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I understand you will be discussing today the way in which Magistrates' Courts across Australia are dealing with family violence to work towards establishing best practice in the handling of family violence applications. In particular, you will consider the impact of such applications upon the courts and learn from the approach of other states and territories.

I believe it is very timely for the AIJA to focus on applications for protection from family violence as this is currently the subject of much concern, debate, legislative and policy change throughout Australia. A number of important initiatives in relation to family violence are underway in Victoria under the framework provided by the Victorian Government's Women's Safety Strategy. Tasmania and Western Australia have recently introduced new legislation dealing with family violence.

In this paper I do not consider issues arising for the courts when they deal with "stalking" or "neighbour dispute" matters. I believe these matters require a separate and different justice system response. Regrettably, such matters have a negative impact upon the way in which family violence matters are considered in Victoria and some other states.

My approach is to address four areas:

These are:

1. To question whether there is an imperative for understanding the dynamics of family violence from the point of court administration and decision making;

2. The underlying principles and objects upon which legislation is or may be framed and the impact these may have on the day to day operation of the court;
3. An overview of possible approaches; and
4. Some comments upon the way courts currently deal with these issues and my comments about what could be done to improve the current situation.

1. Is there an imperative for understanding the dynamics of family violence from the point of view of the courts?

To consider this question I will talk briefly about what family violence is.

Family violence is essentially about control. It occurs most commonly when a man controls, coerces and dominates a woman, who is or has been his partner, by using a variety of behaviours against her.¹

It is rarely a single incident and is a gendered crime, that is, it is an abuse of women because they are women—75% of intimate partner homicides in Australia involve men killing their female partner.² Being about control, the expressed means of control are as variable as the people who use violence and may involve: insulting, derogatory or threatening comments; punching; hitting; direct or indirect coercion to engage in sexual acts against one's will; threat of physical violence towards a person or children, pets or associates; regulating and restricting a person's interaction with friends, family and the community in general; and controlling a person's financial resources for essential needs like food and clothing. The effect is to create such fear in

¹ See University of South Australia, *Reshaping Responses to Domestic Violence* Final Report (2000) 21; Rhea Almeida and Tracy Durkin, 'The Cultural Context Model: Therapy for Couples with Domestic Violence' (1999) 25 (3) *Journal of Marital and Family Therapy* 313.

² Jenny Mouzos and Catherine Rushforth, *Family Homicide in Australia* (2003) 2.

the recipient that one's life is conducted with constant regard for what may trigger a violent or abusive response.

These forms of abuse may be used in conjunction with one another—a person may be subject to sporadic physical or sexual violence and constant verbal abuse and social abuse. In fact, women who have been subject to family violence often say that the constant verbal abuse and harassment they experienced was the most damaging and debilitating aspect of the violence.³

Family violence typically involves more than one incident of abuse and has been described as a 'cycle of violence'.⁴ This cycle involves periods of tension building and intense control, followed by a violent explosion, a period of remorse and promise making and then a honeymoon phase.⁵ People who use violence may try and excuse their violent behaviour by blaming the people they have abused and forcing them to accept responsibility for the abuse.⁶ This 'cycle of violence' may not reflect everyone's experience of family violence,⁷ but it does emphasise the fact that family violence is a pattern of behaviour, rather than an isolated incident.⁸ Behaviour that may not seem threatening or abusive in isolation may actually have a very threatening or abusive effect when it is understood as part of a pattern of controlling and violent behaviour.

It is a very serious concern and we know that intimate partner violence is the highest contributor to death, disability and illness for Victorian women aged 15–44 years of

³ University of South Australia (2000), above n 1, 23.

⁴ Women's Domestic Violence Crisis Service of Victoria, *What's Love Got To Do With It? Victorian Women Speak Out About Domestic Violence Annual Report 2001–2002* (2003) 8.

⁵ Ibid.

⁶ See Zoe Rathus, *Rougher Than Usual Handling, Women and the Criminal Justice System, A Gender Critique of Queensland's Criminal Code and the Review Process Initiated by the Queensland Government with Particular Reference to the Draft Criminal Code Bill, 1994* (2nd ed) (1995) 96.

⁷ Ibid.

⁸ Almeida and Durkin (1999), above n 1, 313; Hegarty, Hindmarsh and Gilles, *Domestic Violence in Australia; Definition, Prevalence and Nature of Presentation in Clinical Practice 2000* 173 (7) *eMJA: The Medical Journal of Australia* 363.

age⁹ and from a community perspective, responses to family violence such as legal medical and support services, costs the Australian community \$8.1 billion each year.¹⁰ The nature and dynamics of family violence and the emotional, practical and financial complications involved in endeavouring to leave a violent relationship shapes a person's behaviour and thoughts, including in relation to the legal system. The effects often change the way a person presents to a court, for example, they may be unduly submissive or very angry. Whatever the presentation, there are often difficulties for court staff who deal with the person in the first instance. People may not follow through with an intervention order application; it influences how they behave towards court staff or whether they adhere to the terms of an intervention order. Procedurally, the prospect of both leaving a person using violence and then facing him or her in court can be overwhelmingly traumatic for a person in a violent relationship; recall of important incidents may be poor, leading to an impression of untruthfulness.

2. The underlying principles and objects upon which legislation is or may be framed and the impact these may have on the day to day operation of the court

What I want to do here is outline three different legal approaches to family violence, and the understandings of family violence upon which they are based, to illustrate how these approaches may influence the way in which a court may operate. These approaches are:

- The Mediation/Treatment Approach
- The Protective/'Special Response' Approach
- The Law Enforcement/Attitudinal Approach

⁹ VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease caused by intimate partner violence: 2004*.

¹⁰ Access Economics and Partnerships Against Domestic Violence, *The Cost of Domestic Violence to the Australian Econom* (2004) Part 1, 63.

The Mediation/Treatment Approach

One understanding of family violence is to see it as something that arises out of unresolved relationship conflict. Understood from this perspective, legal remedies to family violence are not viewed as providing any lasting solution. Rather, the court seeks to address the conflict and refer both parties to counselling. This understanding of family violence, and its subsequent legal response, assumes that all parties contribute to the violent behaviour.

Understanding family violence as stemming from relationship conflict assumes that both parties have equal power in the relationship and a common interest in the resolution of the conflict. However, because family violence is characterised by the domination of one party over another there is in fact no relationship of equality.

Therefore, this approach, which sees violence as a symptom of a troubled relationship, does so at the expense of viewing family violence, in all its forms, as a problem warranting attention in and of itself.

Another understanding of family violence, along these same lines, views it as the result of the abnormal and unhealthy behaviour of the violent person. Factors such as abnormal personality traits, an abusive family of origin, alcoholism, or inappropriate expressions of anger, are all held to be the cause of the family violence.

By this understanding, court-ordered therapy for the violent individual (rather than the couple) is viewed as the most appropriate form of intervention. Violent behaviour may be viewed as beyond the violent person's control, responsibility and accountability. However, most legal approaches would hold the individual accountable in some form, as well as being treatable.

The Protective/'Special Response' Approach

Others argue that family violence is indeed criminal behaviour but that it is different from other forms of criminal assault because there is an ongoing and intimate (or previous ongoing and intimate) relationship between the victim and the assailant. By this understanding, existing criminal action is also an inappropriate and ineffective form of intervention. Advocates of this approach hold that the primary role of the law is to afford protection to those who have been subjected to domestic violence, with less emphasis placed on the punishment of the offender.

Instead, legal responses and solutions to domestic violence are held to lie in the introduction of 'special' legal procedures, such as Intervention Orders or Apprehended Violence Orders, for people who have experienced family violence because it is a 'special' or 'different' sort of crime.

However, others argue that such protection and special responses are used at the expense of maintaining the criminal emphasis in laws relating to domestic violence.

The 'Law Enforcement'/Attitudinal Approach

The third and final response I want to outline is the law enforcement approach. This approach stresses the need for family violence to be viewed as criminal behaviour and to be treated accordingly. The fact that assault has taken place between two parties who are or have been intimately associated with each other does not alter the criminal nature of the conduct.

This is an approach derived from a belief that what we see as a crime in society reflects what we believe to be right and wrong behaviour. We demonstrate what we believe is wrong by criminalising certain behaviours, and rigorously enforcing the law.

Through this approach, the criminal law uses the mechanisms of arrest and bail and the imposition of criminal sanctions to deter violent behaviour and to afford protection to those who have been subject to it.

Advocates of this approach believe that problems arise in the justice system, not because of the imperfections in family violence laws, but rather because the law is weakly enforced. The police, courts and other criminal justice personnel still reflect in their everyday practise of family violence law the implicit and explicit belief that family violence is less serious than other forms of assault, and that is it not really criminal behaviour. Such beliefs diminish the seriousness of domestic assault and reduce the deterrent and protective capacity of criminal law.

Indeed, related to this is an approach which sees family violence as part of the wider social system. Family violence (rather than being abnormal) is viewed as a logical extension of existing cultural norms which implicitly and explicitly condone violence, particularly violence against women.

This approach focuses not only on legal responses which explicitly condemn violence, although these are important, but also on changing wider social norms, such as through education and public awareness campaigns.

When we reflect on this approach, we understand that whatever tinkering or seismic shifts in family violence laws we put into place, preventing family violence must also involve changing individual's and society's attitudes and understanding of family violence. I also argue that this is particularly important for those who work within the courts and others who deal daily with family violence.

The courts and police as powerful institutions in our society play an important symbolic role in promoting attitudinal change. This is as equally important in many respects as implementing legislative and procedural reforms.

3. An overview of possible approaches

Many reform initiatives are centred on the development of ‘integrated’ or ‘coordinated’ responses to family violence, with either a legislative base which provides a ‘criminal’ law response or a ‘civil’ law response. These approaches are based on a shared philosophy of the provision of protection. In practice, these approaches encourage collaboration and dialogue between family violence support services, police, courts, correctional staff and behaviour change program providers. This is the approach currently being piloted in Victoria through the two specialist family violence courts which will commence operation on 14 June this year.

Many integrated responses are premised on the adoption of a strong criminal justice approach that emphasises the fact that family violence is a crime and should be investigated and prosecuted as rigorously as any other crime.

Another aspect of integrated responses is to implement reforms to streamline the legal process: expediting the time in which cases are heard, monitoring the progress of cases and evaluating whether existing legal responses are effective in preventing recidivism. Reforms to the legal process can also involve the development of specialised family violence courts, with specially trained personnel and specially designed court facilities. With regard to punishment and sentencing, recent reforms nationally and internationally often adopt a rehabilitative focus, requiring people using violence to partake in a program to address their violent and abusive behaviour. The first of such institutionalised strategies for integration was developed in 1981 in Duluth, Minnesota. Since then, such strategies have been adopted in many other jurisdictions in western countries including Australia, Canada and New Zealand.

In Winnipeg, Manitoba the court incorporates a specialised prosecutorial unit, tailored courtrooms, a distinct family violence probation unit that is responsible for administering court-ordered treatment programs, support and advocacy programs, and a pro-arrest policy.¹¹

This court is effective in ensuring fast case processing, its sentencing is seen as more appropriate and professionally it is viewed as a very desirable place to work as it could lead to opportunities for appointment to higher office.

In New Zealand the introduction of the *Domestic Violence Act 1995* significantly reformed the civil legal response to family violence. Protection orders automatically apply to any children living in the household.¹² Applications and subsequent orders for occupation or tenancy orders and ‘furniture orders’ (see Part 111) are commonly made and granted.¹³ A rehabilitative aim is supported by requiring the court to direct the respondent to attend a behaviour change program.¹⁴ Parental contact with children is restricted in the early stages of the court processes because where a Protection Order is in place, the respondent may not contact any child of the applicant’s family unless contact is permitted under any order or written agreement.¹⁵

In Australia, the ACT’s Family Violence Intervention Program (FVIP) is an example of an integrated strategy that has a criminal justice focus. Core elements are the adoption of a shared philosophy between government and non-government agencies, the establishment of specialised family violence processes, a commitment to case management and the use of education programs as a sentencing alternative.

Evaluations of the ACT criminal justice approach show it has had significant

¹¹ Federal–Provincial–Territorial Ministers Responsible for Justice, *Final Report of the Ad Hoc Federal–Provincial–Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (2003) 40.

¹² *Domestic Violence Act 1995* (NZ) s 16(1).

¹³ *Domestic Violence Act 1995* (NZ) Part 111.

¹⁴ *Domestic Violence Act 1995* (NZ) s 32(1).

¹⁵ Ministry of Justice [New Zealand], *The Domestic Violence Legislation and Child Access in New Zealand* (1999), 13.

successes: arrest rates have almost doubled; there has been a 69% increase in family violence matters that are initiated and completed; and 86% of these completed matters involve a conviction.¹⁶

The Western Australian approach, which is also an integrated model, is one that operates in both the criminal and civil legal spheres. The Joondalup Family Violence Court model incorporates legal support and referral when an application is made for a restraining order.¹⁷ The criminal justice elements of the model include a specialised family violence police unit, specialised family violence magistrates, prosecutors and defence lawyers and a commitment to case management.

The Gold Coast Domestic Violence Integrated Response project is another integrated program with a civil and criminal focus.¹⁸ The new Tasmanian Family Violence Intervention Program, Safe at Home, also adopts a strong criminal justice focus, emphasising mandatory arrest and a pro-prosecution policy.¹⁹

The NDV pilot project²⁰ in South Australia focused on improving police responses to reduce repeat victimisation, using a tiered program of increasing levels of police intervention at each police attendance with the same family.

All of these reform initiatives are directed towards shaping the legal response to the realities and dynamics of family violence. In doing so, dealing with family violence becomes a shared responsibility with more opportunities for creating a preventative focus. They show that it is possible to improve the response of the legal system and

¹⁶Keys Young, *Evaluation of ACT Interagency Family Violence Intervention Program: Final Report* (2000).

¹⁷ Court Services Division—Department of Justice and Crime Prevention and Community Support Division—West Australian Police Service, *Joondalup Family Violence Court* Final Report (2002).

¹⁸ Gold Coast Domestic Violence Service, 'Domestic Violence Integrated Response' (2003) available from <www.domesticviolence.com.au/gold.htm>.

¹⁹ Department of Justice and Industrial Relations Tasmania, *Tasmanian Family Violence Intervention Program* Discussion Paper (2003) 7–8.

²⁰ Office of the Status of Women, *Access to Justice: Research into Good-Practice Models to Facilitate Access to the Civil and Criminal Justice System by People Experiencing Domestic and Family Violence* Final Report (2003).

achieve goals such as reducing re-victimisation, ensuring fast case processing and enhancing the protection of children.

4. The way courts currently deal with these issues within the existing constraints of legislation and resources

In its 2003 report, the NSW Law Reform Commission²¹ had this to say:

“...however, no matter how valid the policy or how well drafted the legislation, (the law) will only be truly effective if it is interpreted and implemented consistently and appropriately. While this is true of any law, it is particularly the case with AVOs, given the difficult and delicate nature of the subject matter.

The general consensus of views expressed in submissions and consultations is that, while there are aspects of the legislation that require fine-tuning and some amendment, the main problems lie with its implementation and interpretation. Many of these implementation problems can be resolved to some extent by amendments ...However, other issues, such as the attitudes and responsiveness of police and magistrates, transcend the legislation, and will continue to be problematic regardless of any legislative reform. Given the impact that implementation...has on the achievement of the policy objectives...it is important that problems are recognised and appropriate measures be taken to address them.”

Similar views have been put forward in the consultations we have conducted and in submissions received and by the Judicial Commission of New South Wales in its 1999 survey of Magistrates.²²

In particular, we heard that while some magistrates are cognisant of the nature of family violence and the difficulties that applicants can face in the courtroom, many

²¹ New South Wales Law Reform Commission, *Apprehended Violence Orders: Part 15A of the Crimes Act* Discussion Paper 45 (2002) 52.

²² Jennifer Hickey and Stephen Cumines, *Apprehended Violence Order: A Survey of Magistrates* (1999).

consultation participants said magistrates need to receive training and education about the nature, dynamics and effects of family violence.

An applicant's ability to present the relevant evidence to the court can be affected by the potentially traumatic nature of the court process for intervention order applicants. The need to provide specific details about particular instances of abuse²³ can be problematic given that the impact of experiencing such violence may affect a person's ability to remember each incident of abuse with sufficient clarity.²⁴ People who have been subject to family violence may feel that being in the same room as the respondent is terrifying, intimidating and threatening.²⁵ These feelings can be exacerbated by the daunting and embarrassing nature of dealing with such personal experiences in a public, and very formal, environment.²⁶ Some applicants are so intimidated by the respondent's presence that they cannot speak at the court hearing,²⁷ while other people are discouraged from even applying for an intervention order because they are too scared of facing the respondent in the courtroom.²⁸ No doubt this behaviour, understandable in the context of the effects of family violence, is at times very frustrating for magistrates and court staff alike.

One of the issues which affects the court system in Victoria is that applicants and respondents are not often represented by lawyers. Anecdotal information received through the consultation process indicates that very few women who apply for an intervention order have legal representation. However, most consultation participants

²³ VLRC Consultation 28, 2004.

²⁴ VLRC Consultation 21, 2004.

²⁵ VLRC Consultation 26, 2004.

²⁶ VLRC Consultation 29, 2004.

²⁷ VLRC Consultation 28, 2004.

²⁸ VLRC Consultation 5, 2004.

said it is important for people seeking protection to have access to legal advice and/or representation. All the magistrates and court staff consulted expressed the view that the involvement of lawyers is preferable because it leads to more efficient proceedings.

Finally, what then could be done to improve the current situation for the litigants and the courts?

- First, there is evidence to suggest that when support services, police and court systems work together to achieve common aims which are supported by appropriate legislation and resources, then significant improvements can be achieved.
- Secondly, additional legislative and policy reforms will be difficult to achieve without augmenting existing judicial development programmes for magistrates and educational programmes for court staff regarding the nature and dynamics of family violence.
- Thirdly and finally, legal representation should be much more readily available to improve the relevancy and presentation of issues to the court and to navigate the legal complexities such as child contact issues, specifically tailored orders, ouster orders and the like.

Thank you for the opportunity of addressing you today.