraventions) or a low-end order (22.6% compared with 10%–12% for aggravated contraventions).¹⁰²

Persistent contravention offences were more likely to receive imprisonment or a CCO than either the general FVIO contravention offence or the FVIO contravention intending to cause harm or fear for safety. Persistent contravention was also the least likely of the contravention offences to receive a low-end order or diversion.¹⁰³ When low-end orders are used for persistent contraventions they are more likely to be adjourned undertakings than for the other contravention offences.¹⁰⁴

In summary, the 2015 SAC Report shows a shift away from suspended sentences towards imprisonment and CCOs, and a shift away from low-end orders towards monetary penalties such as fines, and possibly towards CCOs.¹⁰⁵

Contravention-only cases and co-sentenced offence cases

Between the two reference periods, 2009–10 to 2011–12 and 2012–13 to 2014–15, co-sentenced offence cases increased slightly, from 54.7% to 60.3% of all FVIO contravention cases.¹⁰⁶ An increase in the severity of the contravention behaviour is likely to be reflected in an increase in the number of cases with co-sentenced offences, and/or an increase in the average number of charges of the aggravated contravention offences.¹⁰⁷ Contraventions of FVIOs sentenced between 1 July 2012 and 30 June 2015 were slightly more likely to be accompanied by charges of unlawful assault (from 17.9% to 22.0%), criminal damage (from 14.8% to 17.3%), and failing to answer bail (from 10.2% to 14.4%) than cases sentenced between 1 July 2009 and 30 June 2012.¹⁰⁸ For example, from 1 July 2012 to 30 June 2015, unlawful assault was a co-sentenced offence in 33.7% of cases of FVIO contravention intending to cause harm or fear for safety compared with 22.0% of non-aggravated cases of FVIO contravention.¹⁰⁹

Magistrates imposed fines and low-end orders at substantially higher rates for contravention-only cases than for all contravention cases. In 2014–15, for example, 78.4% of contravention-only cases received a fine or a low-end order, compared with just 49.4% of all contravention cases. It is clear that fines and low-end orders are the preferred sentencing option when no other offending besides the contravention offence has been proven.¹¹⁰ The use of other sentences for contravention-only cases remained relatively rare during the reference period.¹¹¹

In general, cases of FVIO contravention with co-sentenced offences were given a wider variety of sentences than cases without co-sentenced offences. This may reflect the variety of co-sentenced offences that can appear in the case, some of

¹⁰² SAC Report, p.36, [4.62].

¹⁰³ SAC Report, p.37, [4.67].

¹⁰⁴ SAC Report, p.37, [4.69].

¹⁰⁵ SAC Report, p.32, [4.46].

¹⁰⁶ SAC Report, p.38, [4.74].

¹⁰⁷ SAC Report, p.39, [4.77].

¹⁰⁸ SAC Report, p.41, [4.79].

¹⁰⁹ SAC Report, p.41, [4.82].

¹¹⁰ SAC Report, p.42, [4.90].

¹¹¹ SAC Report, p.42, [4.91].

which may make the contravention more serious in nature.¹¹² Community sentences were the most frequently used principal sentence for co-sentenced contravention cases, increasing from 29.7% in 2009–10 to 34.9% in 2014–15.¹¹³ Both imprisonment and fines increased steadily during the reference period. Imprisonment increased from 18.9% in 2009–10 to 24.3% in 2014–15, while fines increased from 16.9% to 18.7%.¹¹⁴

Aggravated contravention charges with co-sentenced offences are likely to receive either imprisonment (32.5% for contravention of FVIO intending to cause harm or fear for safety and 33.8% for persistent contravention) or a community sentence (32.7% for contravention of FVIO intending to cause harm or fear for safety and 33.8% for persistent contravention), with other sentences used relatively infrequently.¹¹⁵ Conversely, contraventions without co-sentenced offences were more likely to receive a fine (36.5% for contravention of FVIO intending to cause harm or fear for safety and 39.1% for persistent contravention) or a low-end order (29.9% for contravention of FVIO intending to cause harm or fear for safety and 22.8% for persistent contravention).¹¹⁶ It was noted in the SAC report that concern has been expressed at the finding that fines were imposed cases of aggravated contraventions given the gravity of the conduct captured in this charged, however, it was observed that persistent contravention offences can involve, for example, multiple text messages sent over a short period of time in the context of a relationship ending.¹¹⁷

Overall, these findings confirm that the increase in imprisonment and community sentences in FVIO and FVSN contravention cases (including for the newly introduced aggravated offences) has been predominantly driven by cases where there is wider criminality, rather than the contravention offence alone. There is a stark difference between the frequent use of community sentences and imprisonment in co-sentenced offence cases and the infrequent use of these sentences in contravention-only cases.¹¹⁸

6. Opportunities at Court

In its 2015 report *'Opportunities for Early Intervention: Bringing perpetrators of family violence into view'*,¹¹⁹ the RMIT Centre for Innovative Justice¹²⁰ (CIJ) in Victoria stated that the conventional court process often serves to propel perpetrators away and cement isolation rather than keep them within reach of effective intervention. According to CIJ, attendance at court by an abusive man should be seen as an

¹¹² SAC Report, p.44, [4.99].

¹¹³ SAC Report, p.45, [4.100].

¹¹⁴ SAC Report, p.45, [4.101].

¹¹⁵ SAC Report, p.46, [4.111].

¹¹⁶ SAC Report, p.46, [4.112].

¹¹⁷ See SAC Report, p.46, [4.113] – [114].

¹¹⁸ SAC Report, p.46, [4.115].

¹¹⁹ Centre for Innovative Justice *'Opportunities for Early Intervention: Bringing perpetrators of family violence into view'* RMIT University (2015). ("CIJ Report")

¹²⁰ The Centre for Innovative Justice was established by RMIT University in October 2012. Much of the commentary about perpetrator accountability is drawn from the CIJ Report published in March 2015. We thank the Centre of Innovative Justice for this contribution.

opportunity for multiple, purposeful interactions which needs to be seized more effectively.¹²¹ CIJ goes on to say that this is particularly the case where the man has not had previous contact with, or has managed to avoid, the scrutiny of other agencies. In these circumstances, the court system represents a chance to bring him, and keep him, under the spotlight.¹²²

The role of the Court and the Magistrates

In order for the courts to be effective, Magistrates should engage meaningfully with the offender and ensure that judicial authority is leveraged to maximum effect. The detached and fairly cursory tone of many judicial interactions can cement a perpetrator's relative anonymity and, perversely, the sense that he is misunderstood - that the court has no authority to tell him what to do and that he should continue to fly under the radar as much as possible.¹²³ Research concerning procedural fairness [generally] confirms that the way in which a defendant is treated in the courtroom - including whether he feels heard and respected, and whether communication is clear - has a profound effect on his perception of the process, as well as the likelihood of him complying with court orders and the law generally.¹²⁴ The CIJ points out in its Report that "what needs to be better understood ... is that therapeutic courts are not about 'doing therapy' with an offender. Rather, their aim is to break the cycle of crime by leveraging the authority of the court, as well as leveraging the more personalised sense of accountability that is a key feature of many wider therapeutic models".¹²⁵

Further, contact with the justice system often represents the only proactive intervention that many perpetrators experience. This interaction should therefore provide information, identify risk and need alike, map a plan for ongoing interaction and challenge the denial and minimisation that so many family violence perpetrators display.¹²⁶ The Courts should explore ways in which they can maximise the use of contact between the perpetrator of family violence and the court so that the interactions are as purposeful and effective as possible every time. It is also emphasised that where a judicial officer understands the dynamics of family violence, he or she is more able to appreciate the nuances and complexities of the matters which come before the court and make orders which are appropriate.¹²⁷ At the Magistrates' Court, all Magistrates, not only those sitting in specialist list and divisions, are required to undergo specialised training in family violence.¹²⁸

Sentencing options such as community corrections orders and adjourned undertakings are useful vehicles for therapeutic jurisprudence. Under a CCO, an offender is supervised in the community by Community Correctional Services (CCS). A CCO may include certain restrictions on movement, alcohol exclusions and curfew. Offenders may also be required to undertake offender behaviour programs related to the use of violence and to address factors that may heighten the risk of

¹²¹ CIJ Report, pp. 54, 56.

¹²² CIJ Report, p.54.

¹²³ CIJ Report, p.54.

¹²⁴ CIJ Report, p.60.

¹²⁵ CIJ Report, p.66.

¹²⁶ CIJ Report, pp. 60-61.

¹²⁷ CIJ Report, p.59.

¹²⁸ CIJ Report, p.59.

family violence such as alcohol and drug abuse. Compliance may also be monitored by a magistrate under a condition of judicial monitoring.

7. Early Referral to Treatment and Services

In the Report, the CIJ emphasise the importance of early entry into treatment and court programs. Studies have shown that while longer programs can be beneficial, early connection with and entry into treatment has a far greater impact.¹²⁹ Conversely, delay in entering programs, or a failure to enforce or impose sanctions, can vindicate a perpetrator's belief that he is above the law or that his behaviour is not unlawful or inappropriate.¹³⁰ Swift, certain response for non-compliance, as well as ongoing contact with the same judge, are noted as particularly effective.¹³¹

As can be expected, men with minimal previous contact with the criminal justice system are more likely to complete behavioural change programs and change may be easier to achieve among violent men who are concerned about the impact of their arrest and other interventions upon their employment and social status.¹³² Individuals without social connections or a stake in conformity; who are not linked into employment; and who have an existing history of offending, are more likely to drop out of perpetrator programs. For these offenders, research suggests that other forms of intervention, such as drug and alcohol treatment, are necessary before the group-based component of an MBCP can even be considered.¹³³

8. Judicial Monitoring and Ongoing Interaction with the Court - Swift, Certain Sanctions for Non-compliance

The Report further notes that Jurisdictions should explore additional opportunities for courts to increase ongoing monitoring of family violence offenders, including by being brought back repeatedly before the same judge, and by employing swift and certain sanctioning where offenders have failed to comply with orders. This being said, it is important that these opportunities do not place further burden or pressure upon victims to attend court or revisit their experiences. Rather, the role of the court is to step in and assume this burden – keeping the victim informed, but engaging directly with the perpetrator to hold him more effectively to account.¹³⁴

CIJ sets out that the aim of the report was to “promote the potential of the justice system, not as an unwieldy intervention that can sometimes escalate the cycle of family violence, but as an active and involved participant that can interrupt it and make those who use it more visible – monitoring a perpetrator's behaviour; bringing him back to court to account for his commitments; making sure he is known to

¹²⁹ CIJ Report, p.39.

¹³⁰ CIJ Report, p.33.

¹³¹ CIJ Report, p.34.

¹³² CIJ Report, pp. 32, 40.

¹³³ CIJ Report, p.40.

¹³⁴ CIJ Report, p.64.

relevant service agencies; addressing related addiction, mental health or accommodation problems; and identifying whatever stake he may have in becoming a safer man".¹³⁵

9. Case Management Initiatives that Support MCV's Response to Family Violence

- **Fast tracking listing model** – recognising that the rate of recidivism for crimes of violence against intimate partners is much greater than against strangers, the MCV, Victoria Police and Victoria Legal Aid have commenced a staged implementation of fast tracking family violence related criminal cases. This involves prioritising and setting specific timeframes for the hearing of family violence related criminal charges before the Court and using information technology systems to identify these matters.¹³⁶ This initiative, which commenced in the Dandenong Magistrates' Court¹³⁷ and which is being gradually rolled out across the State, recognises that timely criminal justice responses increase perpetrator accountability, reduce recidivism, enhance the safety of victims, and increase the reporting of family violence related criminal matters.¹³⁸

This initiative is underpinned by research that shows the importance of early intervention when it comes to holding perpetrators accountable and changing behaviour, as well as ensuring the safety of victims. Research also suggests that the longer it takes for a matter to come before the Court, the more likely a victim will be reluctant to continue with the process.¹³⁹

The current timelines are:

- (a) Where the accused person is on bail, from the date of his or her release on bail to the first listing of those charges – one week;
- (b) Where the accused person has been summonsed, from the date of the interview to the first listing – four weeks;
- (c) In either case described in (a) or (b):
 - i. From the date of the first listing to the date of the second listing – four weeks;
 - ii. From the date of the second listing to contest mention – four weeks;
 - iii. From the date of the contest mention to trial – four weeks.¹⁴⁰

¹³⁵ CIJ Report, p. 6.

¹³⁶ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 15.

¹³⁷ See Magistrates' Court Practice Direction No. 10 of 2014.

¹³⁸ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 15.

¹³⁹ MCV and CCV's Submission to the Royal Commission into Family Violence, p. 15.

¹⁴⁰ Magistrates' Court of Victoria, Practice Direction No. 8 of 2015, 'Expansion of the fast tracking listing process to the Court at Ballarat and Ringwood'.

Preliminary data from the Dandenong Magistrates' Court pilot is that the vast majority of family violence criminal cases are resolving within 30-45 days of the date of the offence. Successful prosecutions have increased and significantly, the vast majority of complainants no longer seek to withdraw their complaints. There is yet to be a formal evolution of the fast tracking system, however early indications suggest the model will be highly effective.

- **Active case management by judicial officers** including ensuring that the case is being moved along at each step, that there are solid reasons for any adjournments, that any steps that are required to be taken are given strict timelines and that parties are held to account for failure to take steps (e.g. direction: *“that the prosecution provide the defence the additional statement of Mrs Smith within 14 days and failure to provide will result in an order for costs”*), that the reason for the adjournment and any directions made are marked clearly on the court file so that the next judicial officer dealing with the file will see what was required to be done.
- **Docketed/part heard cases** – whereby one judicial officer retains a case part heard before them and case manages a file through the system to ensure continuity and accountability for the parties to progress the matter.
- **Case management hearings** to actively try to analyse the strength of the prosecution case, any defences, the issues in dispute and resolution of the matter either by withdrawal or plea of guilty. In Victoria, criminal cases move from first mention to Summary Case Conference (between defence lawyers and prosecution) through to Contest Mention (discussion between defence, prosecution and the magistrate) before a matter is booked for contested hearing (*Criminal Procedure Act 2009 (Vic)*, s.54,55).
- **The availability of “sentence indications”**, whereby a judicial officer can hear the allegations, the key points of a plea in mitigation and provide an indication that if the accused pleads guilty then the court will impose a sentence of a certain type e.g. imprisonment or another type of sentence such as a community corrections order or a fine (*Criminal Procedure Act 2009 (Vic)*, s.60-61).
- **Incentives to enter a plea of guilty at the earliest opportunity.** In Victoria this “sentence discount” is provided for under s.6AAA *Sentencing Act 1991 (Vic)* which provides that if the court imposes a less severe sentence than it would have otherwise have imposed because the offender pleaded guilty to the offence then the court must state the sentence that it would have imposed but for the plea of guilty. It should be noted that it is a person’s right to plead not guilty and there is no additional punishment for pleading not guilty and being found guilty. This legislative provision does however clearly indicate to an accused that there is a benefit of pleading guilty at the earliest opportunity as a sign of remorse.

Further to these case management strategies in the mainstream/traditional court setting, the Magistrates' Court of Victoria is of the view that the creation of specialist family violence lists within the court would best ensure the effective case management of family violence matters. Specialist family violence divisions within the court would comprise of listing family violence civil and criminal matters together,

with cases to be dealt with by heard by consistent and expert magistrates, court staff, prosecutors and defence lawyers and supported by a range of support services for victims and perpetrators. Currently specialist family violence court divisions operate at two sites, Heidelberg and Ballarat however they tend only to deal with civil protection orders and not the criminal family violence matters. It is the Court's view that specialist family violence divisions should be rolled out across the State of Victoria.¹⁴¹

Conclusion - Effective Responses to Family Violence Related Offending

Family violence offending is recidivist in nature. Research demonstrates that the most effective interventions in family violence offending involve:

- Monitored participation in a comprehensive men's behaviour change programs and ongoing support for victims;
- Individual treatment plans that deal with reducing risk factors such as drug and alcohol abuse, mental illness, homelessness etc;
- Increasing deterrence by increasing the risk of being caught rather than the risk of harsher penalties of itself. Therefore increased deterrence is best achieved through:
 - monitoring of compliance with such treatment programs;
 - immediate, consistent and firm consequences for non-compliance with programs;
 - Immediate, consistent and firm consequences for further offending.¹⁴²

Interestingly as with much offending, there is a greater deterrence effect gained not from the imposition of longer sentences but by the management of risk.

The sentencing judge has a range of sentencing tools at their disposal that can give effect to this research.

Some examples of how a Victorian magistrate may approach family violence criminal sentencing:

¹⁴¹ The benefits of specialisation in family violence matters is discussed in the Magistrates' Court of Victoria and the Children's Court of Victoria (2015) Submission to the Royal Commission into Family Violence.

<https://www.magistratescourt.vic.gov.au/sites/default/files/Default/150708%20FV%20submission%20final_WEB%20VERSION.pdf>

¹⁴² Salter, M (2012) *Managing Recidivism Amongst High Risk Violence Men* (Australian Domestic & Family Violence Clearinghouse, Issues Paper 23); Center for Court Innovation, *Bridging Theory and Practice: A Roundtable about Court Responses to Domestic Violence*; Center for Court Innovation & Bureau of Justice Assistance (2014) *Evidence Based Strategies for Reducing Recidivism*; Klein A.R.(2008) Practical Implication of Current Domestic Violence Research, Part III: Judges (US Department of Justice); Project Mirabal (2015) *Domestic Violence Perpetrator Programs: Steps Towards Change* (Durham University & London Metropolitan University).

- A first time offender, where the family violence is of a lower level and the risk of future violence is reduced
 - An undertaking to be of good behaviour for 12 months with a requirement that the offender complete a men's behaviour change program.
- A first time offender, where the family violence is more serious, the risk of future violence remains high and/or there has been a breach of a civil protection order:
 - A Community Corrections Order with conditions such as community work, participation in a men's behaviour change program and other programs to reduce risk.
- A repeat offender and/or where the family violence is of a serious nature, the risk remains high and/or the violence is occurring in contravention of a civil protection order:
 - A term of imprisonment with a Community Corrections Order following release from custody to address the rehabilitation needs. This Community Corrections Order may include a Judicial Monitoring condition so that the offender is required to appear before the judge to review their progress on the Community Corrections Order; or
 - A term of imprisonment with a minimum term of imprisonment to be served before an offender can apply for release into the community on supervised Parole (overseen by Community Correctional Services).

Magistrate Kate Hawkins
Deputy Chief Magistrate Felicity Broughton
February 2016

Much of the commentary about therapeutic jurisprudential approaches to sentencing in FV cases and the Dandenong fast tracking experience is drawn from a paper presented by Magistrate Pauline Spencer in China in 2015. Thanks to her for this contribution.

Thank you to Katarina Palmgren, Researcher at the Magistrates' Court of Victoria, for her invaluable assistance in the preparation of this paper.

Enclosed below is Appendix 2 of the Sentencing Advisory Council’s Second Monitoring Report ‘*Family Violence Intervention Orders and Safety Notices*’ (2015). The Appendix was reproduced in the Report from Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders* (2009) 150–151. The complete *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (2009) is available from www.sentencingcouncil.vic.gov.au.

Sentencing Range and Factors	Considerations for Each Sanction
<p>Low</p> <p>Nature of the breach is not serious and it has minimal impact on the victim</p> <p>Single instance offending</p> <p>Offender has no prior family violence convictions (or very few non-family violence convictions)</p>	<p>Adjourned Undertaking with/without Conviction (Low)</p> <p>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.</p> <p>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.</p> <p>Fine (Low)</p> <p>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.</p>
<p>Medium</p> <p>Nature of breach is moderate and it has a moderate impact on the victim</p> <p>More than one instance of offending</p> <p>Breach occurs in or near the victim’s home</p> <p>Breach is in the presence of children</p> <p>Breach occurs only a short time after the making of the order or an earlier breach</p> <p>Offender has some relevant prior convictions</p> <p>Victim is particularly vulnerable</p>	<p>Community-Based Order (Low and Medium)</p> <p>When imposing a community-based order, a court could consider attaching:</p> <ul style="list-style-type: none"> • 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. <p>Intensive Correction Order (Medium)</p> <p>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.</p>
<p>High</p> <p>Nature of breach is serious and it has a serious impact on the victim (not limited to physical violence)</p> <p>Persistent or regular offending</p> <p>Breach occurs only a short time after the making of the order or an earlier breach</p> <p>Breach directly involves children</p> <p>Offender has many relevant previous convictions</p> <p>Victim’s ongoing safety is compromised</p> <p>Breach involves a home invasion</p> <p>Victim is particularly vulnerable</p>	<p>Wholly (Medium) and Partially (High) Suspended Sentence</p> <p>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.</p> <p>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.</p> <p>Immediate Custodial (High)</p> <p>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.</p>