

Breaching Intervention Orders Report

Sentencing Advisory Council
June 2008



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Contributors

| | |
|------------------------------------|--|
| Authors | Andrea David Felicity Stewart Adrian Hoel |
| Data Analysis | Nick Turner Geoff Fisher |
| Sentencing Advisory Council | |
| Chair | Professor Arie Freiberg |
| Deputy-Chair | Thérèse McCarthy |
| Council Members | Carmel Arthur Bernie Geary OAM David Grace QC Rudolph Kirby Andrea Lott Jenny Morgan Simon Overland Barbara Rozenes Gavin Silbert SC David Ware |
| Chief Executive Officer | Stephen Farrow |

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1. Introduction

1.1 Background

- 1.1.1 This reference from the Attorney-General arises from the Victorian Law Reform Commission's Report ('VLRC'), *Review of Family Violence Laws*, which was published in March 2006. The report included a number of recommendations, one of which was that 'the Sentencing Advisory Council should review the sentencing of defendants and penalties imposed for breaching intervention orders'.¹
- 1.1.2 This reference is part of a much larger effort to address the problem of family violence. The criminal law can only contribute in a small way to address much broader social ills, however it plays a significant role in communicating abhorrence for violence. Intervention orders were introduced in 1987 as one legal mechanism which would be available to courts to deal with family violence. They are a civil-criminal hybrid and seek to deal with the violence which occurs predominately between intimate partners and which is rarely reported to the police. The civil nature of the order allows for a lower standard of proof, making orders easier to obtain than a conviction and can be tailored to each situation, prohibiting behaviour not always covered by the criminal law. However, a criminal offence of breach is still required in order to give force to the orders. It is the offence of breach with which the Council is now concerned.
- 1.1.3 Currently in Victoria, there are two types of intervention orders available:
- **family violence** intervention orders; and
 - **stalking** intervention orders.
- 1.1.4 A family violence intervention order is used where family members are found to be likely to experience violence, threatened violence, damage to their property or threatened damage to their property from other family members. This type of intervention order is dealt with under the *Crimes (Family Violence) Act 1987* (Vic).
- 1.1.5 Stalking intervention orders may be made where the court finds that a person has been stalked by a defendant and that this stalking is likely to occur again in the future. Although section 21A (5) of the *Crimes Act 1958* (Vic) empowers the court to make stalking intervention orders, this provision directs that, apart from the specific findings relating to stalking itself, stalking intervention orders are made according to the *Crimes (Family Violence) Act 1987* (Vic) as if the court were making a family violence intervention order.² The processes and enforcement mechanisms for stalking intervention orders are the same as for family violence intervention orders and applications for these orders will be heard in the same courts, though stalking intervention orders differ in some respects.
- 1.1.6 In the period from July 2004 to June 2007, Victorian courts granted 41,528 intervention orders. Of these, 32,247 (77.7%) were family violence intervention orders and 9,280 (22.3%) were stalking intervention orders.³

1 Victorian Law Reform Commission, *Review of Family Violence Laws Report* (2006).

2 The *Crimes Act 1958* (Vic) s 21A(5) provides:

Despite anything to the contrary in the Crimes (Family Violence) Act 1987, the Court within the meaning of that Act may make an intervention order under that Act in respect of a person (the defendant) if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again and for this purpose that Act has effect as if the other person were a family member in relation to the defendant within the meaning of that Act if he or she would not otherwise be so. [authors' emphasis]

3 The type of intervention order was not known for one case.

- 1.1.7 Section 22 of the *Crimes (Family Violence) Act 1987* (Vic) makes it an offence for a person to breach an intervention order, regardless of whether it is a family violence intervention order or a stalking intervention order.⁴
- 1.1.8 The Government has announced that it will introduce a Family Violence Bill in 2008, to implement most of the recommendations in the VLRC report.⁵ Among other reforms, the proposed Bill will separate the existing offence of breach of an intervention order into two separate offences of:
- breach of a family violence intervention order; and
 - breach of a stalking intervention order.
- 1.1.9 In addition, the Bill will provide for a pilot program under which police may issue family violence safety notices. These notices will include similar conditions to intervention orders issued by the courts. The Bill will create a new offence of breach of a family violence safety notice.

1.2 Terms of reference

- 1.2.1 On 16 April 2008, the Attorney-General asked the Sentencing Advisory Council to report on:
1. The appropriate statutory maximum penalties for the offences of breaching:
 - (a) a family violence intervention order;
 - (b) a stalking intervention order; and
 - (c) a family violence safety notice.
 2. Sentencing practices for the offence of breaching an intervention order.
- 1.2.2 This report focuses on the first of these two questions. While this paper briefly examines sentencing practices for intervention orders, the Council will publish a separate, more detailed report on sentencing practices later in 2008.
- 1.2.3 The current offence of breaching an intervention order is a summary offence. The maximum penalty is:
- two years' imprisonment and/or 240 penalty units for a first offence; and
 - five years' imprisonment for a subsequent offence.⁶
- 1.2.4 The five year maximum penalty for a subsequent offence is problematic because section 113A of the *Sentencing Act 1991* (Vic) provides that the maximum term of imprisonment that a court may impose for a summary offence is two years, despite anything to the contrary in any other Act.⁷ The effect of this provision is that the maximum penalty of five years' imprisonment for a subsequent offence cannot be imposed.
- 1.2.5 The Attorney has asked the Council to advise on this anomaly and to report on the maximum penalties that would be appropriate for the three new offences in the Bill.

4 Section 22 of the *Crimes (Family Violence) Act 1987* (Vic) provides that: 'A person against whom an intervention order or interim intervention order has been made who has been served with a copy of the order or has had an explanation of the order given to him or her ... and contravenes the order in any respect is guilty of an offence'.

5 Office of the Attorney-General, 'Hulls Outlines Bold Plan to Address Family Violence', Media Release, 13 August 2007.

6 *Crimes (Family Violence) Act 1987* (Vic) s 22.

7 *Sentencing Act 1991* (Vic) s 113A.

- 1.2.6 In doing so, the Attorney has asked the Council to have regard to:
- the need to provide maximum penalties that allow courts to appropriately punish persons who commit these offences, particularly the most serious forms of offending;
 - the appropriateness of any proposed maximum penalty within the broader sentencing framework;
 - the public interest in ensuring that the statute book is clear in its application; and
 - any other factors that the Council considers are relevant.
- 1.2.7 The Council has been also asked to consider which of the following options would be preferable for the maximum penalties for the new offences:
- the current (graduated) penalties for breach of an intervention order;
 - a summary offence of breach of a family violence intervention order or stalking intervention order with a new indictable offence of aggravated breach of a family violence intervention order or stalking intervention order;
 - five years' imprisonment and/or 600 penalty units for breach of a family violence intervention order or stalking intervention order (an indictable offence or an indictable offence triable summarily);
 - a summary offence of breach of a family violence intervention order or stalking intervention order with a maximum penalty of two years' imprisonment or 240 penalty units (and no higher penalty for a subsequent breach); and
 - any other options the Council considers may be appropriate.

1.3 The Council's approach

- 1.3.1 Due to the short period of time available in which to provide our advice to the Attorney-General, the Council was only able to conduct limited consultations for this reference.
- 1.3.2 On 24 April 2008, the Council sent interested parties a consultation paper on breaches of intervention orders, outlining some of the broad issues for consideration. The paper discussed the relevant legal principles and some sentencing practices for breaches of intervention orders and posed a number of questions relevant to the terms of reference.
- 1.3.3 The Council received feedback from a variety of stakeholders and held a roundtable discussion on 1 May 2008. The results of this consultation were considered by the Council and are represented in this report.
- 1.3.4 As an initial step, this report considers the current offence in the context of the history of intervention orders in this state, the types of orders available and the circumstances in which they can be imposed. It also considers the penalty for the current offence, including the problematic nature of the higher penalty for a second and subsequent offence (Chapter 2).
- 1.3.5 The next section of the report analyses sentencing data in relation to the offence of breaching an intervention order to determine the actual sentencing practices in both the Magistrates' Court and County Court (Chapter 3).

- 1.3.6 The report then discusses the considerations relevant to setting or reviewing a statutory maximum penalty. These include:
1. To provide sentencers and the broader community with a legislative guide to the seriousness of the offence.
 2. To place a legally defined ‘ceiling’ on the lawful action permitted by the State against an offender. This ceiling should be sufficiently low to provide meaningful guidance to sentencers as to the relative seriousness of the offence and yet sufficiently high to provide for the worst examples of the crime that the sentencer may face.
 3. To serve as a general deterrent by warning potential offenders about the highest penalty that they will face if they commit such an offence (Chapter 4).
- 1.3.7 These considerations are then reviewed in relation to the offence of breaching an intervention order. Included in this section is a discussion as to whether or not an offence of aggravated breach should be created, whether the higher penalty for a second or subsequent offence should be maintained and whether there should be a different penalty applicable for the breach of different types of orders (Chapter 5).
- 1.3.8 This report also compares the maximum penalty for breaching an intervention order with similar offences in other Australian jurisdictions (Chapter 6).
- 1.3.9 The Council has carefully considered the available options and has taken into account the views raised in consultations in making the following recommendations:
- That each of the three offences (breach of a family violence intervention order; breach of a stalking intervention order; and breach of a police-issued family violence safety notice) should have the same maximum penalty of two years’ imprisonment.
 - There should not be a separate offence with a higher maximum penalty for a second or subsequent offence of breach.
 - There should not be a separate aggravated offence with a higher maximum penalty.

2. Breaching intervention orders

2.1 Introduction

- 2.1.1 In order to consider what the maximum penalties should be for the three new offences, it is necessary to examine the current offence of breach of an intervention order and its maximum penalty. This Chapter considers how the law relating to intervention orders and the breaches of such orders developed in Victoria and how the orders currently available are made, including the conditions that can be attached to them.

2.2 The history of intervention orders in Victoria

- 2.2.1 Intervention orders were the product of a social movement to address family violence in the criminal justice system. The formal process began in 1981, when the Department of Premier and Cabinet convened a Domestic Violence Committee to examine this complex social, legal and criminological problem. The Committee formed four sub-committees, one of which was concerned with legal issues.⁸
- 2.2.2 The Legal Remedies Sub-Committee of the Domestic Violence Committee produced a report for public comment in 1983. The submissions to that report were incorporated into a discussion paper entitled, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence*.⁹ This paper presented a number of options for policy and legislative reform. One of the options put forward was the introduction of a new civil remedy of intervention orders. Parallel initiatives were occurring across Australia and in many developed countries across the world.
- 2.2.3 The need for such orders was discussed in the context of the inability of the criminal law to address fully issues involved with domestic violence. In particular, the paper argued that:
- criminal law cannot be tailored to suit the variety of problems arising out of domestic violence; for example, the criminal law could not be applied to exclude the assailant from the matrimonial home;
 - criminal remedies are retrospective and cannot act as a preventative measure;
 - many women may be reluctant to involve the police at first instance; and
 - the criminal standard of proof of beyond reasonable doubt is difficult to satisfy when the only evidence is the victim's word against the defendant.¹⁰
- 2.2.4 The Sub-Committee's proposals led to the passage of the *Crimes (Family Violence) Act 1987* (Vic), which provided for a scheme of intervention orders in Victoria. The intervention orders introduced under that Act were 'designed to provide ongoing protection to the victim of violence in the home.'¹¹ The Sub-Committee proposed a maximum penalty of two years' imprisonment for the offence of breach, which would 'equate breach of an intervention order with other serious breaches of the criminal law which are dealt with by the Magistrates' Court.'¹²

8 Women's Policy Co-ordination Unit, Department of Premier and Cabinet (1985), *Criminal Assault In the Home: Social and Legal Responses to Domestic Violence Summary Paper*, 1.

9 Women's Policy Co-ordination Unit, Department of Premier and Cabinet (1985), *Criminal Assault In the Home: Social and Legal Responses to Domestic Violence*.

10 Ibid 120-23. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

11 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

12 Women's Policy Co-ordination Unit, Department of Premier and Cabinet (1985), above n 9, 137.

- 2.2.5 However, the Sub-Committee stressed that the intervention order was not designed to ‘usurp’ the criminal law and replace criminal justice system responses to domestic violence. It also noted that an application for an intervention order would not preclude charging the defendant with other offences, such as assault.¹³ This point was reiterated in the second reading speech on the *Crimes (Family Violence) Act 1987 (Vic)*.¹⁴ The Act implemented many of the Sub-Committee’s recommendations, though the maximum penalty for the offence of breach was set at six months’ imprisonment rather than two years.
- 2.2.6 Commencing in 1995, the *Crimes (Amendment) Act 1994 (Vic)* made a number of changes to intervention orders. The most significant of these was that it broadened the range of people who could apply for an intervention order under the *Crimes (Family Violence) Act 1987 (Vic)*. Under the original legislation, an application could only be made for an intervention order against a ‘family member’ – spouses, de facto spouses, and people related to each other and those who are ordinarily members of the same household. This definition was expanded to include people who have had a close personal relationship but have not lived together.¹⁵
- 2.2.7 In addition, section 21A was inserted into the *Crimes Act 1958 (Vic)* to create a new offence of stalking. In addition to the new offence, a person who could establish *on the balance of probabilities* that they had been stalked could have an intervention order made against the person who stalked them. The rationale for broadening the availability of intervention orders in this way was to protect people from continued harassment where the stalker was not charged with a criminal offence, for example, if he or she had a mental illness.¹⁶
- 2.2.8 The 1994 Act also increased the maximum penalty available for breach of an intervention order from six months to two years’ imprisonment for a first offence, consistent with the original proposals of the Legal Remedies Sub-Committee of the Domestic Violence Committee.¹⁷ The reason given for the increase in penalty at that time was that in order for intervention orders to be effective, breaches of those orders must be treated seriously. Further, a separate, higher maximum penalty of five years’ imprisonment was introduced for second or subsequent offences.¹⁸
- 2.2.9 As discussed above, the higher maximum penalty of five years’ imprisonment for second or subsequent offences cannot actually be imposed. This is because section 113A of the *Sentencing Act 1991 (Vic)* prevents any court from imposing more than two years’ imprisonment for a summary offence, regardless of whether or not the offence has a higher maximum penalty. Section 113A was amended in 1997 to state this explicitly.¹⁹ According to the second reading speech, that amendment was intended ‘to expressly clarify the limits of the sentencing discretion...when sentencing for summary offences.’²⁰

13 Ibid 123.

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 1537 (Mr Mathews, Minister for the Arts).

15 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1994, 1383 (Mr Coleman, Minister for Natural Resources).

16 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1994, 1383 (Mr Coleman, Minister for Natural Resources).

17 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1994, 1383 (Mr Coleman, Minister for Natural Resources).

18 *Crimes (Amendment) Act 1994 (Vic)*

19 The section was amended by section 17 of the *Sentencing (Amendment) Act 1997 (Vic)* which inserted the words ‘punishable, but for this section, by a term of imprisonment of more than 2 years.’

20 See the Second Reading Speech (15 October 1997), *Sentencing (Amendment) Bill (Vic) 26*. This speech refers to amendments arising out of the passage of the *Sentencing and Other Acts (Amendment) Act 1997 (Vic)*. The second reading speech to this bill, Second Reading Speech (27 May 1997), *Sentencing and Other Acts (Amendment) Bill (Vic) 1060*, reiterates the purpose of s 113A and notes that the section at that time (pre-amendment) was unclear in its wording.

- 2.2.10 Since intervention orders were introduced, there have been a number of policy initiatives put in place to improve responses to family violence, including the creation of the Family Violence Division of the Magistrates' Court in 2004.²¹
- 2.2.11 In 2008, it is proposed that legislation will be introduced in Parliament, which will include a wide range of reforms to the law on family violence. This proposed legislation will alter the law in relation to family violence intervention orders and will introduce family violence safety notices.²² It is envisaged that stalking intervention orders will continue to exist under the *Crimes (Family Violence) Act 1987* and the *Crimes Act 1958* (Vic).
- 2.2.12 The following discussion relates to family violence intervention orders and stalking intervention orders as they currently exist under the relevant legislation.

2.3 Types of orders

- 2.3.1 There are two types of intervention orders currently available in Victoria:
- family violence intervention orders (under the *Crimes (Family Violence) Act 1987* (Vic)); and
 - stalking intervention orders (under the *Crimes Act 1958* (Vic)).

Family violence intervention orders

- 2.3.2 While the circumstances in which intervention orders are made vary, their prime focus is the protection of family members from harmful or threatening behaviour by the defendant in the future, rather than addressing past conduct. The defendant's previous behaviour will be highly relevant to the court's assessment of the future conduct of a person.²³
- 2.3.3 An intervention order can be made against a defendant where the court is satisfied on the balance of probabilities that:
- the defendant has assaulted a family member or caused damage to the property of a family member and is likely to do so again; or
 - the defendant has threatened to assault or damage the property of a family member and is likely to actually take those steps; or
 - the defendant has harassed or molested a family member or behaved in an offensive manner to the family member and is likely to do so again;²⁴ or
 - a child, who is either a family member of the defendant (whether or not a complaint has been made by that person), has heard or witnessed violence by the defendant and is likely to do so again.²⁵

21 *Magistrates' Court Act 1989* (Vic) s 4H-L. For more discussion of this and other policy initiatives in relation to family violence, see the Victorian Law Reform Commission (2006), above n 1, 2-6. See also State Government of Victoria, *A Fairer Victoria: Achievements So Far* (2008), 17-8.

22 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 April 2008, 1204-5 (Rob Hulls, Attorney-General).

23 See generally Victoria Legal Aid and Victoria Law Foundation, *Applying for an Intervention Order* (2007) 6.

24 *Crimes (Family Violence) Act 1987* (Vic) s 4(1).

25 *Crimes (Family Violence) Act 1987* (Vic) s 4A.

- 2.3.4 'Family member' is defined broadly under the *Crimes (Family Violence) Act 1987* (Vic).²⁶ The term includes a range of people connected to the defendant, though the defendant must, in some way, be in a familial relationship with the person seeking the order.²⁷ The term encompasses:
- a current or former spouse or domestic partner of the person;
 - someone who is in or has had an intimate personal relationship with the person;
 - a current or former relative of the person;
 - a child who normally or regularly resides with the person;
 - a child for whom the person has acted as guardian; and
 - someone who has ordinarily been a member of the person's household.²⁸
- 2.3.5 The standard of proof applied is the balance of probabilities. Applying for an intervention order is a civil, not criminal, procedure, even where police are involved in the application. A person who has an intervention order made against them does not acquire a criminal record as a result of the order itself and, though police may file charges against them where an offence has been committed, the person need not be proven to have committed any offence for the order to be imposed. While intervention orders themselves are a civil remedy, the breach of an intervention order is a criminal offence attracting a criminal sanction.

Stalking intervention orders

- 2.3.6 As noted above, the procedures and enforcement mechanisms for stalking intervention orders are found wholly in the *Crimes (Family Violence) Act 1987* (Vic). The *Crimes Act 1958* (Vic) section 21A(5) does, however, prescribe the elements that need to be established for a stalking intervention order to be made.
- 2.3.7 The court must be satisfied on the balance of probabilities that the defendant has stalked another person and that the defendant is likely to continue to do so or do so again in the future. Like family violence intervention orders, stalking intervention orders are focused on addressing future rather than past conduct.
- 2.3.8 Stalking is defined under sections 21A(2) and (3) of the *Crimes Act 1958* (Vic). Broadly, stalking includes the following conduct:
- following a person;
 - loitering around a place a person lives, works or frequents;
 - harassing a person by telephonic or other electronic means;
 - publishing material about the person or purportedly written by the person;
 - tracing a person's internet, email or other electronic communications;
 - causing unauthorised computer functioning of a computer owned or used by a person;
 - interfering with property in the person's (or any other person's) possession;
 - giving or leaving offensive material so it will be found by the person;
 - keeping the person under surveillance; and
 - otherwise acting in a way that would reasonably cause a person to fear for the person's personal safety or the safety of another person.

²⁶ *Crimes (Family Violence) Act 1987* (Vic) s 3.

²⁷ Where a person is not a family member of the complainant, under certain circumstances the Magistrates' Court may impose a stalking intervention order under the *Crimes Act 1958* (Vic) 21A(5).

²⁸ *Crimes (Family Violence) Act 1987* (Vic) s 3. Subsection 2 further defines family member with a list of people (including blood relatives, half and in-law relatives) including: parents, grandparents, uncles, aunts, sons, daughters, grandsons, granddaughters, brothers, sisters, nephews, nieces, cousins and in the case of domestic partners, people who would be family members if the domestic partners were married.

2.3.9 For conduct to amount to stalking, it must also be found to be part of a course of conduct that is intended by the defendant to cause physical or mental harm to the victim or of arousing apprehension or fear in the person for that person's own safety or the safety of another person.²⁹ Intention is defined to include circumstances where the defendant knows that engaging in conduct is likely to cause such harm or fear or where the defendant ought to have understood, under the circumstances that the conduct would do so and it actually did have that result.³⁰

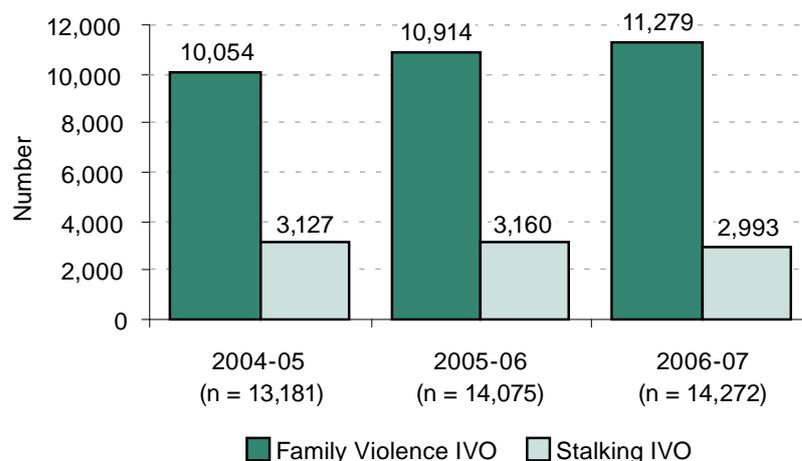
2.3.10 Where the court is satisfied of the above elements, it will treat a defendant as if the defendant is a 'family member' of that other person for the purposes of the *Crimes (Family Violence) Act 1987* (Vic).³¹ All of the substantive provisions contained within that Act, including those regarding breach of intervention orders, apply to stalking intervention orders.

Intervention orders issued in Victoria

2.3.11 From July 2004 to June 2007, Victorian courts issued 41,528 intervention orders, of which 77.7 per cent (32,247) were in relation to family violence and 22.3 per cent (9,280) were in relation to stalking.³²

2.3.12 Figure 1 shows the number of intervention orders ('IVOs') issued by year and intervention order type. Across the three years there was an increase of 12.2 per cent in the number of family violence intervention orders issued, but a 4.3 per cent decline in the number of stalking intervention orders.

Figure 1: Number of IVOs issued by IVO type and financial year, 2004-05 to 2006-07



Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

29 *Crimes Act 1958* (Vic) s 21A(2).

30 *Crimes Act 1958* (Vic) s 21A(3). Subsection 4 excludes certain types of conduct which basically relate to law enforcement and people acting in the court of public duties, which would otherwise fall into the definition.

31 See *Crimes Act 1958* (Vic) s 21A(5). 'Family member' is defined under *Crimes (Family Violence) Act 1987* (Vic) s 3.

32 The type of intervention order was not known for one case.

Family Violence Safety Notice

- 2.3.13 At present the *Crimes (Family Violence) Act 1987* (Vic) also empowers police to hold and detain a person where a member of the police force intends to make a complaint against that person.³³ To do so, the police officer must believe the person is at least 18 years of age and must also believe on reasonable grounds that it is necessary to do so in order to ensure the safety of a family member or to preserve the property of a family member.³⁴ A police officer may direct a person to remain at a nominated place or in the company of a nominated person.³⁵ If a directed person refuses or fails to comply with a direction, that person can be apprehended and detained by police.³⁶ Directions and detention will generally last up to 6 hours but can be extended upon application to the Magistrates' Court.³⁷ The court may hear evidence from family members regarding extensions of directions.³⁸ Police must notify and release any person directed or detained subject to a direction under these provisions immediately after the direction ceases to be in force.³⁹ A person who is subject to a direction may not be interviewed or questioned by police in relation to any alleged offences even if the person is being detained.⁴⁰ This underlines the fact that an intervention order (and interim intervention order) is a civil remedy.
- 2.3.14 In addition to this power, under the legislation to be introduced later this year, it is proposed that police officers of a designated rank will be able to issue a family violence police safety notice.⁴¹ This notice can be issued on the spot, and last for up to 72 hours, until a court can determine whether or not an intervention order is required. The conditions that can be imposed will be the same as those available under a family violence intervention order.

2.4 Applications for intervention orders

- 2.4.1 The Magistrates' Court⁴² is empowered to make an intervention order against a person ('defendant') in a range of circumstances.⁴³ The Children's Court also has jurisdiction to make such orders where the defendant is under 18 years of age at the time of the complaint or application or the family member concerned is under 18 years of age.⁴⁴
- 2.4.2 The *Crimes (Family Violence) Act 1987* (Vic) also provides for the making of interim intervention orders against defendants pending a full hearing of the complaint where the court is satisfied that it is necessary to do so to ensure the safety of a family member or to preserve the property of a family member. An interim intervention order will normally be served with a summons or will be served on a defendant upon being given a direction or being arrested by police. These orders can contain basically the same restrictions and prohibitions that can be made in a final intervention order.⁴⁵ A breach of an interim intervention order attracts the same penalties as

33 *Crimes (Family Violence) Act 1987* (Vic) ss 8AB, 8AD.

34 *Crimes (Family Violence) Act 1987* (Vic) s 8AB.

35 *Crimes (Family Violence) Act 1987* (Vic) s 8AC.

36 *Crimes (Family Violence) Act 1987* (Vic) s 8AD.

37 *Crimes (Family Violence) Act 1987* (Vic) ss 8AF, 8AG.

38 *Crimes (Family Violence) Act 1987* (Vic) s 8AK.

39 *Crimes (Family Violence) Act 1987* (Vic) s 8AI.

40 *Crimes (Family Violence) Act 1987* (Vic) s 8AJ.

41 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 April 2008, 1204 (Rob Hulls, Attorney-General).

42 The *Crimes (Family Violence) Act 1987* (Vic) s 3 defines 'court' as the Magistrates' Court.

43 See Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (Revised ed, 2003) for more detail on the process of making an application for an intervention order.

44 *Crimes (Family Violence) Act 1987* (Vic) s 3A. This section also gives both courts a general power to transfer matters across to the other court where the circumstances of the case make it appropriate to do so.

45 *Crimes (Family Violence) Act 1987* (Vic) ss 1A, 1B .

a breach of a final intervention order.⁴⁶ In making an interim intervention order, a court must determine whether the person holds a firearms licence.⁴⁷ The court can suspend the person from holding a firearms licence and order the surrender of any such firearms and licensing documents.⁴⁸ An interim intervention order will remain in force until the court determines whether to make a final order or until it makes another order.⁴⁹ Where an interim intervention order is made against a person and that person is not present in court, the order will remain in force only until the time specified by the court in the order or until the court makes further orders.⁵⁰ The procedures and formal requirements for interim intervention orders vary slightly from what is required for final orders.⁵¹

- 2.4.3 If an intervention order (or interim intervention order) is made, it will not be binding upon the defendant until the order is either served on the defendant or, if the defendant is present in court when the order is made, until the effect of and means of varying or revoking the order are explained to the defendant.⁵² An intervention order can be for a finite duration or, where appropriate, may be perpetual.
- 2.4.4 The *Crimes (Family Violence) Act 1987 (Vic)* also provides for appeals to the County Court and Supreme Court by complainants and defendants in respect of a court's decision to make or refuse an order or regarding a term of any such order.⁵³ Time limits and other conditions apply to some of these appeals.⁵⁴ Parties will normally have to bear their own costs for any proceedings under the Act, though the court can make costs orders in exceptional circumstances and may also award costs against an applicant where an application under the Act is frivolous, vexatious or made in bad faith.⁵⁵

2.5 The offence of breaching an intervention order

The offence

- 2.5.1 Under section 22 of the *Crimes (Family Violence) Act 1987 (Vic)*, a person is guilty of breaching an intervention order if he or she:
- is the subject of the intervention order;
 - has been served with a copy of the order or has had the order explained to him or her; and
 - contravenes any condition of the order.

46 *Crimes (Family Violence) Act 1987 (Vic)* s 22.

47 *Crimes (Family Violence) Act 1987 (Vic)* s 1C.

48 *Crimes (Family Violence) Act 1987 (Vic)* s 1D.

49 *Crimes (Family Violence) Act 1987 (Vic)* s 8(1G).

50 *Crimes (Family Violence) Act 1987 (Vic)* s 8(3).

51 See generally, *Crimes (Family Violence) Act 1987 (Vic)* ss 8(2)-(10).

52 The *Crimes (Family Violence) Act 1987 (Vic)* s 22(1) makes it an offence to breach such an order only when this has occurred. The *Crimes (Family Violence) Act 1987 (Vic)* s 17(1)(b) reiterates this by requiring any order made (or any variation) to be served on the defendant. Under s 17(1)(d), the order must be served on a range of other parties including police at the defendant's local police station.

53 *Crimes (Family Violence) Act 1987 (Vic)* ss 20, 21.

54 See generally *Crimes (Family Violence) Act 1987 (Vic)* ss 20, 21.

55 *Crimes (Family Violence) Act 1987 (Vic)* s 21C.

2.5.2 Intervention orders may impose any restrictions or prohibitions that the court views as being necessary or desirable under the circumstances.⁵⁶ The *Crimes (Family Violence) Act 1987* (Vic) contains an inclusive list of the types of restrictions that may be imposed.⁵⁷ These basically relate to prohibiting or restricting the person from:

- approaching the aggrieved person;
- accessing premises in which the family member lives, works or frequents even where the person has a proprietary interest in the property;
- being in a locality nominated by the court;
- contacting, threatening or intimidating a family member;
- damaging the property of a family member;
- causing another person to engage in conduct which the person has been restrained by the court from doing; or
- holding a licence, permit or authority to possess, carry or use a firearm (and may disqualify a person from doing so for up to five years after the order has ceased and order the person to forfeit any such firearms).⁵⁸

The current maximum penalty

2.5.3 A person in breach of any of the above conditions attached to an intervention order imposed on him or her is liable to the following maximum penalty:

- two years' imprisonment and/or 240 penalty units for a first offence; and
- five years' imprisonment for a subsequent offence.

Jurisdiction

2.5.4 The offence of breaching an intervention order is a summary offence. As such, it is generally dealt with in the Magistrates' Court. However, in some circumstances it can be dealt with in a higher court, where the offender has been convicted of an indictable offence and is willing to plead guilty to the summary charge at the same time.⁵⁹

2.5.5 Section 113A of the *Sentencing Act 1991* (Vic) provides that no court may impose more than two years' imprisonment for any summary offence, regardless of the statutory maximum penalty that applies to that offence. However, if a defendant is charged with more than one offence committed at the same time, the court can order cumulation of the sentences imposed in relation to those charges up to a maximum of five years.⁶⁰ In the Magistrates' Court, an aggregate sentence of up to five years' imprisonment can also be imposed.⁶¹

2.5.6 It is not necessarily anomalous for legislation to, on the one hand, provide a statutory maximum penalty of five years' imprisonment for a repeat offence of breaching an intervention order and, on the other hand, provide that no court may impose more than two years' imprisonment for that offence because it is a summary offence.

56 *Crimes (Family Violence) Act 1987* (Vic) s 4(2).

57 *Crimes (Family Violence) Act 1987* (Vic) s 5.

58 *Crimes (Family Violence) Act 1987* (Vic) s 5.

59 *Crimes Act 1958* (Vic) s 359AA.

60 *Sentencing Act 1991* (Vic) s 113B.

61 *Sentencing Act 1991* (Vic) s 9(2).

- 2.5.7 This is because the jurisdictional limit of two years' imprisonment for summary offences is not the same as the maximum penalty imposed by statute. Where it is available, the statutory maximum penalty is reserved for the 'worst cases of that sort'. However, if it is not available because of a lower two year jurisdictional limit, the court is not constrained to reserve a sentence of two years for the worst example of that offence.⁶²
- 2.5.8 The statutory maximum penalty is still able to fulfill at least one of its functions of providing a legislative guide to the relative seriousness of the offence, even if it cannot be imposed.
- 2.5.9 In *R v Duncan*,⁶³ the Court of Appeal considered a case involving an offence of breach of an intervention order along with a number of other offences. The sentencing judge, while not sentencing the offender for a period in excess of two years for the breach offence alone, expressly noted that the maximum penalty for the offence was imprisonment for five years, and imposed an aggregate effective sentence of imprisonment of four years and six months.⁶⁴ The offender appealed against the sentence on a number of grounds including that the sentencing judge had acted in error by sentencing on the basis that the maximum penalty for the offence was five years' imprisonment. The court held that section 113A acted only as a bar on the maximum sentence that could be *imposed* by the court.⁶⁵ Nettle JA stated, despite this, in sentencing, under section s 5(2)(a) of the *Sentencing Act 1991* (Vic) the court was still bound *to consider* the maximum penalty prescribed for the offence, which His Honour took to mean the maximum penalty stipulated in the text of the offence itself.⁶⁶ In other words, even though the sentencing judge was compelled not to impose a sanction in excess of the limitations prescribed under section 113A, the judge was properly able (and in fact bound) to take account of the maximum penalty prescribed for the offence in imposing a sanction within the limits of section 113A. Where a court is sentencing a recidivist section 22 offender, it can properly assess the gravity of the offence by reference to a higher statutory maximum than when sentencing a first offender (though the maximum penalty that the court can *impose* will ultimately be the same).

62 *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236-7. See also discussion in Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 239-40.

63 *R v Duncan* [2007] VCSA 137 (Unreported, Chernov, Vincent and Nettle JJA, 22 June 2007).

64 See *R v Duncan* [2007] VCSA 137 (Unreported, Chernov, Vincent and Nettle JJA, 22 June 2007), [12].

65 See *R v Duncan* [2007] VCSA 137 (Unreported, Chernov, Vincent and Nettle JJA, 22 June 2007), [18]-[20].

66 See *R v Duncan* [2007] VCSA 137 (Unreported, Chernov, Vincent and Nettle JJA, 22 June 2007) [20].

3. Victorian sentencing practices

3.1 Introduction

- 3.1.1 An examination of the adequacy of a maximum penalty, including whether it is serving its intended function, necessitates a consideration of current sentencing practices. The Council reviewed breaches of intervention orders from July 2004 to June 2007 in the Magistrates' and County Courts of Victoria.

3.2 Jurisdiction

Hearing charges in the Magistrates' Court

- 3.2.1 Breach of an intervention order is a summary offence with a maximum penalty of two years' imprisonment.⁶⁷
- 3.2.2 The jurisdictional limit in the Magistrates' Court is two years' imprisonment for a single offence.⁶⁸ If a defendant is charged with more than one offence committed at the same time, the court can order cumulation of the sentences imposed in relation to those charges up to a maximum of five years.⁶⁹ A magistrate can also impose an aggregate sentence of up to five years' imprisonment.⁷⁰

Hearing charges in the County Court

- 3.2.3 The offence of breaching an intervention order can also be heard in the County Court if it is accompanied by an indictable offence (such as intentionally causing serious injury). The breach of the intervention order can only be dealt with in the County Court if the accused indicates a willingness to plead guilty to that offence, in addition to the indictable matter.⁷¹

3.3 Sentencing practices in the Magistrates' Court

- 3.3.1 In the three years from July 2004 to June 2007, the Magistrates' Court sentenced 11,571 charges of breach of an intervention order. As shown in Table 1, the most common sentence imposed was a fine (29.7% of sentences imposed against the charge) followed by adjourned undertaking (19.6%). Only 15.5 per cent of charges were dealt with by imposing a term of imprisonment.

67 *Crimes (Family Violence) Act 1987* (Vic) s 22.

68 *Sentencing Act 1991* (Vic) s 113-113A.

69 *Sentencing Act 1991* (Vic) s 113B.

70 *Sentencing Act 1991* (Vic) s 9(2).

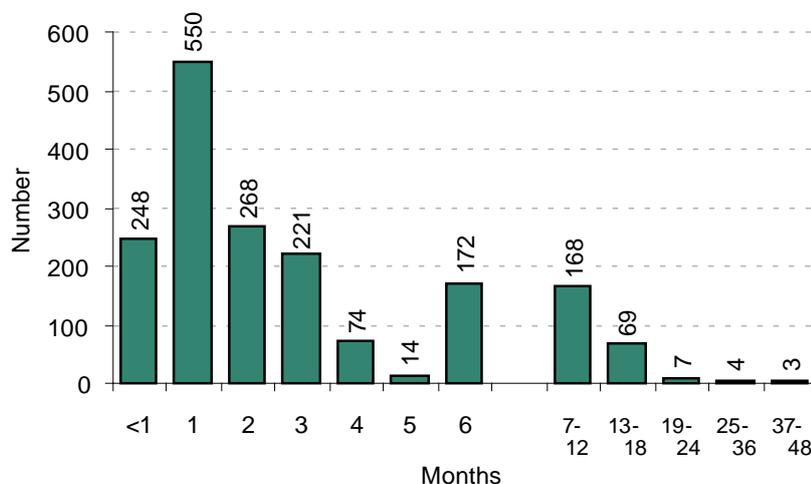
71 *Crimes Act 1958* (Vic) s 359AA.

Table 1: Distribution of sentence types for proven charges of breach of IVO, Magistrates' Court, 2004-05 to 2006-07

| Sentencing Outcome | No | % |
|--------------------------------------|---------------|--------------|
| Imprisonment | 1,798 | 15.5 |
| Partially suspended sentence | 360 | 3.1 |
| Hospital security order | 4 | 0.0 |
| Combined custody and treatment order | 23 | 0.2 |
| Youth justice centre order | 27 | 0.2 |
| Drug treatment order | 4 | 0.0 |
| Wholly suspended sentence | 1,241 | 10.7 |
| Intensive correction order | 479 | 4.1 |
| Community-based order | 1,818 | 15.7 |
| Fine | 3,437 | 29.7 |
| Adjourned undertaking | 2,263 | 19.6 |
| Convicted and discharged (s. 73 SA) | 89 | 0.8 |
| Dismissed (s. 76 SA) | 28 | 0.2 |
| Total | 11,571 | 100.0 |

Source: SAC Courtlink extract April 2008.

3.3.2 Figure 2 shows the number of charges that were dealt with by way of imprisonment by the length of the imprisonment term imposed. As shown, the majority of imprisonment lengths were 12 months or shorter (95.4%). There were only seven charges that received imprisonment terms of longer than 24 months (because of the jurisdictional limit of two years, these were aggregate sentences). The most common length of imprisonment term imposed was one month (550 charges or 30 per cent).

Figure 2: Number of charges of breach of IVO with a sentence of imprisonment by length of sentence, Magistrates' Court, 2004-05 to 2006-07

Source: SAC Courtlink extract April 2008.

3.4 Sentencing in the higher courts

3.4.1 Compared with the Magistrates' Court, there were fewer charges of breach of an intervention order proven in the higher courts but they were more likely to receive a sentence of imprisonment. In the three years from July 2004 to June 2007, 63 charges of breach of an intervention order were proven in the County Court (none was proven in the Supreme Court). Sixty charges were for breaching a family violence intervention order while three were for breaching a stalking intervention order.

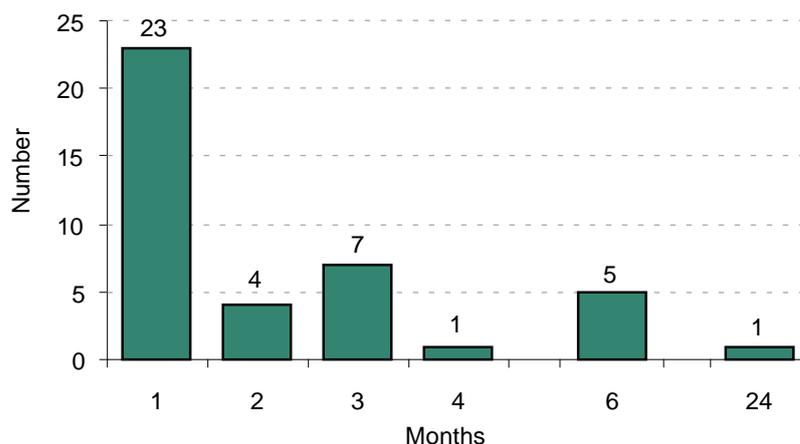
3.4.2 As shown in Table 2, the majority of proven charges of breach of an intervention order received a sentence of imprisonment (65.1%), while the second most common sentence was a community-based order (12.7%).

Table 2: Distribution of sentence types for proven charges of breach of IVO, County Court, 2004-05 to 2006-07

| Sentencing Outcome | No | % |
|--|-----------|--------------|
| Imprisonment | 41 | 65.1 |
| Partially suspended sentences | 1 | 1.6 |
| Wholly suspended sentences | 3 | 4.8 |
| Community based order | 8 | 12.7 |
| Fine | 4 | 6.3 |
| Convicted and discharged | 1 | 1.6 |
| Adjourned undertaking with conviction | 2 | 3.2 |
| Adjourned undertaking without conviction | 1 | 1.6 |
| Unconditional dismissal | 2 | 3.2 |
| Total | 63 | 100.0 |

Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

3.4.3 Figure 3 shows the number of charges of breach of an intervention order that received a sentence of imprisonment by the length of the sentence. The majority of imprisonment sentences imposed in the County Court for breach of an intervention order were for one month (53.5%) while only one charge received a sentence longer than six months (24 months). The charge that received this sentence was against an offender with a previous conviction for breach of an intervention order.

Figure 3: Number of breach of IVO charges with a sentence of imprisonment by length of sentence, County Court, 2004-05 to 2006-07

Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

3.4.4 From this analysis it is clear that while around two-thirds of sentences imposed for breach of an intervention order in the County Court are terms of imprisonment, all but one of the sentences fall well below the maximum penalty of two years. More than half the sentences of imprisonment imposed for this offence are less than 1 month in duration.

3.4.5 A higher proportion of charges of breach of an intervention order dealt with in the County Court received sentences of imprisonment that those matters dealt with in the Magistrates' Court. This is to be expected as the breaches would be accompanied by more serious charges in the higher courts and could be considered more serious breaches.

3.4.6 There was one offence that received the maximum penalty for the offence of breach of an intervention order. That sentence was imposed for a subsequent breach on the basis that the maximum penalty of five years' imprisonment for a second or subsequent breach of an intervention order could be used to guide sentencing, despite the fact that it cannot be imposed.

3.5 Profile of offenders

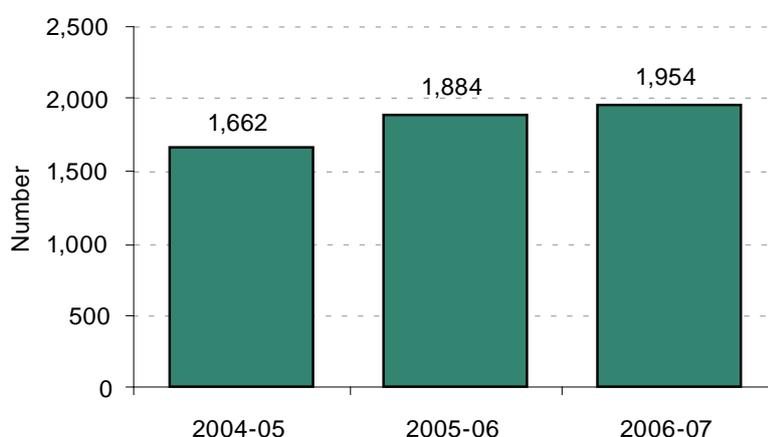
3.5.1 This section provides some information on the people who are being sentenced for breaches of intervention orders in the Magistrates' and County Courts.

Magistrates' Court

People sentenced

3.5.2 Over the three year period, 5,500 people were sentenced for at least one count of breaching an intervention order in the Magistrates' Court. From July 2006 to June 2007, there were 1,954 people sentenced for breaching an intervention order.⁷² This remained relatively stable with the previous year, after recording a 13.4 per cent increase from the period July 2004 to June 2005.

Figure 4: The number of people sentenced for breach of an intervention order, 2004-05 to 2006-07



Source: SAC Courtlink extract April 2008.

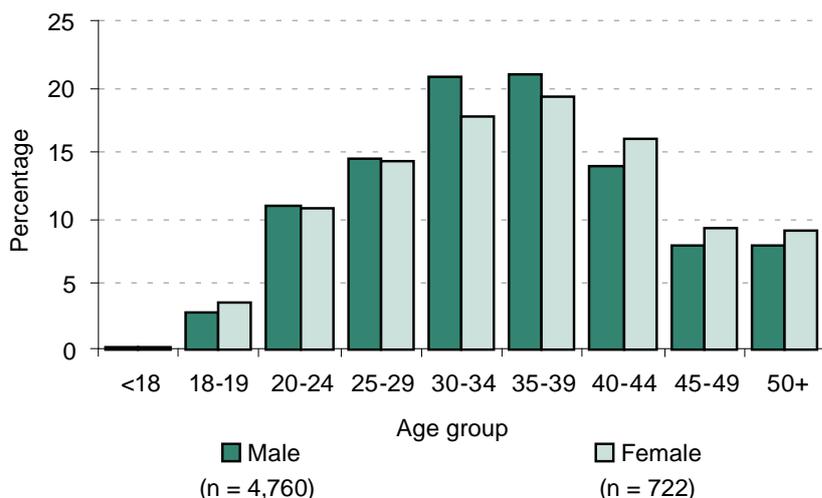
*Age and gender*⁷³

3.5.3 Over the three-year period, the majority of those sentenced were men (4,777 people or 86.9%). The age of people sentenced for breach of an intervention order ranged from 17 years to 85 years, while the median age was 35 years (meaning that half of the people were aged 35 years or younger and half were 35 years or older). The median age for both male and females was the same.

72 The number of people sentenced excludes those who participated in the criminal justice diversion program (201 people). Only the people who were dismissed in 2006-07 could be counted in this report. These people are identified by having the dismissal grounds listed as 'proved and dismissed' (s.360(1)(a) *Children, Youth and Families Act 2005* (Vic)) or 'dismissed' (s.76 *Sentencing Act 1991* (Vic)). The people who were dismissed in 2004-05 and 2005-06 could not be counted because of changes in data recording practices. Therefore the count of the number of people sentenced over the three year period could be an under-representation. In 2006-07, 25 people were dismissed pursuant to this legislation. This made up 1.2% of people sentenced in that year.

73 The age was unknown for 18 people sentenced for breach of an intervention order (0.003%). These people are excluded from all age analyses in this report.

Figure 5: The percentage of people sentenced for breach of an intervention order by gender and age, 2004-05 to 2006-07



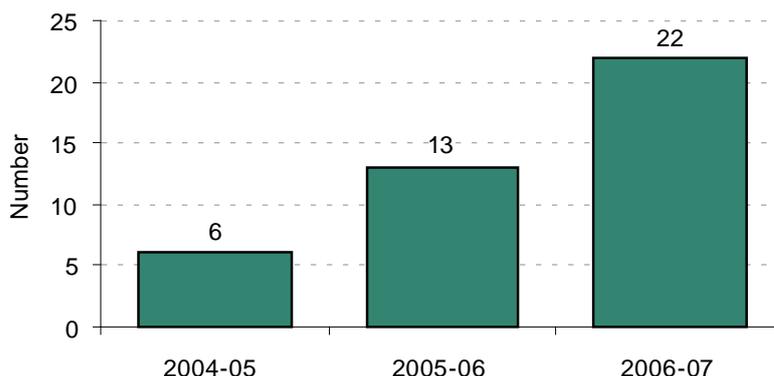
Source: SAC Courtlink extract April 2008.

County Court

People sentenced

3.5.4 From July 2004 to June 2007, 41 people were sentenced in the County Court for breaching an intervention order. Thirty-eight were sentenced for breaching a family violence intervention order while three were sentenced for breaching a stalking intervention order. Figure 6 shows the number of people sentenced for breach of an intervention order in the County Court by financial year. In 2006-07 22 people were sentenced for this offence in the County Court, up from six in 2004-05.

Figure 6: Number of people sentenced for breach of an IVO by IVO type and financial year, County Court, 2004-05 to 2006-07

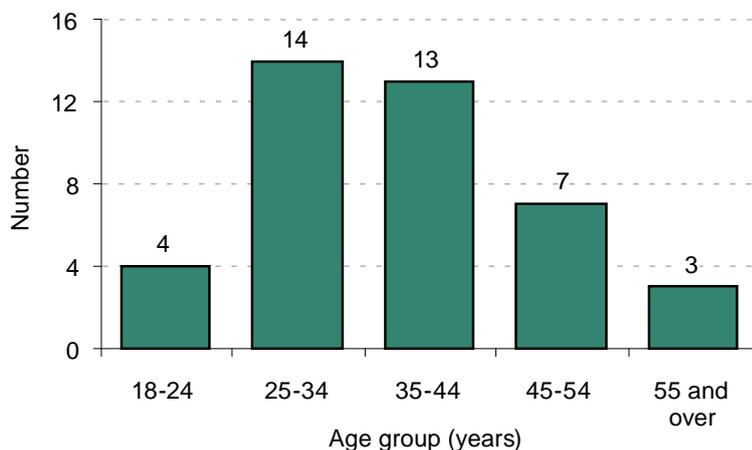


Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

Age and gender

3.5.5 From July 2004 to June 2007, all 41 people sentenced for breaching an intervention order were male and the average age was 37 years and 4 months. Figure 7 shows the age distribution for people sentenced for breach of an intervention order in the County Court. The most common age group for people sentenced for breaching an intervention order was 25 to 34 years (34.1%), followed by 35 to 44 years (31.7%).

Figure 7: Number of people sentenced for breach of IVO by age group, County Court, 2004-05 to 2006-07



Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

3.6 Summary

- 3.6.1 During the period from July 2004 to June 2007, the courts imposed approximately 14,000 intervention orders per year. Around three quarters related to family violence and one quarter related to stalking. Over a quarter of all intervention orders imposed during this period were breached (27%). The average person who breaches an intervention order is a male in his mid-30s.
- 3.6.2 Most offences of breach are dealt with in the Magistrates' Court, although a small number are dealt with in the County Court.
- 3.6.3 The small proportion of cases in the Magistrates' Court in which imprisonment is imposed for breaching an intervention order (15.5%) and the length of imprisonment sentences where it is imposed (which are significantly less than the maximum penalty available for this offence) indicate that the current maximum penalty of two years' imprisonment is sufficient to deal with the offences of breach of an intervention order currently coming before the court. Further, the current maximum penalty would still be sufficient even if sentencing practices became more severe.
- 3.6.4 A charge of breaching an intervention order was more likely to attract a sentence of imprisonment in the County Court than in the Magistrates' Court. However, the most common length of imprisonment term is only one month. Therefore, it can be said in general terms that the current maximum penalty *that can be imposed* of two years' imprisonment is sufficient to deal with the vast majority of the cases coming before the courts.

4. The functions of a statutory maximum penalty

4.1 Introduction

4.1.1 In order to determine the appropriate maximum penalties for a family violence intervention order, a stalking intervention order or a family violence police safety notice, this chapter analyses the functions that these maximum penalties should serve.

4.1.2 A statutory maximum penalty serves a number of functions, including to:

1. Place a legally defined ‘ceiling’ on the lawful action permitted by the State against an individual who commits an offence, in accordance with the principle of legality. This ceiling should be sufficiently high to **provide for the worst examples of the crime** that the sentencer may face, but not so high that it fails to provide meaningful guidance to sentencers as to the relative gravity of the offence in relation to other relevant offences.⁷⁴
2. Serve as a **general deterrent** by warning potential offenders about the highest penalty that they will face if they commit such an offence.⁷⁵
3. Provide sentencers and the broader community with a **legislative guide to the seriousness of the offence**. This is generally determined by reference to **harm** caused or risked by the offender’s act or omission (for example injury, serious injury or death) and the offender’s **culpability** or blameworthiness (for example whether the harm was caused as a result of the offender’s negligence or recklessness or whether the harm caused was intentional).⁷⁶

4.1.3 In Victoria offences are ranked by maximum penalty according to their degree of seriousness. The *Sentencing Act 1991* (Vic) contains a scale of statutory maximum penalties of imprisonment ranging from level 1 (life imprisonment) to level 9 (six months’ imprisonment).⁷⁷

4.2 Principle of legality

4.2.1 The statutory maximum penalty provides a finite upper boundary on a sentencer’s power to restrict the offender’s liberty, whether for punishment or rehabilitation.⁷⁸ As well as setting the upper limit of judicial discretion when sentencing offenders, it acknowledges that the State’s power to deal with offenders must be subject to lawful restraint.

⁷⁴ See for example *DPP v Aydin & Kirsch* [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005) [8]–[12] (Callaway JA).

⁷⁵ Sentencing Task Force, Victoria, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (1989) (written for the Task Force by Richard Fox and Arie Freiberg), 25. However, it is difficult to quantify whether or not the maximum penalty for an offence has any deterrent effect. There is no evidence as to how many potential offenders are aware of the maximum penalties for particular offences or whether or not they are in a position to draw a distinction between those maximum penalties and the level of penalties being imposed by the courts.

⁷⁶ *Ibid* 59–60.

⁷⁷ *Sentencing Act 1991* (Vic) s 109.

⁷⁸ Sentencing Task Force (1989), above n 75, 23.

- 4.2.2 A statutory maximum should provide an indication of the relative gravity of the offence and penalty as compared with other offences and yet be broad enough to allow the sentencer sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.⁷⁹ This tension was recognised by the Victorian Court of Appeal which observed that:

There is no gainsaying the importance of the maximum penalty prescribed by Parliament for an offence. It provides authoritative guidance by the legislature as to the relative seriousness of the offence, in the abstract, by comparison with other crimes in the calendar ... It must always be remembered, however, that a maximum penalty is prescribed for the worst class, or one of a number of worst classes, of the offence in question.⁸⁰

- 4.2.3 When determining an offender's sentence, the statutory maximum penalty is one of the many factors to which the sentencer must have regard. Other factors include current sentencing practices, the nature and gravity of the offence, the offender's degree of responsibility for the offence, the previous character of the offender and any aggravating or mitigating circumstances.⁸¹
- 4.2.4 The Court of Appeal has recently clarified the relevance of an increase to the statutory maximum penalty.⁸² The Court has stated that any increase will have the greatest relevance for a sentence for an offence in the worst category of that offence, however:

Even where the offence to which the increase applies is nowhere near the worst category, the increase remains of relevance since, in the usual case, the increase shows that Parliament regarded the previous penalties as inadequate. Even where the new maximum may only be of general assistance, it becomes the 'yardstick' which must be balanced with all other relevant factors.⁸³

4.3 Deterrence

- 4.3.1 The statutory maximum penalty is intended to function as a general deterrent by warning potential offenders of the maximum punishment they are liable to receive if they commit an offence.⁸⁴
- 4.3.2 It is difficult to quantify whether or not the maximum penalty for an offence actually has any deterrent effect. There is no evidence as to how many potential offenders are aware of the maximum penalties for particular offences or whether or not they are in a position to draw a distinction between those maximum penalties and the level of sentences being imposed by the courts.⁸⁵
- 4.3.3 There is no doubt that there is an emphasis on specific and general deterrence by the courts in imposing penalties on particular offenders who have breached intervention orders. The Victorian Court of Appeal made this clear in *R v Cotham*.⁸⁶

Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated.⁸⁷

79 Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002), 56.

80 *DPP v Aydin & Kirsch* [2005] VSCA 86 [8]–[9] per Callaway JA (citations omitted).

81 *Sentencing Act 1991* (Vic) s 5(2).

82 *R v AB* (No. 2) [2008] VSCA 39 (Unreported, Williams CJ, Maxwell P and Redlich JA, 12 March 2008), [51].

83 *R v AB* [2008] VSCA 39 [51] (citations omitted).

84 Freiberg (2002), above n 79, 56.

85 Sentencing Task Force (1989), above n 75, 25.

86 [1998] VSCA 111 (Unreported, Brooking, Phillips and Charles JJA, 17 November 1998).

87 *The Queen v Robert Wayne Cotham* [1998] VSCA 111 (Unreported, Brooking, Phillips and Charles JJA, 17 November 1998), [14].

- 4.3.4 Further, in *R v King*,⁸⁸ the Court of Appeal found no error where the sentencing judge referred to cases in which an offender murdered his partner in the context of domestic violence when sentencing the offender for the instant offences (false imprisonment, making threats to kill and assault charges). The Court held that the relevant ‘passages emphasised the Court’s obligation to impose a sentence that would deter those who would resort to violence to deal with problems arising out of a domestic relationship.’ The Court of Appeal found no error in those passages as general deterrence was an important consideration to be taken into account when sentencing the appellant.
- 4.3.5 However, it is difficult to say whether the maximum penalty itself acts as a deterrent. The ACT Law Reform Commission found that ‘research does not establish that higher penalties would act as a specific deterrent for breach of a protection order or for criminal offences generally.’⁸⁹
- 4.3.6 Further, in the view of some of those consulted by the Council, the issue of deterrence was actually more to do with police practice in investigating and prosecuting alleged breaches of intervention orders rather than the penalty itself. It was observed that changes in penalty may not actually do very much if police practice is not also addressed. Some suggested that police practice here had improved slightly in recent years but many less serious breaches are still not being dealt with.⁹⁰
- 4.3.7 For these reasons an analysis of whether a particular statutory maximum penalty is appropriate is not significantly advanced by attempting to assess whether it is sufficient to serve as a general deterrent. Therefore it is necessary to turn to the other functions served by statutory maxima to assess whether or not the statutory maximum penalty for a particular offence is set at an appropriate level.

4.4 Offence seriousness

- 4.4.1 The maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary about the seriousness of the offence relative to other offences.⁹¹ The use of a particular statutory maximum penalty as an indicator of the relative seriousness of the offence in question stems from the theory of ‘just deserts’ which emphasises assessing offence seriousness as a more important factor than deterrence to determine the appropriateness of a penalty in a particular case:

The fundamental principle of desert in punishing convicted persons is that the severity of the punishment should be commensurate with the seriousness of the offender’s criminal conduct. The focus of the commensurate-deserts principle is on the gravity of past conduct, not on the likelihood of future behaviour; this retrospective orientation distinguishes desert from the crime-control goals of deterrence, incapacitation, and rehabilitation. The criterion for judging whether a penalty is deserved is whether it fairly reflects the gravity of the criminal conduct of which the defendant has been convicted, rather than its effectiveness in preventing future crimes by the defendant or other potential offenders.⁹²

88 [2007] VSCA 38 (Unreported, Vincent, Redlich JJA and Habersberger AJA, 15 March 2007), [14].

89 Community Law Reform Committee [ACT], Domestic Violence, Chapter 6: Other Issues Relating to the Criminal Justice Response < <http://www.jcs.act.gov.au/eLibrary/lrc/r09/dov6.html#RTFToc1> > at 14 May 2008.

90 Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008); Roundtable Discussion (1 May 2008)

91 Freiberg (2002), above n 79, 55.

92 Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale’ (1983) 74 *Journal of Criminal Law and Criminology* 209, 211. See also Sentencing Task Force (1989), above n 75, 24.

4.4.2 As the report of the Sentencing Task Force recognised, there are a number of difficulties in ranking the relative seriousness of criminal conduct:

Social problems do not lend themselves to simple or elegant mathematical solutions. There is 'no strict denominator of social problems and no scale for comparing different problems'.⁹³ Despite an individual's confidence in the merits of his or her intuitive sense of offence seriousness, the concept does convey different things to different people. Offences vary widely in the way they are carried out and in the harm they cause or the interests they infringe. Yet despite the difficulties, 'the seriousness of criminal acts represents a conceptual dimension of criminality that is indispensable in common everyday discourse, in legal theory and practice, and in sociological work'.⁹⁴

4.4.3 In assessing the seriousness of the offence, it is useful to consider:

- the intrinsic gravity of the offence;
- the relative gravity of the offence; and
- current sentencing practices for the offence or for comparable offences.⁹⁵

4.4.4 The gravity of the offence (both intrinsic and relative) can be assessed according to both:

1. **The degree of harm caused or risked by the offender's act (or omission)**—the most serious harm is generally considered to be that which affects a victim's physical integrity, such as murder, sexual offences and other offences causing serious injury. Offences that involve economic harm (such as theft) or social harm (such as harm to the justice system) are generally lower on the scale.
2. **The culpability of the offender**—an assessment of culpability, or blameworthiness, involves gauging the extent to which an offender should be held accountable for his or her actions by assessing the offender's state of mind when committing the offence (for example, intention or recklessness) and the extent to which the offender's conduct deviated from appropriate standards (such as gross negligence).⁹⁶

93 B. Warner and R. Taylor, 'Conflict and Consensus about Criminal Justice in Maryland' in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries* (1988) 20 cited in Sentencing Task Force (1989), above n 75, 57.

94 Peter Rossi et al, 'The Seriousness of Crimes: Normative Structure and Individual Differences' (1974) 39 *American Sociological Review* 224, 225 cited in Sentencing Task Force (1989), above n 75, 57.

95 Sentencing Task Force (1989), above n 75, 59; Andrew von Hirsch, *Censure and Sanctions* (1993) 29.

96 Ibid.

5. The maximum penalty for breach of intervention orders

5.1 Assessing the offence seriousness

Harm

5.1.1 Harm can be described as the ‘degree of injury done or risked by the act’.⁹⁷ In practice, breaching an intervention order can involve a range of harms, including physical or mental injury to the complainant but legally, the only harm that must be established to prove the offence is that a condition of the order was breached. Such a breach diminishes the effectiveness of the justice system. While this type of harm is considered lower on the harm hierarchy than that which involves personal violence, it is significant because the way in which breaches of intervention orders are enforced and dealt with by the courts can affect community confidence in the effectiveness of these orders, and, by extension, the justice system as a whole, as a means of regulating and preventing particular types of behaviour.⁹⁸

5.1.2 The harm involved in breaching court orders is, at its most basic level, a contempt of court. Contempt of court has been described as involving ‘any action which undermines the authority of courts, or interferes with the fairness of hearings, or which otherwise prejudices their administration of justice.’⁹⁹ As this definition would suggest, it can involve a number of different actions, one of which is disobeying a court order. In *Australian Competition and Consumer Commission v Hughes*,¹⁰⁰ Justice Tamberlin discussed the importance of the ability of the courts to enforce their orders:

Without the enforcement of court orders the whole process of adjudication becomes a hollow exercise. If a losing party can defy the orders of the Court then such disobedience renders futile, in the perception of the community, the remedy secured by the successful party. Orders are not made simply to suggest or advise the persons that they ought to keep the law as proclaimed but to ensure that the law is carried out as determined by the decision pursuant to which the order is made. Defiance of court orders diminishes the authority of courts and removes the incentive of parties, if such conduct is left unpunished, to comply with the requirements of the courts.¹⁰¹

5.1.3 However, the harm is of a different sort where the court order in question is imposed for the protection of the community.¹⁰² It can be described as a greater harm where the purpose of the court order is to ensure that the aggrieved person is protected from further violence or harassment from the defendant, such as in the case of an intervention order. As it was put by the ACT Law Reform Commission in its report on Domestic Violence:

The court order is made to regulate behaviour which is unacceptable and harmful to members of the community. The protection order aims to do this by the imposition of prohibitions and conditions. If the offence of breach of a protection order carries a relatively minimal maximum penalty, this sends a message to the community about the value of the court order, its purpose and the commitment to regulating the behaviour complained of.¹⁰³

97 von Hirsch (1983), above n 92, 214.

98 Sentencing Advisory Panel [UK] *Breach of an Anti-Social Behaviour Order: Consultation Paper* (2007) 17.

99 Richard Fox, *Victorian Criminal Procedure* (2005), 97.

100 *Australian Competition and Consumer Commission v Hughes* [2001] FCA 38.

101 *Australian Competition and Consumer Commission v Hughes* [2001] FCA 38, [15].

102 Sentencing Advisory Panel [UK] (2007), above n 98, 17.

103 Community Law Reform Committee (ACT), above n 89.

- 5.1.4 In addition to the harm to justice procedures, there are situations where breaching an intervention order will result in actual physical or mental harm. The offence covers a wide range of harm and potential harm to the aggrieved person. For example, an intervention order can restrict a person from harassing, threatening or intimidating the aggrieved person. Where an offender contravenes an intervention order by engaging in any of these behaviours, clearly actual (physical or mental) harm is caused. Such an example of the offence is likely to sit higher in the harm hierarchy. It should be noted, however, that where actual physical or mental harm is caused as the result of breaching an intervention order, the defendant should also be charged with the relevant substantive offence, such as intentionally causing injury.
- 5.1.5 Even where the commission of the offence results from behaviour which may not be ordinarily classified as an ‘injury’ (either mental or physical) to the person by the legal system, such as driving past the aggrieved person’s house, such breaches still have the potential to cause ‘acute fear and distress’ to the aggrieved person.¹⁰⁴
- 5.1.6 The Victorian Reform Law Commission referred to a submission in its Final report on Family Violence Laws which described the experience of a woman who had an intervention order against her husband. The husband sat outside the woman’s house in his car and then eventually drove away. This behaviour would not necessarily constitute harm which could form the basis of a substantive offence, such as recklessly causing serious injury. However, in the context of her relationship with her husband, these actions had such a significant impact on the woman’s wellbeing and sense of personal safety that she moved into her parent’s home. It was six months before she felt comfortable moving back into her own home.¹⁰⁵
- 5.1.7 The VLRC noted that there is tendency by courts not to take these types of breaches seriously and this was also raised in the Council’s consultations on this reference.¹⁰⁶ Such an approach fails to realise the impact of seemingly innocuous behaviour in the context of a historically abusive situation, which is required for the imposition of the intervention order at first instance.

Culpability

- 5.1.8 An assessment of culpability, or blameworthiness, involves gauging the extent to which an offender should be held accountable for his or her actions by assessing the offender’s state of mind in committing the crime. For example, an offence involving intention or knowledge has a higher level of culpability than one involving negligence or strict liability.
- 5.1.9 A person cannot be found guilty of breaching an intervention order unless they have been served with a copy of the order or had it explained to them.¹⁰⁷ An offender cannot be guilty of the offence of breaching an intervention order unless there was an awareness of doing so or at least, in the case of entering a particular prohibited place, reckless as to whether or not he or she was in breach of the order. Therefore, the level of culpability required for breach of an intervention order is relatively high.

104 Victorian Law Reform Commission (2006), above n 1, 373.

105 Ibid.

106 Ibid; Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008); Roundtable Discussion (1 May 2008).

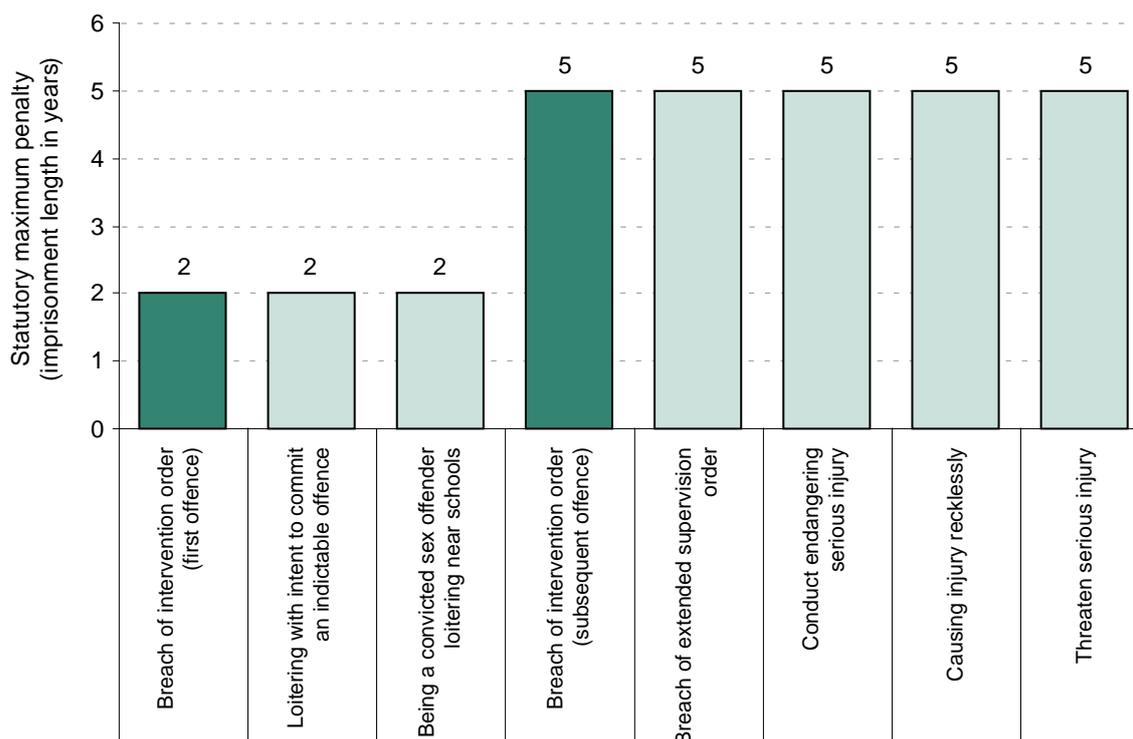
107 See *Crimes (Family Violence) Act 1987 (Vic)* s 22.

Where should the offence sit in the hierarchy of offences?

5.1.10 Since the introduction of the penalty scale, in the *Sentencing Act 1991 (Vic)*, statutory provisions that create an offence ordinarily set the maximum penalty at one of the levels specified in the scale.¹⁰⁸

5.1.11 Figure 8 sets out a number of offences which are at the same penalty level as the offence of breach of an intervention order (and the higher penalty level for a second or subsequent offence) with a comparison of the relative levels of harm and culpability for each offence.

Figure 8: Maximum penalties of imprisonment for breaching an IVO and other offences at the same levels in the penalty scale



5.1.12 It is difficult to compare the offence of a breach of an intervention order with other criminal behaviour, as the offence covers a wide range of possible harms. In addition to the harm caused by the breach of the order, the harm can range from a person driving into a prohibited area without the aggrieved person's knowledge (where no harm is caused to the aggrieved person) to actual physical violence. It is also an unusual offence in that repeat offences primarily committed against the same victim.

5.1.13 There are some other offences which have a similar level of harm. The offence of loitering with intent to commit a criminal offence¹⁰⁹ is also concerned with potential harm. Similarly, the offence of being a convicted sex offender loitering near schools¹¹⁰ is concerned with the potential for harm. These offences both have statutory maximum penalties of two years' imprisonment.

5.1.14 However, neither of these offences involves the contravention of a court order. An offence which combines potential harm with breach of a court order is breach of an extended supervision order.¹¹¹

¹⁰⁸ *Sentencing Act 1991 (Vic)*. See also Fox and Frieberg (1999), above n 62, 13-16.

¹⁰⁹ *Summary Offences Act 1966 (Vic)* s 49B.

¹¹⁰ *Crimes Act 1958 (Vic)* s 60B (Loitering near schools etc).

¹¹¹ *Serious Sex Offenders Monitoring Act 2005 (Vic)* s 40.

- 5.1.15 An extended supervision order is an order which can be imposed by the court where an offender has served a term of imprisonment imposed for a sexual offence. In making such an order, the court must assess whether the offender is likely to commit a relevant offence in the future.¹¹² This is similar to the process for making an intervention order, in the sense that the court must assess whether the defendant is likely to harass or use violence against the aggrieved person.
- 5.1.16 An important difference between the offences of breaching an intervention order and breach of an extended supervision order is that the threshold test for whether an application can be made for an extended supervision order is whether the person is serving a term of imprisonment for a sexual offence. This may account for the higher maximum penalty for that offence.
- 5.1.17 A feature of the first five offences in Figure 8 is that they are incomplete offences. If in the process of committing one of these offences, a person also commits a substantive offence involving actual physical or mental harm, that substantive offence can also be charged. For example, in relation to the offence of being a convicted sex offender loitering near schools, if the person in question actually commits a sexual offence against a child, that offence will be charged. In a similar fashion, where someone commits a breach of an intervention order which includes the threat of violence or actual violence, the relevant substantive offence can be charged.
- 5.1.18 Three such substantive offences are listed in the figure above. Threatening serious injury¹¹³ and causing injury recklessly¹¹⁴ are both substantive offences which could be charged if a breach of an intervention order was accompanied by behaviour amounting to the elements of either of those offences. They require something more than potential harm in order to establish the offence and therefore have a higher maximum penalty. While conduct endangering serious injury¹¹⁵ does not require actual harm, it requires the defendant to have performed some act which threatened serious injury. The potential for harm here is not simply variable; it must be of a high degree to establish the offence.
- 5.1.19 The substantive offences may have a lower level of culpability than breach of an intervention order; however the level of harm is greater.
- 5.1.20 In consultations conducted by the Council, there was an understanding of the difficulty in ranking this offence alongside other criminal behaviour because of the different types of harm involved. There were some differences of opinion as to whether the primary harm is that involved in the breach of a court order or the potential harm to the victim.¹¹⁶

The maximum penalty

- 5.1.21 In relation to the appropriate maximum penalty, it was agreed by most of those consulted that a two year maximum penalty is appropriate for this offence, particularly in relation to other offences. Where there is actual physical or mental harm involved, there is usually another offence with a higher maximum penalty which can be charged, such as assault or intentionally causing injury or serious injury.
- 5.1.22 However, a minority of those consulted considered that the offence should have a maximum penalty of five years. In his submission, the Director of Public Prosecutions submitted that the maximum penalty for the offence of breach of a family violence intervention order should be five years' imprisonment and the maximum penalty for the offence of breach of a stalking intervention order should be three years' imprisonment. It was his view that the offences should be indictable

112 *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 4, 5, 12(1). See further Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention Discussion and Options Paper* (2007) 49-52.

113 *Crimes Act 1958* (Vic) s 21 (Threaten serious injury).

114 *Crimes Act 1958* (Vic) s 18 (Causing injury recklessly).

115 *Crimes Act 1958* (Vic), s 23 (Conduct endangering persons (serious injury)).

116 Roundtable Discussion (1 May 2008).

offences triable summarily. Accordingly, if the offences were dealt with in the Magistrates' Court the maximum penalty would be two years' imprisonment and if the offences were dealt with in the superior courts the maximum penalty would be as indicated.

- 5.1.23 There were a number of participants who were concerned about making this offence an indictable offence with a maximum penalty of five years' imprisonment. Their concern was that if these cases were to be heard in the County Court as indictable offences, there would no longer be the advantage of having them dealt with quickly in the Magistrates' Court. While the offence could be made an indictable offence triable summarily, a defendant could still elect to have the matter heard in the County Court, dragging out the process unnecessarily.¹¹⁷ The Magistrates' Court of Victoria was also concerned about the appropriateness of making breach of an intervention order an indictable offence. The views on the appropriate maximum penalty for breaching an intervention order were divided 'if the price of increasing the maximum penalty is to make the breach of an intervention order an indictable offence'.¹¹⁸
- 5.1.24 There were others who felt that there was a symbolic value in having a maximum penalty of five years' imprisonment to send a strong message to the community that the kind of behaviour involved in the breach of an intervention order is unacceptable.¹¹⁹ One submission received by the Council suggested a maximum penalty of five years' imprisonment as this 'reflects the seriousness of the offence of breach of a court order, and the need to deter the conduct which has led the court to make the stalking or family violence order in the first instance'.¹²⁰
- 5.1.25 Others who felt that the maximum penalty of two years was sufficient were of the view that the main issue is not the maximum penalty, but rather ensuring that breaches are prosecuted by the police and further training and/or guidelines for magistrates to assist them in understanding the relevance of the context of this type of offending, particularly in relation to what are termed 'technical breaches'.¹²¹

5.2 Aggravated offences

Circumstances of aggravation

- 5.2.1 There are certain circumstances surrounding the commission of an offence which can have the effect of increasing the culpability of an offender. Aggravating factors can include recidivism, a breach of trust, the use of a weapon or the particular vulnerability of the victim.¹²²
- 5.2.2 Where the relevant circumstance of aggravation is specified in legislation, through the creation of an 'aggravated offence', it becomes an element of the offence of which the jury must be satisfied beyond reasonable doubt in order to find the offender guilty of that offence.
- 5.2.3 For example, the offence of armed robbery requires that the offender has committed a robbery and at the time of the robbery had with him or her, a firearm, offensive weapon or explosive.

117 Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008); Roundtable Discussion (1 May 2008).

118 Submission 5 (Magistrates' Court of Victoria).

119 Roundtable Discussion (1 May 2008).

120 Submission 4 (Confidential).

121 Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008); Roundtable Discussion (1 May 2008).

122 Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (1988) 248.

- 5.2.4 To reflect the increased culpability of the offender where a robbery is committed in these circumstances, an offender found guilty of armed robbery is subject to a higher maximum penalty (25 years' imprisonment)¹²³ than an offender found guilty of robbery (15 years' imprisonment).¹²⁴
- 5.2.5 In some jurisdictions, aggravating features are listed in legislation without creating a further offence. This may be in the form of a general list, such as that found in the ACT¹²⁵ and NSW¹²⁶ sentencing acts. Alternatively, particular offences may have specific aggravating factors listed which courts may have regard to in sentencing for that offence.
- 5.2.6 The fact that a circumstance of aggravation is not specifically mentioned in legislation does not mean it is disregarded by the courts.¹²⁷ It is a matter for the sentencing judge, rather than the jury. A judge can take into account an aggravating factor at sentencing where satisfied that the relevant factor has been established beyond reasonable doubt.¹²⁸ In this way, the aggravating factor may serve to increase the sentence imposed on the offender in that case. As Justice Brooking, of the Victorian Court of Appeal noted, 'aggravating circumstances point towards greater severity of sentence'.¹²⁹
- 5.2.7 For example, if an offender is found guilty of the offence of intentionally causing injury and the judge is satisfied that a knife was used in the commission of that offence the judge may impose a higher sentence than would have been otherwise imposed, due to the aggravating circumstances in which the offence was committed.
- 5.2.8 It may be a matter of legislative tradition as to whether certain aggravating factors are part of the definition of the offence or left to sentencing.¹³⁰ Alternatively, there could be a particular reason why certain circumstances are particularised in this way. One reason may be that the specified aggravating circumstances increase the level of culpability to such a degree that they should be recorded as part of the offence. Another reason could be that parliament may have intended to create a hierarchy of offences in relation to a particular type of offending, such as the various causing injury offences under the *Crimes Act 1958* (Vic).¹³¹
- 5.2.9 However, the creation of aggravated offences should be approached with caution. There has been a trend in the drafting of offences over time in this state to move away from the highly specified offences which incorporate aggravating factors to 'a more general specification of crimes'.¹³² One of the reasons for this may have been that there is an increased burden on the prosecution if it is required to prove the aggravating circumstances as an element of the offence. It may have also been a consideration that the elevation of a particular aggravating circumstance as an element of such an offence necessarily decreases the significance of all other aggravating factors. This could have the unintended consequence of diminishing the importance of any equally relevant factors not identified at the time the offence is created.

123 *Crimes Act 1958* (Vic) s 75A.

124 *Crimes Act 1958* (Vic) s 75.

125 *Crimes (Sentencing) Act 2005* (ACT) s 33.

126 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

127 Fox and Freiberg (1999), above n 62, 241. See also *R v De Simoni* (1981) 147 CLR 383.

128 *R v Storey* [1998] 1 VR 359, 369. See also Fox and Freiberg (1999), above n 62, 101-07.

129 *R v England* [1999] 2 VR 258, 263.

130 Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed, 2005) 152.

131 *Crimes Act 1958* (Vic) ss 16-18.

132 Victorian Sentencing Committee (1988), above n 122, 239-40.

An aggravated offence of breaching an intervention order?

- 5.2.10 There are, of course, certain circumstances in which an offender breaches a family violence or stalking intervention order which would serve to increase the culpability of that offender.
- 5.2.11 For example, the Sentencing Advisory Panel in the United Kingdom has identified a number of factors as aggravating the breach of a protection order in the sentencing guideline produced in relation to that offence. The factors identified were where:
- the victim is particularly vulnerable (due to age, cultural background or where the victim is pregnant);
 - there were any children involved in the breach;
 - there is a proven history of threats and violence by the offender;
 - contact arrangements with children were used to instigate the breach;
 - the victim is forced to leave home;
 - the offence is a further breach of the order; or
 - the breach occurred soon after the imposition of the order.¹³³
- 5.2.12 The involvement of children in domestic violence situations has also been identified as a relevant aggravating feature in a number of Australian jurisdictions. For example, in Western Australia, there is specific reference made in the relevant legislation that it is taken to be an aggravating feature of the offence of breach where a 'child with whom the offender is in a family and domestic relationship is exposed to an act of abuse.'¹³⁴ In Tasmania, the court may consider as an aggravating feature of the offence that the offender knew or was reckless as to whether a child was present or on the premises at the time of the offence or knew that the affected person was pregnant.¹³⁵
- 5.2.13 However, the relevant question is whether or not any of these circumstances should be singled out for specification in the legislation, as part of an aggravated offence or whether they should remain factors for the judge to take into account when imposing sentence at his or her discretion.
- 5.2.14 It may be that the circumstances in which the offence was committed are sufficient to charge the offender with a further substantive offence (such as criminal damage to property, assault or making threats to kill). In these situations, it is arguable that there is no need for an aggravated offence of breach of an intervention order because the relevant behaviour is covered by another criminal charge.
- 5.2.15 Tables 3 & 4 below show the most common offences which are sentenced alongside the offence of breach of an intervention order. In most of these cases, the other charge was for an offence carrying a higher maximum penalty.
- 5.2.16 While in the Magistrates' Court, there were 1,721 people (31.3%) sentenced for the single offence of breach of an intervention order alone, 3,779 people (68.7%) were sentenced for more than one offence. Table 3 shows the most common offences sentenced in the same hearing as the breach of intervention order in the Magistrates' Court from July 2004 to June 2007. The last column sets out the average number of offences sentenced per person. As shown, 916 (16.7%) of the total 5,500 offenders sentenced for breach of an intervention order also received sentences for unlawful assault. On average they were sentenced for 1.31 counts of indecent assault. The first row indicates that the average number of charges of breach of an intervention order was 2.10.

133 Sentencing Guidelines Council [UK] *Breach of a Protective Order: Definitive Guideline* (2006), 5-6.

134 *Restraining Order Act 1997* (WA) s 61(4).

135 *Family Violence Act 2004* (Tas) s 13(a).

Table 3: The number and percentage of offenders sentenced for at least one charge of breach of an intervention order by the most common offences that were sentenced and the average number of those offences that were sentenced, Magistrates' Court, 2004-05 to 2006-07

| | Offence | Number of offenders | Percentage | Average number of charges/offender |
|----|------------------------------|---------------------|--------------|------------------------------------|
| 1 | Breach of intervention order | 5,500 | 100.0 | 2.10 |
| 2 | Unlawful assault | 916 | 16.7 | 1.31 |
| 3 | Criminal damage | 855 | 15.5 | 1.42 |
| 4 | Fail to appear on bail | 558 | 10.1 | 1.62 |
| 5 | Causing injury | 549 | 10.0 | 1.28 |
| 6 | Theft | 487 | 8.9 | 2.63 |
| 7 | Make threat to kill | 400 | 7.3 | 1.47 |
| 8 | Assault police | 336 | 6.1 | 1.67 |
| 9 | Stalk another person | 264 | 4.8 | 1.45 |
| 10 | Drive while disqualified | 251 | 4.6 | 1.82 |
| | Offenders Sentenced | 5,500 | 100.0 | 4.42 |

Source: SAC Courtlink extract April 2008.

5.2.17 All 41 people sentenced for breaching an intervention order in the County Court were sentenced for at least one other offence in the same hearing. This is because a summary offence such as breach of an intervention order cannot be heard in the County Court unless it is accompanied by an indictable offence.

5.2.18 Table 4 shows the most common offences sentenced in the same hearing as the breach of intervention order in the County Court between June 2004 and July 2007. The most common offence sentenced with breach of an intervention order was causing injury intentionally or recklessly (19 people or 46.3%). These people were sentenced for 1.21 counts of indecent assault. Other offences commonly sentenced with breach of an intervention order were making a threat to kill (34.1%) and aggravated burglary (31.7%). The first row indicates that the average number of counts of breach of an intervention order was 1.54.

Table 4: The number and percentage of offenders sentenced for at least one count of breach of an intervention order by the most common offences that were sentenced and the average number of those offences that were sentenced, County Court, 2004-05 to 2006-07

| | Offence | Number of offenders | Percentage | Average number of charges / offender |
|----|--|---------------------|--------------|--------------------------------------|
| 1 | Breach of intervention order | 41 | 100.0 | 1.54 |
| 2 | Causing injury intentionally or recklessly | 19 | 46.3 | 1.21 |
| 3 | Make threat to kill | 14 | 34.1 | 1.36 |
| 4 | Aggravated burglary | 13 | 31.7 | 1.15 |
| 5 | Intentionally destroy/damage property | 12 | 29.3 | 1.33 |
| 6 | Assault | 6 | 14.6 | 2.00 |
| 7 | Stalking | 5 | 12.2 | 1.20 |
| 8 | False imprisonment | 5 | 12.2 | 1.00 |
| 9 | Theft | 4 | 9.8 | 8.00 |
| 10 | Causing serious injury recklessly | 4 | 9.8 | 1.00 |
| | Offenders Sentenced | 41 | 100.0 | 6.6 |

Source: Court Statistical Services, Department of Justice (Victoria), unpublished data.

5.2.19 It should be noted that in some cases where a substantive offence is committed in breach of an intervention order, it may be that the breach is not charged, but is considered an aggravated circumstance of the commission of the substantive offence.¹³⁶

¹³⁶ See for example, *The Queen v Yasso* [2007] VSCA 306 (Unreported, Maxwell P, Redlich JA, Habersberger AJA, 14 December 2007) [60]; '...this was a very grave offence. That it was committed in breach of an intervention order was itself a significant aggravating circumstance.' This practice was also referred to in the submission of the Magistrates' Court of Victoria.

- 5.2.20 The existence of a number of the aggravated circumstances identified in other jurisdictions above would not amount to the commission of a further offence. The question then is whether or not there should be a different maximum penalty where one of these circumstances is present.
- 5.2.21 In the VLRC report, it was raised in consultations that there should be a provision for different maximum penalties for different types of breaches depending on their seriousness. However this was opposed by a number of submissions as increasing the penalty in relation to one type of breach could have the consequence of minimising other types of breach, despite the serious effect they could have on the victim.¹³⁷
- 5.2.22 There was some support for an offence of aggravated breach of an intervention order in consultations and submissions received by the Council.
- 5.2.23 For example, the Director of Public Prosecutions was of the view that there should be an offence of aggravated breach of a family violence intervention order. The aggravating circumstances identified where the family member is a 'child' and where the breach involves the use of a 'weapon'.¹³⁸
- 5.2.24 There were a number of those consulted who felt that the presence of a child should amount to an aggravating factor.¹³⁹ One submission argued in favour of this, submitting that 'it is... understood that generally, children's exposure to violence has a highly detrimental effect on their mental health and tends to lead to other dysfunctional behaviours'.¹⁴⁰
- 5.2.25 One submission did not have a view as to whether or not an aggravating offence should be created; however, the author also singled out the presence of a child as being a factor which should be considered for inclusion if such an offence were to be created.¹⁴¹
- 5.2.26 However, there were others consulted by the Council who felt that including the presence of a child as an element of an aggravated offence would suggest that a breach which was committed against the victim in the absence of a child was somehow less serious. As one participant put it: 'I am concerned that [including the presence of a child as an aggravating factor] actually diminishes what it means to be violent towards a woman, and there not be a child present'.¹⁴²
- 5.2.27 Another participant felt that this was a danger no matter which aggravating feature was identified, arguing that 'if you elevate one thing above the others, it is going to diminish the others'.¹⁴³ It was also raised that to identify particular aggravating circumstances in the legislation would be to ignore the reality of the many and varied factual situations in which breaches of an intervention order could arise. It was suggested that it would be very difficult even to try and articulate all of the possible aggravating circumstances which could be relevant.¹⁴⁴
- 5.2.28 Another issue raised in consultations was that any aggravating factor that was made an element of an aggravated offence would make it hard for the prosecution to prove its case. For example, one participant said, 'I would not like to see an offence like this complicated and made harder to prove by adding an element that has to be proven. We should strive for simplicity in legislation; we don't need to add another hurdle'.¹⁴⁵

137 Victorian Law Reform Commission Report (2006), above n 1, 374.

138 Submission 1 (Director of Public Prosecutions).

139 Submission 2 (Confidential).

140 Submission 4 (Confidential).

141 Submission 3 (Confidential).

142 Roundtable Discussion (1 May 2008).

143 Ibid.

144 Ibid.

145 Ibid.

- 5.2.29 It was also noted that where significant aggravating factors existed such as the use of a weapon or threats of violence, that this would be better dealt with by charging the offender with the relevant substantive offence.¹⁴⁶
- 5.2.30 The Magistrates' Court of Victoria suggested in its submission that '[a]t the moment almost all of the behaviour breaching intervention orders is either criminal in nature or arises from orders made to control criminal behaviour.'¹⁴⁷ It submitted that the proposed expansion of the definition of family violence under the legislation to be introduced into parliament later this year may lead to breaches of intervention orders which are not inherently criminal in nature and:
- It may be argued that this change justifies an offence of aggravated breach although differentiating criminal and non-criminal violence is likely to suggest that the pernicious behaviours that might be encompassed in non-contact violence are less serious than contact violence. It would not recognize that the dynamics of violent family relationships are complex and often characterized by multiple violent behaviours in a relationship.¹⁴⁸
- 5.2.31 The purpose of an aggravated offence is to provide a greater maximum penalty where the culpability of the offender is higher due to particular aggravating circumstances. Many of the circumstances which could be described as aggravating the offence of breach of an intervention order will amount to a further offence. In such cases, it would be preferable for that offence to be charged alongside the offence of breaching an intervention order. This echoes the intention stated when the intervention order scheme was created in Victoria when it was emphasised that police should continue to charge substantive offences where possible.
- 5.2.32 Where the aggravating conduct does not amount to a substantive offence, the court can and should still take it into consideration in sentencing. This does not require the creation of a separate aggravated offence, which would have the detrimental effect of automatically elevating particular aggravating factors above all other aggravating factors which could arise in the commission of the offence of breaching an intervention order.

5.3 Different penalties for breaching different orders?

Introduction

- 5.3.1 The Council has been asked to consider what the new maximum penalties should be for the new separate offences of breach of a family violence intervention order and breach of a stalking intervention order. This raises the question as to whether or not there should be any difference in the maximum penalties for these offences. This requires a consideration as to whether there is a difference in the level of harm or culpability for these two situations.
- 5.3.2 The Council has also been asked to advise on the maximum penalty for the new offence of breach of a family violence safety notice. This will also require a consideration of the relative harm and culpability of this new offence.

146 Ibid.

147 Submission 5 (Magistrates' Court of Victoria).

148 Ibid.

Distinguishing family violence intervention orders and stalking intervention orders

- 5.3.3 The types of behaviours that can lead to the imposition of a stalking intervention order and a family violence intervention order can be very similar. Further, the conditions available for a stalking intervention order are, at present, identical to those available for a family violence intervention order, so the types of behaviours which would contravene a stalking intervention order would be the same as those which would breach a family violence intervention order. The main difference between the two types of orders is that, in the case of a family violence intervention order, there must also be a family relationship between the parties.
- 5.3.4 In relation to the question of culpability, under the current legislation, to breach either a family violence intervention order or a stalking intervention order requires either an awareness that the order is being breached or recklessness as to the breach.
- 5.3.5 When considering the level of harm involved, it should be reiterated that the only harm required in order to commit the offence of breaching a family violence intervention order or the offence of breaching a stalking intervention order is the harm to justice procedures though the breach of a court order.
- 5.3.6 However, in relation to actual mental or physical harm to the complainant, it has been argued that stalking intervention orders have been granted in situations in which the level of these types of harm already caused is relatively low. Further, the potential for mental and physical harm is considered to be much less in these situations than in the archetypical family violence situation.
- 5.3.7 For example, a 2002 study into the perceptions and opinions of those who work with complainants applying for intervention orders found that there was a 'belief that some applicants seeking intervention orders for stalking...have less serious issues to contend with than do survivors of family violence and so should be treated differently within the legal system'.¹⁴⁹ This view was endorsed by a number of submissions to the VLRC's review of Family Violence Laws.¹⁵⁰
- 5.3.8 An analysis of finalised intervention orders from 2000 to 2002 in Victoria revealed that one quarter of stalking intervention orders imposed over that period were in relation to disputes between neighbours.¹⁵¹ The types of behaviour alleged by the complainants included verbal abuse, throwing rubbish on property and offensive gestures. On the basis of these examples, it could be concluded that the types of behaviours that are involved with stalking intervention orders and the types of potential harm on breach of these orders are much less serious those involved in a family violence situation.
- 5.3.9 This is not to say, however, that cases where the victim is in fear of actual physical harm are not dealt with by the imposition of a stalking intervention order. In addition to the above behaviours, complainants have also alleged conduct including physical violence, threats to inflict serious physical violence and threats to kill. A number of complainants in the above study were 'greatly fearful for themselves or their children.' One applicant reported she was 'terrified' of the defendant. On this basis, Willis and McMahon argued that it is 'inappropriate...to categorise disputes between neighbours as necessarily trivial'.¹⁵²

149 Jessamy Babbel, 'Balancing the Act: Survivors of Family Violence, Intervention Orders and Victorian Magistrates' Courts' (2002) 2 *Domestic Violence and Incest Resource Centre Newsletter* 12, 14.

150 Victorian Law Reform Commission (2006), above n 1, 70.

151 Marilyn McMahon and John Willis, 'Neighbours and Stalking Intervention Orders: Old Conflicts and New Remedies' (2002) 20(2) *Law in Context*, 95,107.

152 *Ibid* 108.

- 5.3.10 It should also be noted that stalking intervention orders are used in cases other than disputes between neighbours. For example, the case of *Gunes v Pearson; Tunc v Pearson*,¹⁵³ concerned a young man (Pearson), who sought an intervention order against two other young males who were 'constantly harassing and assaulting' him at his place of work. Pearson had no previous connection with the defendants. However, their behaviour over a period of two months, which included entering the shop where he worked and punching him in the face, chasing him with a pair of scissors and making threats that they would 'bash' him, resulted in Pearson being 'terrified of going into work'.
- 5.3.11 The difficulty is that the behaviour that leads to the imposition of stalking intervention orders and the breaches of such orders can vary greatly in the type and level of harm that is actually caused. Breaches of a stalking intervention order can cover a wide variety of harm, ranging from 'matters, objectively speaking, of comparative triviality to cases involving serious allegations of violence.'¹⁵⁴ Mullen and Pathè, in a 1997 study, described the 'devastating effects on all aspects of a victim's functioning', which can result from being the victim of stalking.¹⁵⁵
- 5.3.12 It may be that the problem is not that stalking intervention orders and consequently the breaches of these orders by their very nature involve less serious harm than family violence intervention orders (and breaches of those orders), but rather that the protection against stalking has been used inappropriately in some cases. D'Arcy argues that those who need to resolve the disputes as described above clearly need a mechanism to do so – however 'calling it stalking provides us with a false picture of who is stalked and how stalking can be resolved'.¹⁵⁶
- 5.3.13 There were mixed views in consultations as to whether there should be a difference between the maximum penalty for breach of a family violence intervention order and stalking intervention order.
- 5.3.14 Some people consulted were of the view that there is a distinction between the archetypal family violence order scenario on the one hand and the situations in which stalking intervention orders, and therefore breaches arise, on the other. They observed that family violence situations tend to embrace a whole range of factors that are generally not present in the stalking situations, due to the nature of the relationship which exists between the parties. The factors they pointed to were the power and gender dynamics of family violence situations and the level of control exerted over the victim in these sorts of relationships.¹⁵⁷
- 5.3.15 It was suggested that these issues generally do not figure in stalking situations, which usually have a much lower level of intimacy between the parties, and therefore have a much less significant impact on the psychological and emotional wellbeing of the complainants. Some of those consulted observed these orders are often over quite petty neighbourhood disputes (consistent with the relevant research), serious stalking situations being quite uncommon. They thought that, while stalking intervention orders may not always be used appropriately by the public, it is important not to let that misuse dictate how the law deals with family violence situations.¹⁵⁸

153 (1996) 89 A Crim R 297.

154 John Willis, 'Consent intervention orders and the decision in *Stephens v Melis and The Magistrates Court at Moe*' (2002) 2(6) *Bourke's Criminal Law News (Victoria)* 39.

155 Michele Pathè and Paul Mullen, 'The Impact of Stalkers on Their Victims' (1997) 170 *The British Journal of Psychiatry* 12, 16.

156 Marg D'Arcy, 'Stalking, Sexual Assault, Domestic Violence: What's in a Name?' (Paper presented at the Stalking: Criminal Justice Responses Conference convened by the Australian Institute of Criminology, Sydney, 7-8 December 2000), 5.

157 Submission 4 (Confidential); Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008).

158 Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008).

- 5.3.16 The Director of Public Prosecutions submitted that there should be a distinction in the maximum penalty for breach of a stalking intervention order and breach of a family violence intervention order. In his view, such a higher penalty is justified because:
- (i) the family members who obtain a family violence intervention order often find themselves in a vulnerable position (due to age, lack of financial independence etc) from which it is often difficult to escape; and
 - (ii) bearing in mind the familial tensions that often cause such offending there is a greater opportunity for repeated offending.¹⁵⁹
- 5.3.17 However, there were also a number of those consulted who felt that there could be some stalking intervention orders and breaches of such orders that involve harm as serious as the types of physical or mental harm caused by breaches of family violence intervention orders. For example, the Magistrates' Court of Victoria did not support a different maximum penalty for breaching a stalking intervention order as opposed to a family violence intervention order.¹⁶⁰
- 5.3.18 One participant was of the view that there may be a danger in suggesting that there is a difference between stalking and family violence, as it would suggest that one was inherently more serious than the other.¹⁶¹ Another participant felt that 'it depends on the facts of the situation, as to whether or not a penalty is justified to be more in one case than the other.... I don't see a general difference; I don't see a reason why they ought to be different.'¹⁶²
- 5.3.19 Having the same maximum penalty for both offences is consistent with the fact that the only actual harm required for a breach is the harm inherent in breaching a court order. Any actual physical or mental harm caused can then be taken into account by the sentencing judge on a case by case basis.

Family violence safety notices

- 5.3.20 The conditions which can be imposed on a family violence safety notice are intended to be the same as those which are available for an intervention order. The main difference between an intervention order and a family violence safety notice is that an intervention order is an order of the court, while a family violence safety notice is issued by a police officer.
- 5.3.21 On this basis, the harm caused to justice procedures by a breach of a family violence safety notice is less than a breach of an intervention order. A notice issued by a police officer does not carry the same weight as an order imposed by the court and therefore the harm to justice procedures when a police notice is breached is less than that resulting from the breach of a court order.¹⁶³
- 5.3.22 However, it was suggested in consultations that the culpability of an offender is higher if he or she breaches a family violence safety notice as the breach would have to occur in a very short period of time as the order is only made for up to 72 hours. Anecdotally it was suggested that a number of breaches occur immediately after the imposition of an order and this is when the aggrieved person is most vulnerable. One of those consulted argued that it may be appropriate for penalties for breaches of family violence safety notices to be higher to reflect the flagrancy of the breach where the order is made so close to the breach itself.

159 Submission 1 (Director of Public Prosecutions).

160 Submission 5 (Magistrates' Court of Victoria).

161 Meeting with Violence Against Women and Children Working Group, Federation of Community Legal Centres (7 May 2008).

162 Roundtable Discussion (1 May 2008).

163 Submission 3 (Confidential).

5.3.23 One submission argued that the shorter duration of the notice justified a lower maximum penalty:

Due to the nature of the Family Violence Safety Notices...the maximum penalty for a breach of the notice should be a term of imprisonment of no more than one (1) year. As the FVSN is only valid for a period of 72 hours from the time it is issued, it does not seem appropriate that the maximum penalty is identical to that of an intervention order.¹⁶⁴

5.3.24 The Magistrates' Court of Victoria submitted that the maximum penalty for breach of a family violence safety notice should be less than the maximum penalty for breach of an intervention order 'because the breach of a court order is more serious than the disobedience of what is in effect a police direction.' However, the submission also acknowledged that 'breaches of family violence safety notices should attract substantial penalties.' It was suggested that 'perhaps the maximum penalty for breach of a family violence safety notice should be half of that for breach of an intervention order.'¹⁶⁵

5.3.25 The majority of those consulted were of the view that the penalties for breaches of all classes of intervention orders, including police safety notices, should be deserving of the same or similar maximum penalties. One participant in consultations was concerned that 'there is an issue with the safety notices being imposed arguably on a lower standard because you've got police issuing them without judicial oversight', however this person felt that such orders should have the same maximum penalty as the breach of an intervention order as 'they are effectively going to stand in place of urgent interim orders or complaint warrants.'¹⁶⁶

5.3.26 One participant described their view in this manner:

I don't see the need for a distinction. I would've thought that what you're looking at is trying to create a situation that's effectively the same from the beginning and by creating some kind of lesser penalty, aren't you tending to diminish what the police officers are doing. I would've thought the case there is to keep it the same and not to make any distinctions really.¹⁶⁷

5.3.27 The Director of Public Prosecutions, in his submission, did not see a need for a distinction between the penalties either:

It is my understanding that the family violence safety notice is an interim family violence intervention order and accordingly a breach of the notice should be treated in exactly the same way as a breach of a family violence intervention order.¹⁶⁸

5.4 Repeat offending

5.4.1 The statutory maximum penalty for the current offence of breaching an intervention order distinguishes between first and repeat offences. With the introduction of three separate offences of breaching an intervention order or safety notice, the question remains whether this distinction should be retained.

5.4.2 For the intrinsic seriousness of these offences to be altered by prior convictions for breaching an intervention order thereby justifying an increase in the maximum penalty, it would need to be shown that the level of harm or culpability of an offender is altered by the existence of relevant prior offending.

¹⁶⁴ Submission 3 (Confidential).

¹⁶⁵ Submission 5 (Magistrates' Court of Victoria).

¹⁶⁶ Roundtable Discussion (1 May 2008).

¹⁶⁷ Roundtable Discussion (1 May 2008).

¹⁶⁸ Submission 1 (Director of Public Prosecutions).

- 5.4.3 In the case of ‘harm’, it has been argued that ‘whether or not an offender has prior convictions does not affect the harm that is caused by his or her offending behaviour’.¹⁶⁹ Von Hirsch has suggested that, in relation to culpability, if two offenders have committed the same crime and have the same awareness, motivation and intention in committing that crime, there is no rational argument for why the repeat offender is more culpable than the first time offender.¹⁷⁰
- 5.4.4 However, there may be some offences which are an exception to these general rules. Some may argue that such an exception exists in the context of intervention orders, where the purpose of the order is to protect the aggrieved person from further violence and/or harassment. In these circumstances, it has been suggested that where an offender has committed repeated breaches of an intervention order in relation to the same complainant, the harm caused to the victim is compounded by each subsequent breach. As intervention orders are often granted to complainants after a course of conduct by the offender, it could be argued that the continuation of that conduct in breach of the order is directly relevant to the degree of harm caused. Such an increase in harm could be the basis for an increased maximum penalty for a second or subsequent offence of breach of an intervention order.
- 5.4.5 In consultations for the VLRC report, it was suggested that greater use should be made of the existing power to impose a higher penalty for a second or subsequent breach.¹⁷¹ In addition, the Model Criminal Code has a graduated penalty for the offence of breach of a domestic violence order. The maximum penalty recommended is \$24,000 or one year’s imprisonment for a first offence and two years’ imprisonment for a second offence.¹⁷²
- 5.4.6 In consultations conducted by the Council as part of this reference, most of those consulted took the view that a second or subsequent breach of an intervention order caused a higher level of harm than the first breach. For example, the Magistrates’ Court of Victoria submitted that:
- It appears that many family violence and stalking offenders have a greater propensity to become repeat offenders and that many of these offenders will maintain patterns of harassing offending unless strong penalties are imposed. Higher penalties for second offences may have a stronger deterrent effect for intervention order offences than other offences. Repeated breaches of intervention orders are likely to shake the victim’s faith in the system and it is important that everything that reasonably can be done is done to maximise the protection of victims.¹⁷³
- 5.4.7 The Magistrates’ Court also noted some of the difficulties that arise in sentencing multiple breaches. One is the practice whereby a number of breaches by the same offender are rolled up into one offence. The defendant’s criminal history then simply records ‘breach of intervention order’ and the court has no information as to the scope of the breach. The submission suggested that ‘the Court would have more success in making defendants accountable for their violence if a way could be found to record the nature and extent of the breaching behaviour when recording the penalty.’¹⁷⁴ Another issue is that where substantive charges are filed at the same time as an intervention order, they are often withdrawn in exchange for a plea of guilty to the breach of an intervention order. There is then no record of the offending behaviour giving rise to the substantive offence, which makes it difficult for the court to assess the new breach in the context of previous behaviour.¹⁷⁵

169 Sentencing Advisory Council, *Maximum Penalties for Preparatory Offences* (2006).

170 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005), 149.

171 Victorian Law Reform Commission (2006), above n 1, 374.

172 Partnerships Against Domestic Violence, *Model Domestic Violence Laws* (1999), 212.

173 Submission 5 (Magistrates’ Court of Victoria).

174 Ibid.

175 Ibid.

5.4.8 A number of those consulted, including the Director of Public Prosecutions, were also of the view that the most appropriate way of dealing with the higher level of harm associated with a subsequent breach was for previous breaches to be taken into account in the same way that any prior conviction is taken into consideration by the court when sentencing.¹⁷⁶

5.4.9 One submission discussed the importance of higher penalties for repeat offenders of breaches of intervention orders (in the context of family violence), including the symbolic nature of such penalties:

One of the key challenges to police regarding family violence is attendance at recurring incidents. Ongoing episodes of violence are difficult to address and it is imperative that penalties for subsequent offences send a clear message that family violence is not acceptable and will be dealt with accordingly. The imposition of higher penalties for subsequent breaches would act as both a clear deterrent to perpetrators and as an acknowledgement of the gravity in which society views such actions. ...repeated incidents of family violence merely serve to compound distress for victims and increase their sense of isolation and helplessness.¹⁷⁷

5.4.10 However, this submission also acknowledged the difficulties inherent in creating a split penalty, noting that ‘this [o]ption is however restricted by the jurisdictional limit in the Magistrates’ Court [where the majority of these offences are heard] and while the principle is admirable, it is unenforceable and confusing for those working within the system and victims and their families’.¹⁷⁸

5.4.11 The problematic nature of retaining a graduated penalty was discussed in the roundtable held by the Council. One participant was concerned about a split penalty as in order to retain the current graduated penalty in a manner that the higher penalty could actually be used by the court, an indictable offence would have to be created for the second or subsequent offence. This was thought to be an issue because it would mean that if the matter were listed for hearing, it would have to be heard before a jury and it was suggested that such an offence is not appropriate for such a hearing. There would also be significant delay if such matters were heard in the County Court, and this would be detrimental to the victim.¹⁷⁹

5.4.12 This was also raised in the Magistrates’ Court of Victoria’s submission:

There is an advantage in retaining all breach of intervention order offences as summary offences because of the large range of conduct involved in the breaches. Some breaches can be very petty. It often makes sense to deal with an offender involved in minor breaches on an ex parte basis both for the benefits of immediacy and a proportionate response. It may be that the justice system has to live with the disadvantages of an apparent softening of the sentencing regime to correct the 5 year maximum anomaly and preserve the advantages of summary charges.¹⁸⁰

176 Submission 1 (Director of Public Prosecutions); Roundtable Discussion (1 May 2008).

177 Submission 3 (Confidential).

178 Ibid.

179 Roundtable Discussion (1 May 2008).

180 Submission 5 (Magistrates’ Court of Victoria).

5.4.13 There were others who made submissions to the Council who felt that the graduated penalty should be retained for this offence. It was suggested by some that the symbolic value of such a penalty is the most important consideration.¹⁸¹ One submission shared this view in relation to breaches of family violence intervention orders, submitting that:

The physical and economic cost of family violence to the individual and the community is enormous. Much of the violence is not visible to the community and impacts to a disproportionate degree on women and children. A higher maximum penalty for second and subsequent breaches is necessary to signal to the community abhorrence of the inherent nature of family violence and the fact that if a second breach has been found to occur, the case has already been before the courts on a number of occasions.¹⁸²

5.4.14 It is unusual for an offence in Victoria to have a graduated penalty for repeat offending. In general, subsequent offending does not attract a higher maximum penalty as offences are not thought to be inherently more serious based only on repetition. The offence of breach of an intervention order may be considered differently because the repeat offending will usually be against the same victim, with each subsequent breach compounding the harm in relation to that victim.

5.4.15 However, there are difficulties inherent in retaining a workable higher maximum penalty for a second or subsequent offence where such a penalty would have to be created in the form of an indictable offence. Further, while there may be a symbolic value in having a higher maximum penalty, it is unclear whether this higher penalty has any impact on sentencing practices for repeat offending, considering the low level of imprisonment for this offence¹⁸³ and whether or not it acts as an effective deterrent to offenders.

181 Roundtable Discussion (1 May 2008).

182 Submission 4 (Confidential).

183 See Section 3.6.3 above.

6. Comparable offences in other Australian Jurisdictions

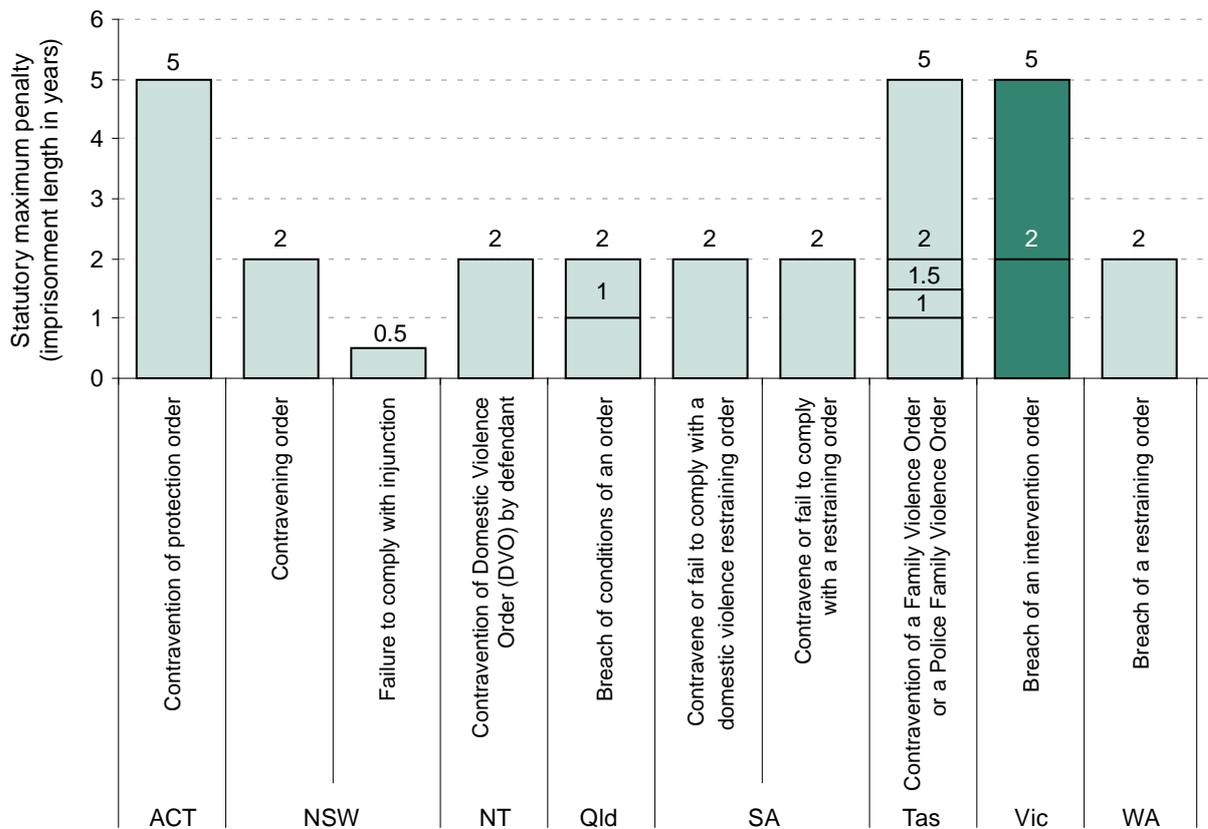
6.1 Introduction

6.1.1 Each Australian jurisdiction has the provision for the making of some form of intervention order and an accompanying offence of breach of that order. The circumstances in which these orders can be made and/or breached vary depending on the jurisdiction, but all the orders are generally aimed at protecting the aggrieved person from future violence and/or harassment. The Northern Territory, Western Australia and Tasmania also have provisions for the police to issue notices in lieu of an intervention order for a short period of time.

6.2 Approaches in other Australian jurisdictions

6.2.1 Figure 9 compares the Victorian offence of breaching an intervention order with similar or related offences in other Australian jurisdictions. A more comprehensive description of the breach offences can be found in Appendix 1.

Figure 9: Comparison of the maximum penalty for the Victorian offence of breaching an intervention order with the statutory maximum penalties for similar Australian offences



- 6.2.2 As Figure 9 shows, three states in Australia have a graduated penalty for the breach of some form of intervention/protection order. In Victoria, an offender is liable to a higher maximum penalty of five years' imprisonment on a second or subsequent offence. Similarly, in Tasmania, the maximum penalty for one offence is one year's imprisonment and this increases to 18 months on a subsequent offence. However, the tariff increases on each subsequent offence, so that for the third offence the maximum penalty is two years' imprisonment and for a fourth offence, it is five years. The Queensland legislation also increases the maximum for a repeat offender, but only where the offender has been previously convicted of the same offence twice before and it has been less than three years since the commission of those offences.
- 6.2.3 The highest penalty for a single offence is five years' imprisonment, which is available in the ACT. Prior to the enactment of the legislation which contains this offence, the ACT Law Reform Committee suggested that there was 'considerable value in having an elevated penalty for a second or subsequent offence' in its report on Domestic Violence.¹⁸⁴ However, the recommendation was not followed. It should be noted that this offence can be determined summarily in the Magistrates' Court. The Magistrates' Court in the ACT has a jurisdictional limit of two years' imprisonment.
- 6.2.4 The most common maximum penalty for breach of an intervention order or its equivalent is two years' imprisonment. New South Wales, the Northern Territory, Western Australia and South Australia all have a maximum penalty of two years' imprisonment. It should also be noted that while Queensland has a graduated penalty, the higher penalty for a second and subsequent offence is also two years' imprisonment.
- 6.2.5 The maximum penalty for the breach of a domestic violence order in the Northern Territory was recently increased from six months with the introduction of the *Domestic and Family Violence Act 2007* (NT). In the second reading speech introducing that legislation into parliament, the reason given for the increase to two years was that 'it was the government's view that six months was manifestly inadequate given the adverse impact that this kind of violence has on family members and on the community. Two years is also broadly consistent with other serious offences of violence, such as threatening to cause injury or assault.'¹⁸⁵

6.3 Breach of a family violence safety notice

- 6.3.1 Legislation in a number of Australian jurisdictions empowers a police officer, under certain circumstances, to themselves make short term intervention orders.
- 6.3.2 The Northern Territory,¹⁸⁶ Tasmania¹⁸⁷ and Western Australia,¹⁸⁸ all have provisions for police officers to issue a short term intervention order. In Western Australia there is a separate offence of breach of a police order, while in the Northern Territory and Tasmania, the offence of breach of an order specifically includes an order or notice made by the police.
- 6.3.3 In all of these jurisdictions, the maximum penalty for the breaching an order or notice issued by the police is the same as the maximum penalty for breaching an order made by the court. It is a maximum of two years' imprisonment in the Northern Territory and Western Australia. In Tasmania, the same graduated penalty applies – from one to five years' imprisonment depending on how many previous breaches for which the offender has been sentenced.

184 Community Law Reform Committee [ACT], above n 89.

185 Parliamentary Debates, *Northern Territory*, Legislative Assembly, 17 October 2007 (Sydney Stirling, Attorney-General).

186 *Domestic Family Violence Act 2007* (NT) s 41.

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

188 *Restraining Orders Acts 1997* (WA) s 30A.

7. The Council's View

7.1 The maximum penalty

- 7.1.1 There is significant overlap between the types of behaviour that would lead to the imposition of a family violence intervention order and a stalking intervention order and the breach of either of those types of order.
- 7.1.2 Despite that overlap, the Council acknowledges that there are certain factors that exist in relation to family violence situations which are not necessarily an issue in relation to stalking. Inherent in the intimate relationship that is required in order to obtain a family violence intervention order are a number of factors which, it was suggested in consultations, may serve to increase the harm caused and the culpability of the offender. The Council is also aware that many stalking intervention orders are obtained in situations that do not have the same potential for harm as the archetypal family violence situation.
- 7.1.3 Nevertheless, the Council considers that, even though some of the situations in which stalking intervention orders have been obtained are not, objectively speaking, particularly serious, it would be wrong to treat the offence of breach of a stalking intervention order as less serious than the offence of breach of a family violence intervention order. The Council considers that the behaviour needed to obtain a stalking intervention order and potential breaches can be just as serious as behaviours in relation to family violence, with just as high a potential for serious mental and/or physical harm. Taking this into consideration, the maximum penalty needs to be able to deal with the 'worst case' of that type of offence. Therefore, we consider that there should be no difference in the maximum penalty for breach of a stalking intervention order and breach of a family violence intervention order.
- 7.1.4 It may be that there need to be alternative measures put in place for the resolution of neighbourhood disputes so that stalking intervention orders are used for the purpose for which they were intended, which was to protect people from further violence and/or harassment. Further, we suggest that some of the factors specifically relevant to family violence may form part of a set of guidelines produced to inform sentencers of the issues relevant when sentencing for this type of behaviour.
- 7.1.5 The proposed family violence safety notices will be very similar to family violence interim intervention orders, except that they will be issued by police, not the court, and they remain in force for very short periods of time. These orders will be able to be issued for 72 hours and are to be directed toward the safety of the complainant during the most dangerous time for them.
- 7.1.6 A core harm of the offence of breach of an intervention order is harm to justice procedures, because the offence involves breaching a formal order made by a court after legal proceedings, in addition to the potential for actual physical or mental harm to the aggrieved person. On this view, the offence of breach of a family violence safety notice may involve less actual harm because the notice is issued by the police. However, an offender's culpability in breaching a family violence safety notice may be higher because the order is breached within a very short time after it was made. As both intervention orders and family violence safety notices are designed to protect the aggrieved person in the same way, the Council believes that there should be no difference in the penalty for breach.
- 7.1.7 The Council is therefore of the view that each of the three offences should have the same maximum penalty.

7.2 First and subsequent offences

- 7.2.1 The current graduated penalty for the existing offence is not anomalous because, even though the maximum penalty of five years' imprisonment for a subsequent offence cannot be imposed, it can be used to assist judicial officers in sentencing. However, in the interests of clarity and transparency, the Council believes that the current maximum penalty of five years' imprisonment for a second or subsequent offence should not continue to exist in its current form.
- 7.2.2 The Council has previously taken the view that, as a general rule, statutory maxima should not differentiate between first time and repeat offenders. This does not mean that there are no exceptions to this rule.
- 7.2.3 However, the Council does not believe that breach of a stalking intervention order and/or breach of a family violence intervention order are offences which warrant a graduated penalty for second or subsequent offences. The Council acknowledges that repeated breaches against the same victim may increase the level of harm caused to that victim. We also acknowledge the symbolic value in having a higher penalty for a second or subsequent offence. However, the Council does not believe that a graduated penalty acts as a significant practical deterrent to repeat offenders. It is our view that it would be more appropriate for the sentencer to take into account the previous breaches at sentencing in a similar way that all prior convictions are taken into account. Therefore, we recommend the abolition of the existing graduated penalty for the offence of breach of an intervention order. We would, however, note that courts should give more weight to previous breaches of an intervention order against the same victim than other prior convictions because of the potential for greater harm to the victim with each subsequent breach. It may be that the best way to ensure this is through the development of guidelines for use by the courts.

7.3 Length of maximum penalty

- 7.3.1 The offences of breaching an intervention order involve harm to the justice system. While this harm is lower on the scale that physical or mental harm against a person, it is still significant as it has the potential to affect the court's ability to regulate behaviour and enforce its own orders.
- 7.3.2 A breach of an intervention order can involve a wide spectrum of actual mental or physical harm. It also involves a high level of culpability because the offender must be aware of the conditions of the order, so must be aware that he or she is contravening a condition or at the very least, be reckless as to whether or not the order is being breached.
- 7.3.3 An examination of the sentencing practices for this offence reveals, particularly in the Magistrates' Court where the vast majority of these offences are heard, that few offenders receive sentences of imprisonment (15.5%). Of those that do receive sentences of imprisonment, the most common length is one months' imprisonment. This indicates that a maximum penalty of two years' imprisonment provides ample scope to deal with the charges that are coming before the courts.
- 7.3.4 Taking all of this into consideration, the Council is of the view that the appropriate maximum penalty for these offences is two years' imprisonment.

- 7.3.5 The Council believes that the offences of breach of a stalking intervention order and breach of a family violence intervention order are most appropriately dealt with in the Magistrates' Court. The advantage of having an intervention order is that if it is breached, the alleged offender can be brought before the court quickly and the matter dealt with speedily. This would not occur if these offences were heard in the County Court. The offence could be made an indictable offence triable summarily, which would mean that the majority of these cases would still be heard in the Magistrates' Court. However, a defendant may still elect to have the matter dealt with in a higher court merely to prolong proceedings to the detriment of the complainant. Further, the nature of some of these breaches is such that it would not be appropriate to have a committal hearing and then a trial in front of a jury. As a summary offence, if a breach is currently accompanied by more serious substantive offences, then the matter can be dealt with in the County Court on conviction for the substantive offences, which should mean that the more serious breaches are already being dealt with in that court.
- 7.3.6 In making this recommendation, the Council is keenly aware of the limitations on the ability of the maximum penalty to address this type of offending, particularly in relation to family violence.¹⁸⁹ While the breach of a family violence intervention order is a serious offence, the focus on the maximum penalty of imprisonment is a flawed way of dealing with this offence. It may be that in some cases, there are alternative sanctions which may be more appropriate.¹⁹⁰
- 7.3.7 Further, there was a need identified by many of those consulted for some sort of guidance for judicial officers to assist them in identifying the relevant aggravating factors and better understanding the context in which such offending occurs. The Council will consider this matter further in its next report.

7.4 An aggravated offence?

- 7.4.1 The Council was asked to consider whether there should be an aggravated offence of breach of an intervention order. There are a number of circumstances which could aggravate the commission of the offence of breach of an intervention order. The Director of Public Prosecutions singled out the use of a weapon or where the victim is a child (with particular reference to family violence), but there are a number of factors which have been articulated in legislation and guidelines in other jurisdictions.
- 7.4.2 The main difficulty we see with specifying particular aggravating factors as part of an aggravating offence is that it diminishes the significance of all other circumstances of aggravation which could arise in relation to that offence.
- 7.4.3 The Council was also cognizant of the fact that an aggravated offence requires the prosecution to prove that element beyond reasonable doubt.
- 7.4.4 Where violence has been committed, the appropriate response is for the police to charge it as a separate and additional offence. Most, if not all of the substantive injury offences and offences involving threats have a higher maximum penalty than breach of an intervention order. At present, in the Magistrates' Court, just over two-thirds of the charges of breach of an intervention order dealt with in that court were accompanied by another charge, including assaults and offences involving threats. Therefore, the Council recommends against the creation of an aggravated offence of breach of either a family violence or stalking intervention order.

189 Victorian Law Reform Commission (2006), above n 1, 377.

190 *Ibid.* See also Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence' (2007) 31 *Criminal Law Journal* 220, 233.

Recommendations

Recommendation 1

That each of the three offences (breach of a family violence intervention order; breach of a stalking intervention order; and breach of a police-issued family violence safety notice) should have the same maximum penalty of two years' imprisonment.

Recommendation 2

That there should not be a separate offence with a higher maximum penalty for a second or subsequent offence of breach.

Recommendation 3

That there should not be a separate aggravated offence with a higher maximum penalty.

Appendix 1: Inter-jurisdictional comparison

| Jur | Legislation | Section | Offence | | Statutory Maximum Penalty |
|-----|--|---------|--|--|---------------------------|
| ACT | <i>Domestic Violence and Protections Orders Act 2001</i> (ACT) | 34 | Contravention of protection order | 'A person...is subject to a protection order if the person (a) was present when the protection order was made; or (b) has been personally served with a copy of the protection order. The person commits an offence if the person engages in conduct that contravenes the protection order (including a condition of that order).' | 5 years |
| NSW | <i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) | 14 | Contravening order | 'A person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order made against the person is guilty of an offence.' | 2 years ¹⁹¹ |
| | <i>Property (Relationships) Act 1984</i> (NSW) | 54 | Failure to comply with injunction ¹⁹² | 'A person against whom an injunction under section 53 has been granted and who: (a) has been served personally in the prescribed manner, with a copy of the order under section 53 by which the injunction was granted, and (b) after having been so served, knowingly fails to comply with a restriction or prohibition specified in the order, shall be guilty of an offence.' | 6 months |

191 This section does not apply unless the person was served with a copy of the order or was present in court when the order was made; see *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(2). Unless the court otherwise orders, a person who is convicted of this offence must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against the person (this does not apply if the offender was under the age of 18 at the time of the offence): see *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 14(4)–(5).

192 A court may, on an application made to it by a party to a domestic relationship or in any other proceedings between parties to a domestic relationship...grant an injunction: (a) for the personal protection of a party to the relationship or of a child ordinarily residing within the same household as the parties to the relationship or who at any time ordinarily so resided, (b) restraining a party to a relationship: (i) from entering the premises in which the other party to the relationship resides, or (ii) from entering a specified area, being an area in which the premises in which the other party to the relationship resides are situated, (c) restraining a party to the relationship: (i) from entering the place of work of the other party to the relationship, or (ii) from entering the place of work of a child referred to in paragraph (a), or (d) relating to the use or occupancy of the premises in which the parties to the relationship reside: *Property (Relationships) Act 1984* (Vic) s 53.

| | | | | | |
|------------|---|--------|--|--|--|
| NT | <i>Domestic and Family Violence Act 2007 (NT)</i> | 120(1) | Contravention of Domestic Violence Order (DVO) by defendant ¹⁹³ | 'A person commits an offence if: (a) a DVO is in force against the person; and (b) the person engages in conduct that results in contravention of the DVO.' ¹⁹⁴ | 2 years ¹⁹⁵ |
| | | 41 / 4 | Contravention of Domestic Violence Order (DVO) by defendant ¹⁹⁶ (the definition includes an order issued by the police) | 'domestic violence order or DVO means a court DVO or police DVO, and includes: (a) a DVO as varied under Part 2.7 or 2.8; and (b) a police DVO confirmed under Part 2.9.' | 2 years |
| Qld | <i>Domestic and Family Violence Protection Act 1989 (Qld)</i> | 18, 80 | Breach of conditions of an order | 'A respondent must not contravene a protection order, temporary protection order or any other order made under this Act, including a condition imposed by the order, if— (a) the respondent was present in court when the order was made; or (b) the respondent was served with a copy of the order ; or (c) a police officer told the respondent about the existence of the order.' | 1 year; or 2 years (if the respondent has previously been convicted on at least 2 different occasions of an offence against this subsection; and at least 2 of those offences were committed not earlier than 3 years before the present offence was committed). |
| SA | <i>Domestic Violence Act 1994 (SA)</i> | 15 | Contravene or fail to comply with a domestic violence restraining order | 'A person who contravenes or fails to comply with a domestic violence restraining order...is guilty of an offence.' | 2 years |
| | <i>Summary Procedure Act 1921 (SA)</i> | 99I | Contravene or fail to comply with a restraining order | 'A person who contravenes or fails to comply with a restraining order...is guilty of an offence.' | 2 years |

193 Under the *Domestic and Family Violence Act 2007* (NT) s 41 authorised police officers may also make short term DVOs. The definition of a DVO under s 4 of that Act includes a police DVO. As such, breach of a police DVO is treated simply as a breach of a DVO with the same penalties applying.

194 This section does not apply unless (a) the person has been give an copy of the DVO; or (b) where the DVO has been altered, the person has been given a copy of the order as varied or confirmed or the person's conduct also constitutes a contravention of the DVO last given to the person. It should also be noted that an offence against this section is a strict liability offence: *Domestic and Family Violence Act 2007* (NT) ss 120 (2)–(3).

195 If an adult is found guilty of this offence, the court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of such an offence: *Domestic and Family Violence Act 2007* s121(2). This subsection does not apply if the offence does not result in harm being caused to a protected person; and the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the case: s 121(3). The court must not make an order for a person found guilty of a second or subsequent offence if the order would result in the release of the person from the requirement to actually serve the term of imprisonment imposed: s 121(5). Further if the person is already serving a term of imprisonment for another offence, the court must direct that any term of imprisonment imposed for this offence is to be served cumulatively: s 121(6). If a young person is found guilty of this offence, provisions identical to those under s 121(2)-(3) apply: s 122(2)-(3).

196 Under the *Domestic and Family Violence Act 2007* (NT) s 41 authorised police officers may also make short term DVOs. The definition of a DVO under s 4 of that Act includes a police DVO. As such, breach of a police DVO is treated simply as a breach of a DVO with the same penalties applying.

| | | | | | |
|------------|--|--------|--|---|---|
| Tas | <i>Family Violence Act 2004 (Tas)</i> | 35 | Contravention of a Family Violence Order or a Police Family Violence Order | 'A person who contravenes a Family Violence Order, Police Violence Order or interim Family Violence Order, as made, varied or extended, is guilty of an offence'. | 12 months (first offence); 18 months (second offence); 2 years (third offence); 5 years (fourth offence) |
| Vic | <i>Crimes (Family Violence) Act 1987 (Vic)</i> | 22 | Breach of an order | 'A person against whom an intervention order or interim intervention order has been made who— (a) has been served with a copy of the order or has had an explanation of the order given to him or her in accordance with section 15; and (b) contravenes the order in any respect is guilty of an offence.' | 2 years (first offence); 5 years (second or subsequent offence) |
| WA | <i>Restraining Orders Act 1997 (WA)</i> | 61(1) | Breach of a restraining order | 'A person who is bound by a violence restraining order and who breaches that order commits an offence.' | 2 years |
| | | 61(2a) | Breach of a police order | 'A person who is bound by a police order and who breaches that order commits an offence.' | 2 years |

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