

Victorian
Law Reform
Commission

Family Violence Police Holding Powers
Interim Report

Victorian Law Reform Commission

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Preface

This Interim Report makes recommendations to confer on members of Victoria Police a power to remove, hold and detain persons pending an application for an interim intervention order.

As the initial response by police to a family violence incident is particularly important in the process of prevention, this power if introduced will be an appropriate addition to the current options for police.

In examining this issue we briefly consider the nature and significance of family violence to examine whether an extension of police powers is relevant and beneficial to victims, and note the legal impediments police face in seeking intervention orders in a crisis situation. These impediments put pressure on police resources and can expose victims to further violence.

We have found widespread support for the introduction of this power, which has already been introduced into every other Australian jurisdiction.

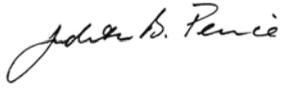
In our recommendations we consider the safeguards for a person detained by police, including people from marginalised groups, as well as necessary protections for police.

In this report, we have drawn upon submissions, consultations and research conducted in preparation for our forthcoming Final Report. In addition, we held consultations to inform this report's specific recommendations.

I acknowledge and thank the following people for their valuable contributions: Judge Felicity Hampel, County Court Victoria; Anne Goldsbrough, Supervising Magistrate for Family Violence and Family Law Victoria; Greg Davies, Manager Discipline/Legal and Tony Walsh, Discipline Advocate, the Police Association Victoria; Gregory Connellan, barrister and Immediate Past President Liberty Victoria; Inspector Wendy Steendam, Inspector in Charge, Sexual Offences and Child Abuse Coordination Office, Victoria Police; and Senior Sergeant Gordon Fairmont, State Coordinator Family Protection Major Crime Division, Western Australia Police. I also thank all the members of the commission, and in particular Paris Aristotle who applied useful critical analysis to the issues contained in this report.

On 9 August 2005 the Attorney-General requested the commission prepare and deliver this report by 31 August 2005. It was therefore prepared by commission

staff within a short time and I thank Joanna Carr, Dr Zoë Morrison, Padma Raman and Alison Hetherington for their skilled and dedicated support in achieving its prompt completion.

A handwritten signature in cursive script, reading "Judith Peirce".

Judith Peirce
Commissioner

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Terms of Reference

On 1 November 2002, the Attorney-General, the Honourable Rob Hulls MP, gave the Victorian Law Reform Commission a reference:

1. To consider whether the *Crimes (Family Violence) Act 1987* is based on a coherent philosophy and whether, having regard to national and international experience, its approach to family violence is the best approach available to Victoria.
2. To identify any procedural, administrative and legislative changes which may be necessary to ensure that the *Crimes (Family Violence) Act 1987* provides the best available response to the problem of family violence.
3. To undertake research to monitor the practical effect of such changes.
4. To develop and/or coordinate the delivery of educational programs which address any lack of knowledge or misconceptions relating to the *Crimes (Family Violence) Act 1987* and the existing processes under the Act.
5. To develop and/or coordinate the delivery of educational programs which may ensure the effectiveness of proposed legislative, procedural or administrative reforms.
6. In conducting this review, the commission shall have regard to:
 - the work of the Statewide Steering Committee to Reduce Family Violence;
 - the accessibility of the Act and whether it is working effectively for:
 - immigrant women (particularly recent immigrants)
 - Indigenous communities
 - people with disabilities.
 - the position of children in applications made under the Act and the intersections between the *Crimes (Family Violence) Act 1987* (Vic), the *Children and Young Persons Act 1989* (Vic) and the *Family Law Act 1975* (Cth).



Attorney-General

9 August 2005

Professor Marcia Neave
Chairperson
Victorian Law Reform Commission
Level 10, 10–16 Queen Street
Melbourne VIC 3000

Dear Professor Neave

CRIMES (FAMILY VIOLENCE) ACT 1987 – REFERENCE

I refer to previous correspondence concerning the above Reference, the Final Report on which is scheduled for 31 December 2005.

I have received a letter from the Minister for Police and Emergency Services enclosing for consideration correspondence the Minister has received from the Chief Commissioner of Police regarding the possibility of amending the Crimes (Family Violence) Act 1987. The purpose of the proposed amendment would be to confer members of Victoria Police with power to detain and remove persons pending the making of an application for an interim intervention order.

As the issue raised by the Chief Commissioner appears to be an issue within Term 2 of the Commission's Terms of Reference, I would like to request an Interim Report specifically addressing the following:

To, within the context of the problem of family violence, consider the merits of the proposal to empower members of Victoria Police with power to detain and remove persons pending the making of an application for an interim intervention order.

I would appreciate it if you would report to me on this issue by 31 August 2005, in order for the State Government to consider the Commission's recommendations.

Yours sincerely

A handwritten signature in cursive script that reads "Rob Hulls".

ROB HULLS MP
Attorney-General

Abbreviations

ACT	Australian Capital Territory
CEDAW	Convention on the Elimination of Discrimination Against Women
ibid	in the same place (as the previous footnote)
GA Res	General Assembly resolution
n	footnote
NSW	New South Wales
NT	Northern Territory
para	paragraph
Qld	Queensland
s	section
SA	South Australia
sch	schedule
sess	session
Tas	Tasmania
UK	United Kingdom
UN GAOR	United Nations General Assembly
Vic	Victoria
WA	Western Australia

Interim Recommendations

Chapter 2

1. A holding power be introduced for police in family violence situations to enable them to obtain and serve an intervention order and protect the victim.

Chapter 3

2. The *Crimes (Family Violence) Act 1987* should be amended as follows:
 - (a) If a police officer is applying for an intervention order under section 7 or a summons or warrant under section 9 of the *Crimes (Family Violence) Act 1987* (Vic), the officer may direct the person against whom the order is sought to remain at a place stated by the officer.
 - (b) If the person refuses or fails to comply with the police officer's direction, the officer may arrest and detain the person in custody without a warrant.
 - (c) In exercising the holding power referred to in 2(a), the police officer may use such force as is reasonably necessary. The police officer has the same power and protection in relation to the exercise of these powers as a police officer has when arresting a person for an offence.
 - (d) The person may only be held or detained until:
 - (i) a summons, intervention order or warrant applied for by police is granted and served or executed upon the person; and
 - (ii) further measures to protect the family member(s) are carried out; or
 - (iii) the summons, warrant or intervention order is refused.
 - (e) In all cases mentioned in (d), the person shall not be detained for longer than 6 hours unless a further extension of time is granted, as detailed in (f). An extension will not be granted for more than an additional 4 hours and the detained person may in no circumstances be held for longer than 10 hours.
 - (f) If a police officer needs to hold a person for longer than 6 hours to obtain and serve an order or a summons, or to take measures necessary for a family member's safety, the officer may apply to the on-duty magistrate for an extension of time. An extension shall only be given in exceptional circumstances. Exceptional circumstances may include:

- (i) where there are long distances involved in transporting the person to the police station
 - (ii) any other unforeseen and urgent police matter that occurs after the person is held prevents the police officer from making the application within a reasonable time.
- (g) People held under 2(a) must:
 - (i) be 18 years or older
 - (ii) if held at a police station, have their details entered into the Attendance Register.
- (h) If people are held at a police station, they must:
 - (i) be advised that they may notify a friend or family member of their whereabouts
 - (ii) be granted access to an interpreter if required for the purpose of understanding the process
 - (iii) be granted access to a community justice panel representative or other appropriate support if they identify themselves as Aboriginal or Torres Strait Islander
 - (iv) be granted access to an independent person if they have a cognitive impairment or to a guardian if they have one—the guardian must be contacted by police.
- (i) Victoria Police should develop guidelines to accompany the implementation of the above changes. In particular, these guidelines may outline procedures for dealing with perpetrators who are held under these provisions who are from newly arrived communities. For example, the guidelines could outline an appropriate role for community workers or family members while the person is being held by police.
- (j) The existing regime of monitoring and reporting of police under the Police Code of Practice for the Investigation of Family Violence be extended to include the use of the holding power. Statistics should be kept on the use of the power and reported annually.

Chapter 1

Legal, Social and Community Contexts

INTRODUCTION

1.1 On 9 August 2005, the Attorney-General requested the commission provide the Victorian Government with an Interim Report about a possible extension of police powers in response to family violence incidents. Specifically, the commission was asked:

To, within the context of the problem of family violence, consider the merits of the proposal to provide members of Victoria Police with power to detain and remove persons pending the making of an application for an interim intervention order.

1.2 This Interim Report is released as part of the Victorian Law Reform Commission's review of the *Crimes (Family Violence) Act 1987*. The commission has been asked to review the Act and to identify any procedural, administrative or legislative changes necessary to ensure the best possible response to family violence. The commission released its Consultation Paper on 26 November 2004. The commission's Final Report will be provided to the Attorney-General in late December 2005.

1.3 In its work to date, the commission has conducted extensive consultations across rural, regional and metropolitan Victoria, held two forums in conjunction with the Victims Support Agency, conducted and participated in numerous meetings with individuals and groups, interviewed many victims and received and considered 82 submissions from organisations and individuals. The commission has also conducted specific consultations on police powers with a range of organisations. These views inform the recommendations made in this Interim Report.

1.4 The report is also written in the context of a number of important police, court and government initiatives to deal with family violence. These initiatives are:

- the Victoria Police Code of Practice for the Investigation of Family Violence, released on 31 August 2004;

- the *Magistrates' Court (Family Violence) Amendment Act 2004*, introducing two pilot Family Violence Courts located at Heidelberg and Ballarat, which commenced operation on 14 June 2005;
- the 2005 report of the Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria*, which will be used to develop the first integrated and consistent system for addressing family violence in Victoria;
- programs and initiatives to fund a new approach to family violence in the 2005–2006 Victorian State Budget, which include the men's behaviour change program, a program for young men exhibiting violent behaviour, counselling services, crisis accommodation and referral services for men, and intensive support for vulnerable women and children;
- the *Victorian Government Response to the Victorian Indigenous Family Violence Task Force Final Report*, which includes the Family Violence Housing Pilot Program and rural and remote family violence initiatives to recruit skilled Indigenous family violence workers, Holistic Healing Centres and Indigenous Men's Resource and Advisory Service, among other programs;
- a review of child protection laws¹ and the development of a new policy framework for vulnerable children and young people.

1.5 In the remainder of this chapter, we discuss the social and legal contexts within which additional police powers in relation to family violence would be situated. We outline the nature and significance of family violence as a social problem, the importance of an effective immediate response to family violence, and the immediate responses available in the current legal system.

1.6 In Chapter 2 of this report, we describe the problems and inadequacies of the current system. In doing so, we state and explain our support for a police holding power in Victoria. In Chapter 3, we articulate the details of such a power and the safeguards that it should contain.

NATURE AND SIGNIFICANCE OF FAMILY VIOLENCE

1.7 Family violence is a significant problem in Victoria. It affects at least one in five women² and its effects are wide-ranging, usually severe, and sometimes

1 Department of Human Services [Vic], *Protecting Children the Next Steps* (July 2005).

2 Government of Victoria, 'Fact Sheet: a New Approach to Family Violence in Victoria' (Media Release, 27 May 2005).

fatal. Physical effects range from broken bones to long-term disability such as vision and hearing impairments and death—approximately 75 women in Australia each year are murdered by their male partner.³ Effects on mental and psychological health are also acute—for example, abused women are three times more likely to be diagnosed as depressed⁴ and three and one-half times more likely to be suicidal than non-abused women.⁵ Economically, victims of family violence may lose jobs, be stripped of their assets through economic abuse, have witnessed extensive property damage and be forced to flee their homes. Overall, family violence is the leading contributor of death, disability and illness in Victorian women aged between 15 and 44 years.⁶ It is responsible for a greater disease burden than the more recognised risk factors of high blood pressure and obesity.⁷ It costs Australia about \$8 billion a year, half of which is borne by the victims themselves.⁸ A quarter of all Australian children have witnessed violent behaviour towards their mother or stepmother,⁹ which a growing body of research suggests may be a form of child abuse in its own right.¹⁰

RESPONDING TO FAMILY VIOLENCE THROUGH THE LEGAL SYSTEM

1.8 An effective legal response to family violence is vital. Recent research on the dynamics of family violence has found that reasons for the high incidence of family violence lie partly in inadequate legal structures, responses and inadequate support service provision, as well as the wider social structures in which it takes place.¹¹

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- 3 Jenny Mouzos, *Femicide: the Killing of Women in Australia 1989–1998* (1999) 12.
 - 4 Angela Taft, 'Promoting Women's Mental Health: the Challenges of Intimate/Domestic Violence Against Women' (2003) 8 *Australian Domestic Violence Clearinghouse Issues Paper* 7.
 - 5 Ibid.
 - 6 VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004) 10.
 - 7 Ibid.
 - 8 Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004).
 - 9 David Indermaur, *Young Australians and Domestic Violence* (2001) 2.
 - 10 Partnerships Against Domestic Violence, *Children, Young People and Domestic Violence*, Phase 1 Meta-Evaluation Report (2003) 42, 44; John Fantuzzo and Wanda Mohr, 'Prevalence and Effects of Child Exposure to Domestic Violence' (1999) 9 (3) *The Future of Children* 21, 26–28; Joy Osofsky, 'The Impact of Violence on Children' (1999) 9 (3) *The Future of Children* 33; World Health Organisation, *World Report on Violence and Health* (2002) 103.
 - 11 Lesley Laing, 'Working with Women: Exploring Individual and Group Work Approaches' (2001) 4 *Australian Domestic & Family Violence Clearinghouse Issues Paper*.

1.9 An effective response to family violence requires different action at different stages. That is, there is a difference between what is required in a ‘crisis situation’, when the police attend a reported incident, and what is required in the medium and long term to address family violence and its effects. At the point of crisis, direct and immediate action is required to stop the violence occurring and to prevent its re-occurrence. In the medium and long term, it involves continual and reliable protection from the perpetrator and the availability of support services such as legal assistance, support groups and housing assistance, which can all enable a victim to establish a new violence-free life.

1.10 In this report, we are mostly concerned with the legal response to the crisis situation, in particular, the actions of police when they attend a reported family violence incident. Police holding powers would provide additional resources to police at such a time. However, as we demonstrate below, the way in which a crisis situation is handled also has an impact on the medium- and long-term success of addressing family violence. In this way, the initial police response to a family violence situation is particularly important in the overall process of addressing family violence.

RESPONDING EFFECTIVELY TO A FAMILY VIOLENCE CRISIS SITUATION

1.11 When a victim of family violence contacts the police, research has found it is usually an act of desperation that occurs during a crisis. Invariably, it means the victim has unsuccessfully tried every other solution to stop the violence.¹² A UK study found that, on average, women have been assaulted 37 times prior to their first contact with the police.¹³ If a victim does contact the police, an effective and immediate police response is therefore crucial. Research has found that an effective police response at this point can also be a key factor in the process of leaving a violent relationship.¹⁴

1.12 An effective initial police response to a family violence situation for victims includes believing the woman, removing the male partner from the home,

Intervention orders are a civil response to family violence that restrain the behaviour of violent family members.

initiating legal action following an assault or breach of an intervention order, efficient processing and serving of intervention orders, and overall taking a position that condemns men’s use of violence against their female

12 Shirley Patton, *Pathways: How Women Leave Violent Men* (2003).

13 A McGibbon, L Copper and L Kelly, *What Support? An exploratory study of council policy and practise, and local support services in the area of domestic violence within Hammersmith and Fulham* (1989).

14 Patton (2003), above n 12.

partners.¹⁵ In a recent Tasmanian study, women who identified police as a ‘key enabler’ in helping them leave a violent relationship were more likely to have permanently left the relationship shortly after this positive police contact.¹⁶

1.13 By contrast, victims define an ineffective initial police response to family violence as including delays in the serving of intervention orders and a failure to take any legal action following an assault or breach of an order.¹⁷ If family violence victims contact the police following an alleged assault and there is a subsequent lack of legal action, they often remain in the violent relationship longer.¹⁸ They may also have an increased sense of fear because the perpetrator has experienced no consequences or sanctions for his violence and nothing has been done to prevent the perpetrator harming them again. Such inaction can confirm what perpetrators themselves have told victims as part of their violent and threatening behaviour—that the police will not respond to their calls for help, and if they do, they won’t believe them or take action. Our consultations also found that an ineffective first response by the police, such as not responding immediately¹⁹ or requiring the victim rather than the perpetrator to leave the family house,²⁰ inhibits a victim from contacting the police again during a violent crisis situation.

1.14 In the remainder of this chapter, we demonstrate how the current legal response to a family violence crisis situation has limitations in providing this effective, immediate response.

CURRENT LEGAL RESPONSE

1.15 In Victoria, the legal system currently responds to family violence in two ways: the criminal response, which consists of arresting and charging a perpetrator for crimes such as assault; and civil response, which consists of granting an intervention order, or an interim intervention order, through the Crimes (Family Violence) Act.

An **interim intervention order** is a temporary order that is issued until a hearing can be held to decide whether a final order is made.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Zoë Morrison, Interview with Aid, 18 May 2005.

20 Zoë Morrison, Interview with Kate, 21 April 2005.

1.16 Both these responses have the potential to be effective in a crisis situation, as well as addressing family violence in the medium and long term. However, there are also problems with these responses as they currently stand.

CRIMINAL RESPONSE TO FAMILY VIOLENCE IN A CRISIS SITUATION

1.17 Criminal charges are the only way that a perpetrator can be detained in custody by the police immediately following a family violence crisis situation. Unless a person is arrested, there is no power for the police or anyone else to detain a person for questioning.²¹ Because of this, criminal charges have the potential to offer an immediate and effective response to a family violence crisis situation. Detaining the perpetrator achieves all the elements mentioned above which comprise an effective response to family violence: it removes the violent partner from the home, initiates legal action and takes a position that condemns men's use of violence against their female partners. Indeed, criminal charges send a very important message to both individual perpetrators and the community that family violence is a crime and is not tolerated, which also helps address family violence in the long term.

Limitations of the Criminal Response

1.18 However, there are two main problems associated with a criminal response to family violence, which mean that it is still not often used or indeed desirable in a crisis situation.

1.19 First, police have been and still are reluctant to treat family violence as a crime. The result of this has been a particularly low charge rate for family violence offences. For example, the proportion of charges laid where Family Violence Incident Reports were submitted remained consistent from years 1993 to 2003, ranging from 8% to 12.6%.²²

1.20 Fortunately, the tendency not to treat family violence as a crime is changing. There has been a positive shift in the police response to family violence as a result of the Victoria Police Code of Practice for the Investigation of Family Violence that was launched in August 2004. The code states that the primary response of police to family violence reports should be the pursuit of criminal charges where appropriate.²³ While the code has been in operation for less than a year and not all members of the force have received training, preliminary statistics

21 An exception is the Australian Security Intelligence Organisation.

22 Victoria Police, *Crimes Statistics 2002/03* (2003), 130.

23 Victoria Police, *Code of Practice: for the Investigation of Family Violence* (2004).

and anecdotal evidence suggest it is working: from June 2004 to June 2005 the number of charges laid by police in relation to family violence incidents increased by 73.2% from the previous year.²⁴

1.21 However, while the number of criminal charges for family violence is increasing, it is not always possible or in some cases desirable to respond to family violence in this way.

1.22 In addition, not all forms of family violence are crimes, such as verbal harassment, forced social isolation and emotional abuse.²⁵

1.23 Some victims are very reluctant to see family members charged, despite the harm they are causing. Processes involved in the criminal justice system can be extremely traumatic for victims of family violence. Accordingly, many victims are keen to avoid involvement in criminal law proceedings.

1.24 Problems with the criminal justice system can be compounded for disadvantaged groups who are affected by family violence the most, including Indigenous communities and people with disabilities.

1.25 Therefore, while one of the main benefits of a criminal response to family violence in a crisis situation is the ability of police to arrest and remove the perpetrator from the scene, there are limitations inherent in criminal prosecutions. This requires the alternative civil system to ensure an effective legal response to a family violence crisis situation.

CIVIL RESPONSE TO FAMILY VIOLENCE IN A CRISIS SITUATION

1.26 The civil response to family violence was introduced in Victoria in reaction to the inadequacies in the operation and effectiveness of the criminal justice system. From the outset, it was intended to work in tandem with a criminal response, not to replace it. However, it appears to have become the predominant response to family violence in Victoria.

1.27 A civil response to family violence involves the granting of intervention orders, which prohibit a perpetrator from contacting a victim of family violence and proscribing certain behaviour. If a perpetrator breaches the intervention order it is a criminal offence. The intervention order process can be accessed directly by the victim, another person on their behalf, or by the police. To obtain an

24 Victoria Police, 'Victoria Police Responds to Domestic Violence' (Media Release, 2 August 2005).

25 Many women who experience family violence say that the most pervasive and damaging types of abuse are verbal and emotional: University of South Australia, *Reshaping Responses to Domestic Violence*, Final Report (2000) 21.

intervention order an application must be made to the Magistrates' Court. After-hours applications can only be made by police.

1.28 There are advantages to this civil response to family violence at both the crisis point and in the medium and long term. While a criminal response to family violence can only react to previous crimes committed, a civil response, through the operation of an intervention order, operates to also prevent future violence. This is particularly important in relation to the crime of family violence, the very nature of which is continuous and usually escalating.

1.29 Other benefits of intervention orders include their availability and accessibility and the fact they provide a response to acts that are not considered criminal. Also, while a criminal charge requires proof 'beyond reasonable doubt' an intervention order only requires proof 'on the balance of probabilities'. It is also a flexible response to family violence in that the conditions of an intervention order can be varied according to the needs of individual family violence cases.

1.30 Given the advantages of the intervention order, it is particularly desirable for the civil legal response to be immediately effective in a family violence crisis situation. When police attend a family violence incident and find that it is not possible or appropriate to take criminal action, they could apply for an intervention order. As mentioned above, only police can apply for orders after hours, when most family violence incidents are reported.

1.31 However, police face impediments in seeking intervention orders in a crisis situation because of limitations in process and procedure.

Limitations of the Civil Response

1.32 Currently, police who attend a family violence incident must return to the police station to complete the necessary paperwork and obtain the necessary permissions to get an interim intervention order.

1.33 This may take some time, depending on where the police station is in relation to the location of the incident, particularly in rural areas. Regardless of how long this takes, it always means that the police must leave the crisis scene to attend to these procedural matters. Even if an order is obtained, it is not effective until served on the perpetrator. This severely impedes the effectiveness of the intervention order crisis response, as outlined in the following chapter.

Chapter 2

A Holding Power—the Case for Reform

CURRENT SYSTEM

2.1 The police response to family violence is crucial in holding perpetrators of violence accountable and ensuring safety and protection for victims of violence. A holding power will improve the police response to victims by providing greater safety while the intervention order process is accessed; assist the victim and/or children to remain in the home by detaining the perpetrator; reduce the impact on police resources; and in some circumstances, prevent the perpetrator from absconding or causing property damage after police have attended an incident.

2.2 This chapter examines the current civil system and the issues for police, victims of violence and marginalised groups. It also briefly outlines how other jurisdictions have dealt with holding powers, summarises submissions received on the issue and outlines the commission's recommendation to support the introduction of a holding power for police when intervening in family violence incidents.

PROCESS AND PROCEDURE

2.3 An applicant in person, another person on behalf of the applicant or a police officer can directly access the court during business hours or sitting days and seek a complaint or apply for an intervention order or an interim intervention order. Responsibility for serving documents on the respondent lies with police.

A **complaint and summons** is a court-issued document that notifies a person to attend court. A **complaint and warrant** tells the person the court details and allows police to arrest the person.

2.4 The out-of-hours²⁶ procedure for a complaint and warrant, a complaint and summons or to obtain an interim intervention order may only be accessed by a

26 Out of hours is defined as before 9am or after 5pm on a weekday; on a Saturday, Sunday or public holiday; and where the distance from the nearest venue where the court is sitting is so great that it is impracticable to make the complaint in person: *Crimes (Family Violence) Act 1987* (Vic) s 8(4).

police officer. Most family violence incidents occur after 5.00pm during the week and throughout weekends.²⁷

2.5 A police officer may apply outside business hours for an interim intervention order by telephone or facsimile machine to the on-duty magistrate. Police must complete a form of complaint to make a telephone or fax application.²⁸ The current practice is for police to apply for a complaint and summons²⁹ (for a less serious incident) or a complaint and warrant which, if granted, enables the police to arrest the perpetrator when apprehended.³⁰

2.6 Although the Crimes (Family Violence) Act specifically allows a police officer to telephone the on-duty magistrate to apply for an intervention order,³¹ it appears that all applications after hours are made to an on-duty registrar for a complaint and warrant or a complaint and summons.

2.7 The Police Code of Practice leaves it up to the individual officer to decide whether to apply for an order outside business hours, stating that an interim order 'may be sought...where police are required to take immediate action'.³² The code does not specifically address police obligations regarding after-hours applications, except to state that police may apply for an interim order 'after hours by contacting the after-hours registrar'.³³

2.8 We will be considering the current practice and procedure for obtaining after-hours applications in detail in our Final Report, as it would appear that streamlining and improving these procedures would help police and the courts and improve the provision of immediate protection to victims.

27 Victoria Police, *Crimes Statistics 2003/04* (2004) 133.

28 *Crimes (Family Violence) Act 1987* (Vic) s 8(4)-(10); *Magistrates' Court (Family Violence) Rules 2000* (Vic) sch 6; Victoria Police, *Victoria Police Manual* (4 April-1 May 2005) Instruction 109-4, para 6.2.2.

29 This process formalises the complaint and requires the perpetrator to attend court. It does not restrain the perpetrator in the intervening period.

30 *Crimes (Family Violence) Act 1987* (Vic) s 9.

31 *Crimes (Family Violence) Act 1987* (Vic) s 8(4).

32 Victoria Police (2004), above n 23, para 5.4.1.

33 *Ibid*, para 5.4.2.2.

ISSUES FOR POLICE

Police members considered [a] holding power to be particularly beneficial. The most telling advantage was that it would negate the need for police to return to the scene or go looking for the defendant to serve the interim order. More importantly, members believed the power would make it easier for them to deal with the incident, restore order, conduct investigations and ultimately increase their confidence to respond efficiently with family violence incidents.³⁴

2.9 Under the current system, it can be very difficult for police to respond effectively and provide an appropriate level of safety and support to those affected by family violence. The following example, provided to the commission by a police officer, illustrates this point:

The incident occurred in the [xx] area during the night shift. Police were called to the address at approximately 11.55pm in relation to a domestic. No criminal offences were detected but police had concerns for the welfare of the female at the premises. As a result of these concerns, police remained at the scene trying to convince the male to leave. Initially the male refused and dared police to arrest him. The couple's teenage daughter was present and consequently the female was also reluctant to leave the premises. Police eventually convinced the male to leave. While the police were still present at the address the male rang the premises six times to harass the female. As there was no intervention order the male was not committing an offence. Police left the premises at 12.45am and returned to the station to complete a complaint and warrant for an intervention order.

At 1.10am the male returned to the premises and the van was called to re-attend. The male fled the scene prior to the police arriving. Police spoke to the female and then returned to the station to complete the paperwork.

At 1.23am the police were called to re-attend the address as the male had returned again. During a search of the property police located the male hiding in the backyard. The male had removed the flywire screen from one of the back windows and had attempted to gain entry to the premises. At this stage the male had still committed no offence and police could only ask him to leave the premises. The male left and the police returned to the station to complete the paperwork.

At 2.10am the male attended the address again. Police re-attended but the male fled and was unable to be located. Police returned to the station and were eventually able to complete the complaint and warrant for an intervention order. However, by the time the complaint and warrant was issued police were unable to locate the male and consequently the warrant could not be executed.³⁵

2.10 Police currently have no clear authority to hold or remove a violent family member unless they have the grounds to immediately arrest for a criminal offence such as assault. Therefore, the violent family member cannot be lawfully detained while police use the civil intervention order process. It takes several hours to obtain the intervention order, warrant or summons and after it is granted police must subsequently spend time locating the respondent to serve the order.

2.11 Calls seeking police attendance at family violence incidents represent a significant proportion of the workload of operational police officers.³⁶ The impact on police resources of completing the procedure and travelling to and from the place of the incident can be severe, particularly in rural areas. It is also time consuming as it takes on average four hours to complete.³⁷

2.12 Serving family violence complaints or orders on respondents may also use significant police resources. A Queensland study found that the number of visits required by police to serve an application for an order on a respondent is on average 2.3.³⁸

POLICE ORDERS—A POSSIBLE ALTERNATIVE

2.13 Other jurisdictions have dealt with the need to provide immediate protection to those experiencing family violence by allowing police to grant emergency intervention orders in crisis situations. Amendments in 2004 to Western Australia's *Restraining Orders Act 1997* gave police the power to issue temporary orders that restrain the respondent in the same way as a court-imposed order.³⁹

35 Consultation, 19 April 2005, Inspector John Thexlon and others, Broadmeadows police complex.

36 From July 2004 to 2005, Victoria police submitted 29,162 family violence incident reports: Victoria Police, 'Victoria Police Responds to Domestic Violence' (Media Release, 2 August 2005).

37 Consultation, 21 April 2004, Barwon South-West Region service providers and police.

38 Dale Murray, 'Problems Associated with the Preparation and Service of Domestic Violence Documents by Members of the Queensland Police Service' (Paper presented at the Seeking Solutions: Domestic Violence & Sexual Assault Conference, Queensland, 5–7 September 2001).

39 *The Acts Amendment (Family and Domestic Violence) Act* (WA), amending the *Restraining Orders Act 1997* (WA) s 30A.

2.14 Tasmanian police have also recently been granted a very extensive power to make orders of up to 12 months duration where the violence is between intimate partners.⁴⁰ The New South Wales Law Reform Commission has recently recommended that police have the power to make an order that lasts for up to 48 hours where an authorised justice cannot be contacted.⁴¹

2.15 We heard mixed views on whether it is desirable for police to have the power to issue short-term orders and believe the possible introduction of powers to enable police officers to make orders requires further and more detailed consideration. We will make recommendations about this in our Final Report.

CURRENT SYSTEM—ISSUES FOR VICTIMS

Perpetrators...should be locked up until...you get that intervention order...If they know the order is coming they can avoid being served, which a lot of them do. This makes it hard for the police too. If the police arrive at a premises and it's quite evident that things have gone on, why can't the perpetrator be held at the police station...Then the police don't have to run around and try to serve him. The best thing is to try to free up as much time as possible for everyone concerned. The police keep telling me that they have too much paperwork...They told me they only had one car out on a Sunday, so bad luck if he came and attacked me on a Sunday, it could take five hours for them to get there.⁴²

2.16 Three major difficulties arise for family violence victims as a result of the current constraints on police in dealing with perpetrators.

2.17 First, if the victim and/or children do not feel safe remaining in the home while the perpetrator is at large, they must be taken to a police station while the application is made. Leaving their home at this point is disruptive, especially for children, and also inappropriate if a victim is traumatised and/or requires medical attention. It is also unjust to require victims to leave their home for their own protection—it is the perpetrator who has created the problem, yet it is the victim who must attend the police station.⁴³ It means perpetrators are not held immediately accountable for their actions.⁴⁴

40 *Family Violence Act 2004* (Tas) s 14.

41 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003) 142.

42 Zoë Morrison, Interview with Julie, 27 April 2005.

43 Submissions 27, 33. This concern for fairness to the innocent party was also expressed by women participating in a study on the ways that female victims of family violence can be supported to remain

2.18 Furthermore, requiring a victim to leave the home at this point can be detrimental to addressing family violence and its long-term effects. It often leads to women and children moving into domestic violence refuges,⁴⁵ and significantly increases the chances of the woman eventually becoming homeless.⁴⁶ When police remove the perpetrator from the home (rather than the victim), research has shown it has an overall positive impact on the woman's ability to remain in the home.⁴⁷ As the Women's Domestic Violence Crisis Service notes, '[w]omen and children should be able to be safe in their homes while the violent partner or ex-partner should be made to leave and change his behaviour'.⁴⁸

2.19 The second major difficulty is associated with a perpetrator being left in the home while the application is made. If family members have been taken away it gives the perpetrator an opportunity to destroy family property, an action which is not uncommon. If family members have remained it gives the perpetrator another opportunity to be violent towards them.

An example of the ineffectiveness of our justice system was once when he abused me badly and wrecked the house (which was jointly owned), the police arrived and told me I had to go with them, not him. He got to stay in the house, and I was the one who had to leave...If they do take you with them, they just dump you somewhere, with a friend, parents or at a hotel. I stayed in a hotel on a number of occasions, and of course the next day I would end up going home. Where else would I go? I have no money or possessions. The police just try to stop it there and then so that they can get on with their night it seems like. But you can't blame the police it's the fault of the law. That is what they are following.⁴⁹

2.20 Finally, if police cannot locate the perpetrator to serve an order it may lead to extended delays in the order being granted. During this period, the victim is left unprotected and may be subjected to more violence and the acute fear that accompanies the threat of violence. Indeed, family violence can become dramatically worse when there has been some separation between the perpetrator

in their own home: Robyn Edwards, *Staying Home Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (2004) 3.

44 Ibid 36.

45 Submissions 27, 41, 45, 46.

46 Partnerships Against Domestic Violence, *Home Safe Home: the Link Between Domestic and Family Violence and Women's Homelessness* (2000) 17.

47 Edwards (2004), above n 43, 29.

48 Submission 33.

49 Submission 78.

and victim (eg if the victim has decided the relationship must end). Some victims will have to leave their homes at this point in an attempt to be safe:⁵⁰

I wasn't secure until I knew they'd actually served that interim [intervention order] on him. And then I felt at ease, but until then you've got to just make sure they do serve it, because otherwise you're still living in fear, 'cause he can still come on the premises until that interim is actually served to him in person.⁵¹

2.21 Overall, the limited options currently available to the police do not sufficiently recognise the serious nature and consequences of committing family violence. As Robyn Edwards notes:

The women's movement, government agencies and the community sector have been talking for a very long time about the perpetrator being held accountable for the violence. Despite this, women are still blamed for the violence and bear many of the consequences of the violence, including having to leave their own homes.⁵²

ISSUES FOR INDIGENOUS PEOPLE AND OTHER MARGINALISED GROUPS

2.22 Some groups or communities may have particular difficulties in their dealings with police, or they may need support to be able to properly negotiate the justice system or make arrangements for appropriate accommodation. While a holding power will benefit victims by improving the police response, safeguards need to be included for perpetrators from Indigenous communities and other marginalised groups. These issues are discussed below and the commission's recommendations for safeguards are discussed in Chapter 3.

INDIGENOUS PEOPLE

2.23 During consultations, the commission heard of the many problems experienced by Indigenous people in relation to the police response to family violence. Many Indigenous people do not want to involve police in family violence situations due to previous experiences of police racism. Those who call the police in a crisis situation sometimes experience long waiting times before the police attend, especially when police have had prior contact with the family or even the area where they live. Police sometimes downplay the severity of violence

50 Zoë Morrison, Interview with Aid, 18 May 2005.

51 Edwards (2004), above n 43, 32.

52 Ibid 43.

in Indigenous communities, believing it is part of Indigenous culture and therefore not serious.

2.24 The commission is particularly concerned that any changes to current rules and procedures do not worsen the relationship between Indigenous people and the police. As the Police Code of Practice states, family violence is not part of Indigenous cultures,⁵³ but the Indigenous population is significantly over-represented as family violence victims and offenders.⁵⁴ Effectively addressing family violence in Indigenous communities is therefore of paramount concern.

2.25 The commission acknowledges particular concerns about Indigenous people being subjected to a police holding power. Such concerns need to be seen in the context of the findings of the Royal Commission into the Aboriginal Deaths in Custody,⁵⁵ as well as the broader issue of Indigenous and police relations. Although holding powers are different from being taken into custody in that the person is not arrested, the consequences of holding powers may involve a short period of custodial detention. Concerns about detention, and indeed other police action, should not be used to lessen the effectiveness and operation of response to family violence in Indigenous communities. Rather, existing measures that exist to prevent harm to Indigenous people in custody should also be taken in relation to police holding powers. Guidance as to the appropriate form of intervention for Indigenous people may also be obtained from a current Victoria Police project that is examining the police response to family violence in Indigenous communities, with initiatives being generated at a local community level.⁵⁶

REFUGEES AND IMMIGRANTS

2.26 The commission acknowledges that refugees and other immigrants who have been persecuted by police in their countries of origin, such as being held against their will and tortured, may have particular concerns in relation to a police holding power. Our consultations have found that such experiences may already prompt a greater reluctance to involve police in family violence issues. We recommend that sensitivity to such issues be at the forefront of any police use of

53 Victoria Police, above n 23, 17 para 2.5.6.2.

54 Ibid.

55 Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

56 Victoria Police Response to Family Violence in the Indigenous Community: a project for the Family Violence Unit of Victoria Police. The project is due for completion in October 2005.

holding powers in regard to groups of people who have experienced such trauma or have little understanding of the system they confront.

YOUNG PEOPLE

2.27 The commission recognises that young people can also be the perpetrators of family violence. Children and young people have specific rights as perpetrators of criminal acts. International human rights law recognises the detrimental consequences of involving young people in the criminal justice system, stating that contact with law enforcement agencies ‘might profoundly influence the juvenile’s attitude towards the State and society’.⁵⁷ International human rights law stipulates that criminal sanctions, particularly imprisonment, are only used as a last resort.

PEOPLE WITH A DISABILITY OR COGNITIVE IMPAIRMENT

2.28 For people with disabilities who are victims of family violence, there are additional problems if they are required to leave their homes as very few refuges or alternative sources of accommodation provide them with appropriate facilities. People with disabilities may be unwilling to seek protection through the justice system, particularly after hours, because of concerns about being forced into inappropriate accommodation. For people who have a cognitive impairment or where a guardian has been appointed according to the *Guardianship and Administration Act 1986* (Vic), special consideration needs to be given if they are to be involved as a respondent in a civil process.

POLICE HOLDING POWERS IN OTHER AUSTRALIAN JURISDICTIONS

2.29 Police in every other jurisdiction in Australia have a limited power to detain suspected perpetrators of family violence.⁵⁸ Police may detain a perpetrator for the purposes of obtaining an interim intervention order in Western Australia,⁵⁹ New South Wales,⁶⁰ Queensland,⁶¹ Tasmania,⁶² Australian Capital Territory,⁶³ Northern Territory⁶⁴ and South Australia.⁶⁵

57 United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (*The Beijing Rules*), GA Res 40/33, UN GAOR, 40th sess, UN Doc A/40/53 (1985) annex commentary to Rule 10.

58 See Appendix 1.

59 *Restraining Orders Act 1997* (WA) s 62F.

60 *Crimes Act 1900* (NSW) s 562H(12).

61 *Domestic and Family Violence Protection Act 1989* (Qld) s 69.

2.30 Each state and territory's holding power operates in a different way.⁶⁶ In some states, police can require the person to remain at a 'particular place' or at

Model laws are developed by an expert committee and aim for legislative best practice.

'the scene of the incident' until an interim intervention order is granted and served. If the person refuses to comply with this instruction, the police officer can arrest the person without a warrant. Once the perpetrator is arrested, the normal police procedures for arrest apply. This model is adopted in South Australia, New South Wales and Western Australia.⁶⁷ In other states and territories, the holding power is a power to take perpetrators 'into custody' or to 'detain the person' without arresting them. This model applies in the Australian Capital Territory, the Northern Territory and Queensland.⁶⁸ The Model Domestic Violence Laws include a hybrid of these two systems by providing that a police officer may direct the perpetrator to 'remain at a place stated by the officer' and if the person does not comply with the directions, the police officer can detain the person either at the place stated by the officer or at a police station.⁶⁹

SAFEGUARDS ON EXERCISE AND EXTENT OF POWER

2.31 All Australian jurisdictions include various safeguards in their legislation to ensure that the holding power restricts the perpetrator's liberty as little as possible. The power to detain usually lasts only until an application for an interim order is either granted or rejected. In most jurisdictions there is a maximum time for detention of between two and four hours. However, in Tasmania the police may detain the suspected perpetrator for 'as long as is necessary' to determine any charges to be laid, carry out a risk screening or safety audit, implement measures identified by a safety audit, make and serve a police order or apply for a court

62 *Family Violence Act 2004* (Tas) s 11.

63 *Protection Orders Act 2001* (ACT) s 68.

64 *Domestic Violence Act* (NT) s 7.

65 *Domestic Violence Act 1994* (SA) s 8(7).

66 See Appendix 1.

67 *Domestic Violence Act 1994* (SA) s 8(7); *Crimes Act 1900* (NSW) s 562H(12); *Restraining Orders Act 1997* (WA) s 62F.

68 *Protection Orders Act 2001* (ACT) s 68; *Domestic and Family Violence Protection Act 1989* (Qld) s 69; *Domestic Violence Act* (NT) s 7.

69 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999) 174.

order.⁷⁰ In New South Wales, police can arrest and detain the person ‘until the order is made and served’.⁷¹

2.32 In Queensland, the legislation contains additional safeguards to ensure against an abuse of power by police. The person taken into custody must be delivered immediately into the custody of a watch-house manager, who must enter the person’s details in a register. The register must be made available at all times to people detained or to another person authorised by them. If there is no entry in the register, this is taken as evidence that the taking of the person into custody was unlawful.⁷²

2.33 The Queensland legislation also allows for additional protection for the victim of violence. If the power to keep a person in custody expires because an application for an intervention order has been granted or rejected, the person can continue to be held in custody if it is necessary to implement measures to safeguard the victim. The watch-house manager must record the reasons for the belief that the victim needed safeguarding.⁷³ There is still a maximum limit of four hours that the person can be held for.⁷⁴ This provision is important in recognising the dual purpose of a detention power—first, to make and serve a temporary intervention order and secondly, to allow time for measures to be put in place to protect the victim.

INTERNATIONAL STANDARDS AND OBLIGATIONS

2.34 Under international human rights law binding on Australia, there is an obligation on State agencies to combat violence against women. This obligation comes particularly from the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), which Australia ratified in 1983. The CEDAW committee has held that violence against women is a form of discrimination covered by Article 1 of the convention.⁷⁵

2.35 In recent times, the international community has recognised that this duty includes taking all necessary measures to prevent and punish rights abuses

70 *Family Violence Act 2004* (Tas) s 11.

71 *Crimes Act 1900* (NSW) s 562H(12).

72 *Domestic and Family Violence Protection Act 1989* (Qld) ss 70, 75.

73 *Domestic and Family Violence Protection Act 1989* (Qld) s 69(3).

74 *Domestic and Family Violence Protection Act 1989* (Qld) s 69(4).

75 United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation 19*, CEDAW, 11th sess, 1992.

committed by individuals.⁷⁶ For example, the United Nation's General Assembly *Declaration on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women* states all countries should:

...ensure that police procedures, including decisions on the arrest, detention and terms of any form of release of the perpetrator take into account the need for the safety of the victim...and that these procedures also prevent further acts of violence.⁷⁷

2.36 To comply with such international standards, Victoria needs to adopt the strongest possible protections for victims of family violence.

VIEWS FROM SUBMISSIONS

2.37 Most submissions received by the commission explicitly supported a power for the police to hold suspected perpetrators of family violence for the purpose of obtaining an intervention order. Supporters of this power included victims of family violence, the Women's Domestic Violence Service, the Royal Women's Hospital, the Whittlesea Domestic Violence Network, the Domestic Violence and Incest Resource Centre, the Eastern Community Legal Centre, the Darebin Family Violence Working Group, the Federation of Community Legal Centres and the Women's Legal Service.⁷⁸

2.38 The commission has received a detailed submission from Victoria Police⁷⁹ and consulted extensively with police officers, who have expressed overwhelming support for the introduction of a holding power as an important intervention in dealing with family violence incidents.

2.39 Support was also expressed by a men's referral service staff member participating in a Victoria Police study, who stated '[i]t will be safer for the woman until the order is in place. This is traditionally the most unsafe time, when she has initiated action but the order is not in place'. In the same study a Magistrate's Court staff member noted

76 United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation 19*, CEDAW, 11th sess, 1992; United Nations, *Declaration on the Elimination of Violence against Women*, UN GAOR, 48th sess, UN Doc A/RES/48/104 (1993); United Nations, *Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women* UN GAOR, 52nd sess, UN Doc A/RES/52/86 (1997); United Nations, *Fourth World Conference on Women Beijing Declaration and Platform for Action*, A/CONF.177/20 (1995).

77 United Nations, *Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women* UN GAOR, 52nd sess, UN Doc A/RES/52/86 (1997) Annex para 8(c).

78 Submissions 5, 25, 33, 39, 40, 49, 62, 63, 64, 74.

79 Submission 5.

[the holding power] is short-term for the crisis intervention stage. The liberty of the defendant is only interfered with for a short time. It calms down a volatile situation. It prevents escalation to a serious offence or death.⁸⁰

2.40 Two of the 77 submissions received by the commission expressed reservations with this power. The Police Association was concerned that holding powers would increase police workloads and expose police to an increased risk of litigation.⁸¹ Victoria Legal Aid was concerned about ‘giving police additional detention powers in the absence of demonstrated need’.⁸² Some submissions emphasised that a holding power should be exercised solely for the purpose of obtaining an interim order and that there should be a short maximum time allowed.⁸³

RECOMMENDATIONS

2.41 Given the restrictions police currently experience in providing an effective crisis response to family violence, the effect this has on victims, the fact that all other Australian jurisdictions have a holding power, and the overwhelming support outlined in submissions, the commission recommends that a holding power be introduced for police in family violence situations.

! INTERIM RECOMMENDATION(S)

1. A holding power be introduced for police in family violence situations to enable them to obtain and serve an intervention order and protect the victim.

2.42 In addition to this recommendation, the commission also recommends specific safeguards for such a power. In the next chapter we consider guiding principles for the formulation and operation of the proposed holding power.

80 Ibid.

81 Submission 17.

82 Submission 41.

83 Submissions 41, 64, 74.

Chapter 3

Police Holding Power Framework

3.1 In this chapter, we recommend a framework for a police holding power and the safeguards that should be associated with it. In regard to such police powers, we agree with the following principles outlined by Liberty Victoria:

An accountable police force is an essential element in a civilised society.

Coercive powers given to the police must be justified by a demonstrated need, be the least intrusive necessary to achieve their purposes, contain adequate checks and balances to protect the rights of the individual, and be subject to independent scrutiny.⁸⁴

We use these principles to structure the guiding principles for the formulation and operation of the proposed holding power, framework and safeguards.

A DEMONSTRATED NEED

3.2 In Chapter 2, we detailed the need for a holding power to overcome the limitations placed upon police in responding to family violence. As discussed in that chapter, this need has been recognised in all other Australian jurisdictions and is widely supported by community groups, service providers, victims and the police in Victoria.

LEAST INTRUSIVE TO ACHIEVE THE PURPOSE

3.3 The purpose of extending police powers to intervene in family violence incidents is to enable police to obtain and serve an intervention order and to secure the safety and protection of the victim. In achieving these purposes, it is important that such a power be as least intrusive as possible. Police can only exercise the holding power if they have a reasonable belief that there are grounds for an intervention order. If the intervention order is not granted or a summons or warrant is not issued, the person must be immediately released.

84 Liberty Victoria, *Policy on Police and Policing* <www.libertyvictoria.org.au/issues> as at 22 August 2005.

3.4 If police have determined, pursuant to their Code of Practice, that it is necessary to make a complaint or an application for an intervention order, they should be able to detain the perpetrator while the relevant application is made and served—but for a strictly specified period. As detailed above, the extent of the period of detention in other Australian jurisdictions varies considerably, from two hours in Western Australia to as long as necessary in Tasmania. In Victoria, operational police have advised the commission that the time required to deal with a family violence incident varies significantly according to the location of the incident and the availability of personnel, but takes an average of four hours. In rural areas where there are fewer police and travelling times are greater, the time required by police may be longer. In some cases, therefore, the intervention order application would not be completed within the average time of four hours and would result in police being required to release the offender prior to completion of the process.

3.5 The commission believes the holding period should be long enough to cover a wide range of contingencies and achieve a balance between the shortest

Community justice panels are made up of volunteers and operate throughout Victoria to support Indigenous and Torres Strait Islander people who are arrested.

period of detention necessary and a sufficient time to enable service of the order and protection of the victim. Additional safeguards may need to be put in place for perpetrators from marginalised groups, such as obtaining the attendance of a representative from a community justice panel or assisting with support for the perpetrator to find alternative accommodation. It may be necessary to engage safety measures for the victim, such as changing locks, installing a personal alarm or obtaining a mobile phone. These procedures may take longer than completing the court process. Such provisions for detention of the perpetrator for the purpose of executing safety measures for the victim is the model adopted in Queensland. Victoria Police and service providers also saw a holding power as an important way to provide better protection and safety measures to the victim while the perpetrator is still in police custody.

3.6 The commission does not agree that police should have an open-ended timeframe, as there is a possibility the process would be given insufficient priority. Accordingly, to avoid a situation where police routinely need to seek an extension of time or have an open-ended timeframe, the commission believes that a six-hour period is reasonable in the circumstances and any extension of time should be a measure of last resort. If there are unforeseen and exceptional circumstances which give rise to the need to detain the person for longer than six hours, an application must be made to a magistrate for authority to hold the person for a further period, which is not to exceed four hours. An extension should only be granted if there are exceptional or unforeseen circumstances that have prevented police from

completing the process and serving the perpetrator within the specified time, or completing measures for the protection of the victim.

3.7 The Model Domestic Violence Laws suggest that a perpetrator may be held at any place that a police officer requests. If the perpetrator refuses, police can detain the perpetrator at the requested place or at a police station. The commission supports this model as it ensures that taking a perpetrator into police custody is a last resort, to be used only where the perpetrator will not cooperate with police by remaining in the place requested.

3.8 The commission also recommends that the holding power should only be available where the person who has used violence is aged 18 or over.⁸⁵ While the commission recognises that violence perpetrated by adolescents within the family can be very serious, the consequences of involvement with police at a young age can lead to negative consequences. Where young people come into contact with the intervention order system, it is essential that appropriate support services are available, particularly given the impact an intervention order may have on their housing situation.

ADEQUATE CHECKS AND BALANCES

3.9 Appropriate safeguards must be introduced with holding powers to guard against abuse, especially as the perpetrator will not automatically have all the rights associated with an arrest. The detention power should be accompanied by rights and safeguards that are applicable when a perpetrator is detained.

INDIVIDUAL RIGHTS PROTECTION

3.10 To ensure clarity of the responsibilities upon police officers exercising this power, and to guard against the problems which may be experienced by particular groups, we believe the following safeguards should be included in legislation:

- If the person identifies as Aboriginal or a Torres Strait Islander, the detained person should be granted access to a representative of a community justice panel or other appropriate support person.⁸⁶

85 See discussion in para 2.27.

86 Victoria Police Response to Family Violence in the Indigenous Community: a Project for the Family Violence Unit of Victoria Police. The project is due for completion in October 2005.

- If the person has a cognitive impairment, police must grant access to an independent third person on behalf of the detained person or if a guardian has been appointed he/she must be notified.
- The detained person must be granted access to an interpreter if required for the purpose of understanding the process.
- The detained person may notify a friend or a family member.
- To ensure that an adequate record exists of the exercise of the holding power at a police station, the detained person's details must be entered into the attendance register.
- The detained person should be given a written notice about the complaint or order, when the matter will be listed in a named court and advised where to access advice and support.
- Victoria Police should consider developing guidelines for dealing with family violence incidents involving newly arrived and emerging communities.

INDEPENDENT SCRUTINY AND MONITORING

3.11 Service of a complaint or intervention order will provide the perpetrator with notification of a place and date for the court hearing. The matter is then subject to the independent scrutiny of the court as the complaint will be determined by the court within a specified time and at a specified hearing date.

3.12 An existing regime of police monitoring in regard to family violence is included in the Code of Practice and ensures that police can be held accountable for their actions. Police supervisors have direct responsibility for checking the appropriateness of police responses. This is achieved through direct case management of family violence incidents. Each 24-hour police station also has a Family Violence Liaison Officer who is responsible for monitoring and reporting on responses, being a contact person for local community agencies and coordinating the response to victims where there are multiple attendances by police with the same people.⁸⁷ We recommend that this monitoring procedure be extended to include the use of holding powers by police.

3.13 Scrutiny of the use of holding powers should be provided by collecting data about the exercise of the proposed power and publishing it annually.

87 Victoria Police (2004), above n 23, 51

POLICE LIABILITY

3.14 Concern has been expressed by the Police Association⁸⁸ that permitting police officers to hold a perpetrator would place officers under increased workloads and expose them to a potential risk of litigation. Concerns about exposing police to litigation can be met if adequate safeguards for officers are provided and the proposed power has a clear legislative base. The commission also believes that potential litigation against police can be addressed through express provision in the legislation. This provision would state that police cannot be liable in any civil action for actions that they take ‘in good faith and in the normal course of their duties’.⁸⁹ As to the potential impact on police workloads, one of the key justifications for this power is to make police procedures for serving intervention orders more efficient and therefore decrease workloads.

3.15 As a holding power does not carry with it the same common law and legislative basis as a power of arrest, officers’ protection from liability should be made clear by introducing legislation to permit police to apply only such force as is reasonably necessary in the exercise of the detention power, and to provide the same power and protection in relation to the exercise of holding powers as the member would have had if arresting the person for an offence.

3.16 It is also important to have clarity about the extent of the proposed police holding power if a person refuses to comply with the police officer’s direction to remain in a designated place or to accompany police to a place. If a person refuses or has refused to comply with a police officer’s direction, the person may be arrested without warrant. The person may be detained in custody for as long as necessary to make and complete an application for a complaint or intervention order or for the proposed period of six hours, whichever is earlier.

CONCLUSION

3.17 This Interim Report has been written in response to a request from the Attorney-General. The commission is keen to get feedback on its interim recommendations. Such views will be taken into account in developing recommendations in our Final Report.

88 Submission 17.

89 See *Crimes (Family Violence) Act 1987* (Vic) s 7A(2) for a similar provision.

! INTERIM RECOMMENDATION(S)

2. The *Crimes (Family Violence) Act 1987* should be amended as follows:

(a) If a police officer is applying for an intervention order under section 7 or a summons or warrant under section 9 of the *Crimes (Family Violence) Act 1987* (Vic), the officer may direct the person against whom the order is sought to remain at a place stated by the officer.

(b) If the person refuses or fails to comply with the police officer's direction, the officer may arrest and detain the person in custody without a warrant.

(c) In exercising the holding power referred to in 2(a), the police officer may use such force as is reasonably necessary. The police officer has the same power and protection in relation to the exercise of these powers as a police officer has when arresting a person for an offence.

(d) The person may only be held or detained until:

(i) a summons, intervention order or warrant applied for by police is granted and served or executed upon the person; and

(ii) further measures to protect the family member(s) are carried out; or

(iii) the summons, warrant or intervention order is refused.

(e) In all cases mentioned in (d), the person shall not be detained for longer than 6 hours unless a further extension of time is granted, as detailed in (f). An extension will not be granted for more than an additional 4 hours and the detained person may in no circumstances be held for longer than 10 hours.

(f) If a police officer needs to hold a person for longer than 6 hours to obtain and serve an order or a summons, or to take measures necessary for a family member's safety, the officer may apply to the on-duty magistrate for an extension of time. An extension shall only be given in exceptional circumstances. Exceptional circumstances may include:

(i) where there are long distances involved in transporting the person to the police station

(ii) any other unforeseen and urgent police matter that occurs after the person is held prevents the police officer from making the application within a reasonable time.

! INTERIM RECOMMENDATION(S)

(g) People held under 2(a) must:

- (i) be 18 years or older
- (ii) if held at a police station, have their details entered into the Attendance Register.

(h) If people are held at a police station, they must:

- (i) be advised that they may notify a friend or family member of their whereabouts
- (ii) be granted access to an interpreter if required for the purpose of understanding the process
- (iii) be granted access to a community justice panel representative or other appropriate support if they identify themselves as Aboriginal or Torres Strait Islander
- (iv) be granted access to an independent person if they have a cognitive impairment or to a guardian if they have one—the guardian must be contacted by police.

(i) Victoria Police should develop guidelines to accompany the implementation of the above changes. In particular, these guidelines may outline procedures for dealing with perpetrators who are held under these provisions who are from newly arrived communities. For example, the guidelines could outline an appropriate role for community workers or family members while the person is being held by police.

(j) The existing regime of monitoring and reporting of police under the Police Code of Practice for the Investigation of Family Violence be extended to include the use of the holding power. Statistics should be kept on the use of the power and reported annually.

Appendix 1

OTHER AUSTRALIAN DETENTION POWER PROVISIONS

MODEL DOMESTIC VIOLENCE LAWS

45. Police officer detaining person for telephone interim protection order

- (1) A police officer who makes, or is about to make, an application for a telephone interim protection order may direct the person against whom the order is sought to remain at a place stated by the officer.
- (2) If the person does not comply with the police officer's direction, the officer may –
 - (a) detain the person at the place stated by the officer in the direction; or
 - (b) take the person to a police station and detain the person at the station.
- (3) However, the person may only be detained until the first of the following happens –
 - (a) the elapsing of 4 hours from when detention begins;
 - (b) the making of the telephone interim protection order by an authorised justice and served on the person;
 - (c) the denial by an authorised justice of the police officer's application for a telephone interim protection order against the person.

AUSTRALIAN CAPITAL TERRITORY

DOMESTIC VIOLENCE AND PROTECTION ORDERS ACT 2001

68. Detention of person against whom protection order sought

- (1) If it is proposed to apply for an emergency order against a person, a police officer may—
 - (a) if appropriate, remove the person to another place; and
 - (b) detain the person until the application for the order has been dealt with and a copy of any order made is given to the person.
- (2) A person must not be detained under this section for longer than 4 hours.

NEW SOUTH WALES

CRIMES ACT 1900

562H Telephone interim orders

...

(12) Detention of defendant. A police officer who makes or is about to make an application for a telephone interim order may direct the person against whom the order is sought to remain at the scene of the incident concerned. If the person refuses to do so, the police officer may arrest and detain the person at the scene of the incident, or arrest and take the person to a police station and there detain the person, until the order is made and served.

NORTHERN TERRITORY

DOMESTIC VIOLENCE ACT

7. Power to remove and detain while order sought

(1) Where a member of the Police Force intends to apply for an order under section 6 [telephone applications by police] against a person and believes on reasonable grounds that unless the person is removed a person in a domestic relationship with the person, for whose protection the order is to be sought, will be in imminent danger of suffering personal injury at the hands of the person or an aggravation of personal injuries already sustained, the member may enter any premises on or in which the member believes the person to be, take the person into custody and remove the person to the nearest police station or other place where an application under section 6 can conveniently be made.

(2) A member of the Police Force who under subsection (1) removes a person to a police station or other place may detain the person at that police station or place for as long as is reasonably necessary for an application under section 6 in relation to the person to be made and an order given or refused but, in any case, for not more than 4 hours after the person was first taken into custody.

(3) A member of the Police Force may apply such force as is reasonably necessary in the exercise of the member's powers under subsection (1) and has the same power and protection in relation to the exercise of those powers as the member would have had the member been arresting the person for an offence.

QUEENSLAND***DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989*****69. Presence at domestic violence incident**

(1) A police officer who has reasonable grounds for suspecting that an act of domestic violence has been committed and—

- (a) a person is in danger of personal injury by a respondent; or
- (b) a person's property is in danger of being damaged by a respondent;

may take the respondent into custody using such force as is reasonable and necessary.

(2) The respondent taken into custody may be held in custody until the earliest of the following happens—

- (a) an application for a protection order naming the respondent is heard and decided under section 71(1);
- (b) a temporary protection order is made under section 39G;
- (c) an application for a protection order is completed, and arrangements are made with the watch-house manager, under section 71(3).

(3) If the watch-house manager reasonably believes it is necessary for arrangements to be made to safeguard the aggrieved but the respondent may no longer be held under subsection (2)—

- (a) the respondent may continue to be held in custody until the arrangements are completed; and
- (b) the watch-house manager must record the following in the register kept under section 70—
 - (i) the reasons for the belief; and
 - (ii) the time at which the respondent could no longer be held under subsection (2); and
 - (iii) the time at which arrangements to safeguard the aggrieved were completed; and
 - (iv) the time at which the respondent was released from custody.

(4) A respondent may not be held under subsection (2) or (3) for more than 4 hours from when the respondent is first taken into custody under subsection (1).

70. Duty of police officer who has taken a person into custody under s 69

- (1) If a person is taken into custody under section 69(1), the police officer who took the person into custody must immediately deliver the person into the custody of a watch-house manager.
- (2) As soon as possible after the person arrives at the watch-house, the watch-house manager must enter the person's particulars, as required under a regulation, in the register kept by the watch-house manager for the purpose.
- (3) The police officer who took the person to the watch-house is responsible for confirming the particulars the watch-house manager has entered in the register.

71. Police officer must apply for protection order etc.

(1) Subject to this section, if a police officer takes a person into custody under section 69(1), the officer must prepare an application for a protection order in which the person is named as the respondent and immediately bring the person before the court for the hearing and determination of the application if the person is still in custody.

(2) If—

- (a) it is not practicable to bring the person taken into custody before a court under subsection (1); and
- (b) the police officer believes that it is necessary to obtain a temporary protection order under section 54 against the person before the person is released;

the police officer may make an application under section 54.

(3) If—

- (a) it is not practicable to bring the person taken into custody before a court under subsection (1); and
- (b) the police officer is not satisfied that it is necessary to make an application under section 54 against the person before the person is released;

the police officer must—

- (c) complete the application prepared under subsection (1); and
- (d) arrange with the watch-house manager for the person to be released from custody on such reasonable conditions as the watch-house manager considers appropriate, including prescribed conditions and a condition that sets out the details of the time and place of the hearing of the application.

(4) When the person is released from custody, the watch-house manager must give the person a copy of the application for the protection order and the conditions on which the person is released.

(5) Conditions on which a person is released from custody as mentioned in subsection (4) continue in force until—

(a) a court determines whether or not to make a protection order against the person; or

(b) a court determines whether or not to make a temporary protection order against the person; or

(c) a magistrate determines whether or not to make a temporary protection order against the person on an application under section 54;

whichever happens first.

SOUTH AUSTRALIA

DOMESTIC VIOLENCE ACT 1994

8. Complaints by telephone

...(7) If a member of the police force has reason to believe that a complaint is being, or is about to be, made against a person by telephone, the member may—

(a) require the person to remain at a particular place while the complaint is made and dealt with so that any order or summons made or issued on the complaint may be served on the person; and

(b) if the person refuses or fails to comply with the requirement or the member has reasonable grounds to believe that the requirement will not be complied with, arrest and detain the person in custody (without warrant) for—

(i) so long as may be necessary for the complaint to be made and dealt with and any order or summons made or issued to be served on the person; or

(ii) two hours,

whichever is the lesser.

TASMANIA***FAMILY VIOLENCE ACT 2004*****10. Power of police to enter certain premises**

- (1) A police officer may, without warrant, and using such force as is necessary, enter and remain on premises for such period as he or she considers reasonably necessary to prevent family violence –
- (a) at the request of a person who apparently resides on the premises; or
 - (b) if the officer reasonably suspects that family violence is being, has been or is likely to be committed on those premises.
- (2) A police officer who enters premises under subsection (1) may –
- (a) arrest, without warrant, any person on those premises to facilitate the issue of a PFVO [police family violence order], or the making of an application for an FVO [family violence order], in respect of that person; and
 - (b) remain on those premises in order to conduct a risk screening, safety audit or forensic examination with such assistance as is necessary and reasonable in the circumstances.

...

11. Arrest and detention

- (1) Where a police officer reasonably suspects that a person has committed family violence, the officer may arrest that person without a warrant.
- (2) Subject to subsection (4), a person taken into custody under this section or section 10 must be brought before a court as soon as practicable after being taken into custody unless released unconditionally or under section 34 of the *Justices Act 1959*.
- (3) Subject to subsection (4) of this section, section 4 of the *Criminal Law Detention and Interrogation Act 1995* applies to a person taken into custody under subsection (1).
- (4) A police officer may detain a person taken into custody under subsection (1) for a period reasonably required to do any or all of the following:
- (a) determine the charge or charges which should be laid in relation to the family violence;
 - (b) carry out a risk screening or safety audit;

(c) implement the measures identified by a safety audit where it is practical to do so;

(d) make and serve a PFVO or an application for an FVO.

(5) In deciding whether to arrest a person under subsection (1), the police officer is to give priority to the safety, wellbeing and interests of any affected person or affected child.

WESTERN AUSTRALIA

RESTRAINING ORDERS ACT 1997

62F. Detention of respondent during telephone hearing or while police order is being made

If —

(a) a telephone application has been, or is about to be, made; or

(b) a police order is being made,

a police officer may, without a warrant and in order to facilitate service of any resulting order on the person against whom the order is being, or is to be, sought or made —

(c) require that person to remain in a place designated by the police officer while —

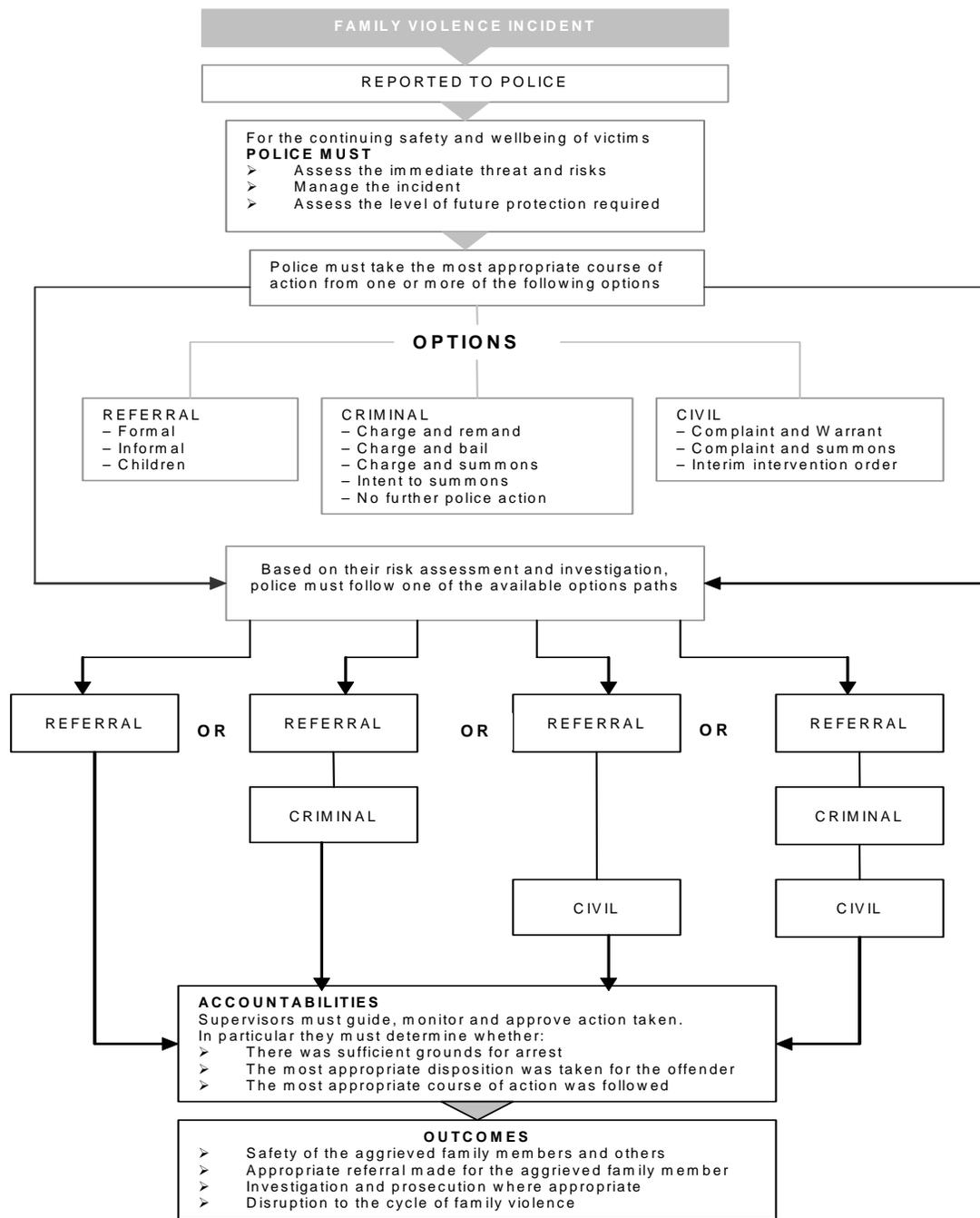
(i) the telephone application is made and heard; or

(ii) the police order is made; and

(d) if the person does not, or the police officer reasonably believes the person will not, remain in the place, arrest and detain the person in custody for up to 2 hours.

Appendix 2

VICTORIA POLICE FAMILY VIOLENCE CODE OF CONDUCT



Appendix 3

CONSULTATION PAPER SUBMISSIONS

No	Name
5	Victoria Police
17	Police Association Victoria
25	Barbara Roberts
27	Robinson House BBWR
33	Women's Domestic Violence Service
39	CASA House
40	Whittlesea Domestic Violence Network
41	Victoria Legal Aid
45	South West Community Health Centre
46	Royal Children's Hospital
49	Domestic Violence and Incest Resource Centre
62	Eastern Community Legal Centre
63	Darebin City Council
64	Federation of Community Legal Centres
74	Women's Legal Service Victoria
78	Anonymous

Other VLRC Publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law: Options for Reform—Information Paper (July 2001)

Sexual Offences: Law and Procedure—Discussion Paper (September 2001)
(Outline also available)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper (January 2002)

Disputes Between Co-owners: Report (March 2002)

Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report (May 2002)

Failure to Appear in Court in Response to Bail: Report (June 2002)

People with Intellectual Disabilities at Risk—A Legal Framework for Compulsory Care: Discussion Paper (June 2002)

What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English (June 2002)

Defences to Homicide: Issues Paper (June 2002)

Who Kills Whom and Why: Looking Beyond Legal Categories by Associate Professor Jenny Morgan (June 2002)

Workplace Privacy: Issues Paper (October 2002)

Defining Privacy: Occasional Paper (October 2002)

Sexual Offences: Interim Report (June 2003)

Defences to Homicide: Options Paper (September 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care (November 2003)

Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper (December 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Report in Easy English (July 2004)

Sexual Offences: Final Report (August 2004)

The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction: Occasional Paper by John Tobin (September 2004)

A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review: Occasional Paper by Adjunct Professor John Seymour and Ms Sonia Magri (September 2004)

Outcomes of Children Born of A.R.T. in a Diverse Range of Families by Dr Ruth McNair (September 2004)

Workplace Privacy: Options Paper (September 2004)

Defences to Homicide: Final Report (October 2004)

Review of Family Violence Laws: Consultation Paper (November 2004)

Review of the Laws of Evidence: Information Paper (February 2005)

Assisted Reproductive Technology & Adoption: Position Paper One: Access (May 2005)

Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage (July 2005)