

**SUBMISSION OF THE FEDERATION OF COMMUNITY
LEGAL CENTRES (VIC.) INC**

TO THE VICTORIAN LAW REFORM COMMISSION

REVIEW OF FAMILY VIOLENCE LAWS

RESPONSE TO THE CONSULTATION PAPER



March 2005

This submission was prepared on behalf of the Federation of Community Legal Centres (Vic) by various members of the Violence against Women and Children Working Group and representatives of individual member Centres, with pro bono assistance from Blake Dawson Waldron.

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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc. ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLCs') assist in excess of 60,000 people throughout Victoria each year by providing free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use Community Legal Centres are on low incomes, with most receiving some form of pension or benefit. Community Legal Centres also see a considerable number of people from culturally and linguistically diverse communities.

Community Legal Centres provide free legal services in a range of legal areas where issues can arise from and relate to family violence including family law, victims of crime assistance, and intervention orders. In addition, Community Legal Centres have been at the forefront of delivering court based legal support services in intervention order applications at the Magistrates' Court for many years. We have developed innovative models to fill a significant gap in service provision by providing legal advice and assistance and facilitating and co-ordinating domestic violence support, predominantly to women seeking orders under the *Crimes (Family Violence) Act 1987*. Community Legal Centres currently provide intervention order court support at 11 Magistrates' Courts around Victoria. This work is not specifically funded but, rather, is undertaken utilising limited, general funding.

Introduction

The Federation welcome this opportunity to provide detailed feedback in response to the Commission's discussion paper. Whilst we have explored both the need for significant changes to the system, as outlined in Chapter 3, and have sought to respond to relevant questions looking at changes required to the existing system, our focus necessarily has been on the latter. This is due entirely to resource and time constraints and does not indicate that we do not have views or wish to provide further input into the need or otherwise for significant changes to the justice system's response to family violence. The Federation hopes that our submission will be considered as the first stage in a dialogue about these issues.

3. Chapter 3

Question 1: Given the information on approaches outlined in this Chapter, are any significant changes required to the Victorian justice system's response to family violence? Are there any other approaches that we should consider?

Alternative approaches to family violence have developed alongside the criminal and civil law responses but in Victoria, are in their infancy and incomprehensive. The Federation supports further exploration of alternative justice system approaches to family violence, including restorative justice practises, where appropriate and favoured by the parties. Whilst we discuss the alternative approaches outlined in the Commission report, our comments on these approaches are preliminary and we would like to have the opportunity for further discussion and exploration.

The Federation acknowledges that there is no single solution to each person's problems. We believe that the justice system should adopt a variety of processes to allow justice in all situations. A flexible system, that is better equipped to deal with a more complex and diverse range of behaviour, is required. The system should offer a diversity of options through a restorative justice approach, a civil response and a criminal system. A single response cannot be effective for all people and a multi-option system approach will help to ensure that fewer people affected by family violence will fall through the gaps.

Strengthening the Criminal Justice Response

The Federation is concerned about pursuing increased criminality given the inadequacy of our current criminal system to hold perpetrators accountable for their behaviour. The Federation does not believe that punitive sanctions, such as imprisonment as it currently operates, assist in anyway with offender rehabilitation and reintegration with family upon release. Significant resources would need to be allocated to alter the culture of violence within the prison system, and to develop rehabilitative and pre and post release reintegration programs for this to be a viable option.

The Federation does however believe that there is a role for a strengthened criminal justice system in family violence areas. It is appropriate and desirable that courts take a strong stand and send a message to the community that violence, in particular within families and domestic settings, is intolerable in our community. This should happen as part of a broader strategy to educate the community about domestic violence. This should be done by the courts in ways other than harsher penalties and increased imprisonment rates. To do this however will require significant commitment by Police to prosecuting breach offences and an investment by governments in comprehensive and effective rehabilitative and diversion programs.

Restorative Justice Practises

The Federation acknowledges that the use of restorative justice practises (including the common models of family conferencing, victim-offender mediation and circle sentencing) promotes mixed responses within the community. The restorative justice and community-based approaches as applied to family violence have tended to suit indigenous women but have not been favoured by non-indigenous cultures.

The Victorian Indigenous Family Violence Taskforce found that it was very important for indigenous people to have 'ownership' over family violence issues and the importance of a community-led approach to indigenous family violence was a constant theme throughout the Taskforce's Final Report.¹

We have also received positive feedback from the healing centres operating in Alice Springs. A healing centre is a community owned and community driven place where aboriginal women and their family can go to heal the wounds suffered from domestic violence, as well as from assimilation. It is a refuge that holds workshops and sessions relating to domestic violence and anger management, as well as teaching skills and addressing any health issues. The Victorian State Government has agreed to invest money into three healing centres specific to domestic violence, following the Taskforce's Final Report. More funding is required to ensure a more complete restorative justice system is available for all relevant groups and parties affected by family violence.

Whilst we welcome further exploration of restorative justice practises, the civil and criminal justice system responses must also be further developed for situations where restorative justice is not appropriate, not favoured by the relevant parties or is unsuccessful. In this regard, the Federation considers the protocols issued to the Victorian police and court registrars and magistrates are a positive step forward in establishing appropriate guidelines for police and court officers involved in family violence matters. Given the infancy of these protocols, the Federation is unable to comment in detail at this stage on their effectiveness.

Furthermore, the increased use of restorative justice principles and practises in the criminal process must not be seen to be "a soft option" for offenders.

Significant new resources are necessary

Undoubtedly, to trial and develop alternative responses as outlined above will require that significant increased funding and resources be applied by governments. This is borne out by the experience of Western Australia and Tasmania where recent changes to their systems have been accompanied by extra funding to domestic violence centres in WA; and in Tasmania, by

¹ Victorian Indigenous Family Violence Taskforce, *Victorian Indigenous Family Violence Taskforce Final Report* (2003).

- establishment of 24/7 access to crisis support services including a family violence hotline staffed by people specifically trained to respond to victims and others affected by family violence in Tasmania;
- additional court funding;
- enhanced counselling and support services for victims; and
- establishment of a new program to assess the ongoing risk an offender poses and rehabilitation programs for suitable offenders.

Question 2: What should the primary purpose of the Crimes (Family Violence) Act 1987 be, for example, protection, punishment or rehabilitation? Which approaches are most likely to achieve these purposes?

The Federation strongly believes that it is essential to identify the purpose behind the justice system’s response to family violence before any real solutions can be properly tabled and addressed.

The Statewide Steering Committee to Reduce Family Violence put forward the following three goals of the justice system’s response to family violence:

- *Safety* - to ensure the safety of the victim;
- *Accountability* - to ensure perpetrators are accountable; and
- *Agency* - to restore the victim’s capacity to make decisions for themselves.

It is necessary to bear in mind that each of the three goals listed above is equally important, all are interrelated and interdependent and each one is achieved in different ways for different groups within the community, and for different individuals within those groups. The Federation supports these goals being adopted as primary purposes of the *Crimes (Family Violence) Act 1987*.

In addition, the Federation believes there should be a fourth goal of the *Crimes (Family Violence) Act 1987* to include:

- *best practice* principles for decision-making about children, for instance, where decisions affecting children are being made. These include that the best interests of the child are a paramount consideration and that the opinion of the child should be taken into account in decision-making affecting them.

The *Crimes (Family Violence) Act 1987* provides that its purpose is to “provide for intervention orders in cases of family violence...”². This is of limited utility because it provides no guidance about the principles that should underpin decision-making under the Act and allows for subjective decision-making based on opinions about family violence. A more detailed “objects” section, clearly

² *Crimes (Family Violence) Act 1987*, section 1.

setting out underlying principles, would provide guidance for all those involved in the process, particularly magistrates making decisions in relation to orders.

(Refer also to question 5)

4. Chapter 4

Question 3: Should stalking intervention orders be dealt with under separate legislation? Why or why not?

The Federation is of the view that intervention orders relating to stalking should be dealt with under separate legislation, independent of the provisions of the *Crimes (Family Violence) Act*, unless the stalking occurs in a domestic setting, family or intimate relationship. Ultimately, the four proposed principles of family violence laws identified by the Federation in question 2, do not carry the same importance in relation to stalking. Moreover, dealing with stalking in the same legislation may undermine the ability of family violence legislation to achieve its objectives. When involved in a domestic or family relationship the effect of the violence is enhanced. This familial context makes conduct that would ordinarily be viewed as stalking bear a significantly different character.

The Federation agrees with the observation made on page 73 of the Consultation Paper, that the relevant provisions relating to stalking in the *Crimes (Family Violence) Act* do not operate as they were originally intended to operate. For example, stalking orders were never intended to operate in respect of neighbour disputes. In the Federation's experience, applications for intervention orders on the basis of stalking detract from the seriousness warranted for family violence matters.

Relevant to this issue and discussed in further detail later, the Federation considers it vital that the definition of 'family member' be extended to cover all "domestic relationships" including carers of people with a disability in both private residential dwellings and institutions. The Federation refers to its answer to question 8.

5. Chapter 5

Question 4: Are the grounds for obtaining an intervention order at section 4(1) of the Crimes (Family Violence) Act 1987 adequate?

The Federation considers that the grounds for obtaining an intervention order as currently set out in the Act are inadequate.

The Act should be amended to clarify beyond doubt that non-physical abuse is to be caught by the relevant provisions. The Act does not make this clear and, as a result, persons subjected to family violence which does not involve actual or threatened physical abuse go unprotected. In our experience, many magistrates hearing matters will not consider the provisions of the *Crimes (Family Violence) Act* to be enlivened in situations where there is no evidence of physical harm. For example a client's partner was carrying out daily checks of the odometer on her car as a means of monitoring her movements.³

The Act should also be amended to include economic abuse within the definition of family violence. We refer to the report recently published by the Coburg Brunswick Community Legal and Financial Counselling Centre Inc, *His Money or Our Money?* which begins to map the financial abuse of women. The Federation believes the definition provided in section 8 of the *Tasmania (Family Violence) Act* provides a good starting point for the development of such a definition. The non-inclusive definition contained in the Western Australian Act is also preferable to the narrowly defined and interpreted Victorian version.

The language in the *Crimes (Family Violence) Act* must be more self explanatory. For example, assault should be defined by reference to its common and ordinary meaning.

The Federation also opposes the suggestion, given some credence in the current legislation, that "if it has only happened once, it is unlikely to happen again". This is not in accordance with community expectations and is not a sound principle of law. It needs to be made clear in the legislation that one incident is one too many, and that there need not be evidence of repeated past behaviour for a person to have the benefit of legislative protection.

Question 5: Should "family violence" be defined in the legislation? In particular, should the Crimes (Family Violence) 1987 Act specifically provide that forms of abuse other than actual or threatened physical abuse constitute family violence, and should those other forms of violence give grounds for an order to be made?

As stated above, the Federation supports the inclusion of a definition of "family violence" in the Act. We also support the definition being expanded to specifically include non-physical abuse (for example, emotional and economic abuse). If terms such as "family violence" are defined, there is a lesser likelihood of a

³ Case study provided by Eastern Community Legal Centre with the consent of the client.

victim's application being struck out or rejected on the basis of a magistrate's restricted, artificially narrow or outdated view of what constitutes "family violence". We also believe that a broad definition in the Act is important as part of a strategy to expand understanding in the community about what constitutes family violence.

In accordance with relevant interpretative principles, it is also important that the intention of the Act is made clear, as discussed in question 2, so that the Act can operate for the benefit of those that it is supposed to benefit.

Question 6: The proposed amendments to the Crimes (Family Violence) Act 1987 will allow intervention orders to be made in respect of children who have "heard or witnessed" family violence. Are any further changes needed to increase protection of children who are at risk of exposure to family violence?

Whilst it is a positive development, the Federation does not concede that the proposed change goes far enough in protecting the needs of children. As studies have shown, children witnessing violence between parents can have a negative psychological impact – more needs to be done to address the needs of children.

The Federation has made a number of submissions to the current review of the child protection system in Victoria and we have made a number of recommendations that are also applicable to this review. Firstly, our child protection system is radically under resourced and regardless of the system's legislative framework, a significant injection of new funding is required to make Victoria's child protection system work.

Secondly, the Federation strongly supports the Children's Court Family Division being retained as the decision-making court with respect to all intervention orders that involve children. If this is impractical, the *Crimes (Family Violence) Act* should be amended to enshrine the decision-making principles of the *Children and Young Persons Act 1989* in intervention order matters heard in the Magistrates' Court that involve children. These principles include that in all matters affecting children, the best interests of the child should be the paramount consideration in decision-making and that all children with capacity to instruct a lawyer should be separately represented and have their opinion taken into account by a court, in its decision-making.

These reforms will require that magistrates and court staff undertake specialist training in dealing with matters affecting children and that resources are allocated to the legal aid system so that children can be separately represented by lawyers with specialist training in working with children. In addition, significant resources need to be allocated to support services in the community, in particular to supervised contact services so that access between defendants and their children can occur within the conditions of intervention orders.

Another fundamental point which the Federation makes in this regard is that, even without having heard or witnessed family violence first hand, children will

often still be aware of what is taking place. The requirement that children "hear or witness" violence firsthand, before they can successfully apply for an intervention order, should be revisited. Even when a child does not see or hear violence occur, the available statistics suggest that the child still has an awareness of what is taking place, with consequent detrimental effects on the child⁴. It ought to be the law that a child has the benefit of the protection of an order where there is abuse between the parents, irrespective of whether the child has heard or witnessed the violence first hand, provided that best practise procedures for decision-making about a children's order are met.

It is a primary consideration in making any amendment to the law that the legal process does not, albeit inadvertently, double the impact of violence. The Federation is concerned that this may result in cases where children are involved and the result of the intervention order application is a Department of Human Services Child Protection investigation that removes the children from the household. Until the child protection system is sufficiently resourced to support parents and work with them to keep children at home in a safe environment, this reform may have the unintended consequence of discouraging victims with children from seeking the protection of an intervention order for fear of child protection involvement.

Question 7: Should the grounds for obtaining an intervention order under the Crimes (Family Violence) Act 1987 include actual or threatened abuse of animals?

The Federation is of the view that the actual or threatened abuse of animals falls squarely within the category of emotional abuse and should be included in the grounds for obtaining an intervention order. The presence of a pet in the household does deter some victims from leaving a residence in which family violence occurs. Many people have a high degree of emotional attachment to their pets. A pet cannot and ought not be regarded as a mere item of property.

The Federation notes that the fact that a threat to animals is of concern is evidenced by the fact that some kennels provide refuge for animals until a victim is settled and the threat posed by the perpetrator is no longer present.

Case study:

A woman lived in on a large farm. She had four children. Her partner regularly physically and emotionally assaulted her and threatened to kill the youngest child's pet horse if the victim left the family, or reported the matter to the police. The woman, due to the nature of her farm work did not have an independent income and was very worried that her child would lose her pet horse if she

⁴ Dr L Laing, "Children, young people and domestic violence" Australian Domestic and Family Violence Clearinghouse, Issues Paper 2 2000. Available from <http://www.austdvclearinghouse.unsw.edu.au/>

attempted to use the law to protect herself. The youngest child was very distressed about the possibility of her pet coming to harm.⁵

Question 8: Is the definition of "family member" adequate? If not, what other kinds of relationship should be added?

The Federation believes that the current definition of "family member" in the *Crimes (Family Violence) Act* is insufficient. The definition ought to incorporate the ordinary meaning of the words "family member", in both the traditional sense and that of a domestic group within which people live.

The definition of "family member" currently includes those with which one has had an "intimate relationship". This might be satisfied where, for example, a person has had a sexual encounter with another person on one occasion. The Federation does not consider that the perpetrator in such a circumstance ought to be considered a "family member", and that this aspect of the definition ought to be narrowed accordingly.

The definition of "family member" should be broad enough to cover living situations that do not involve blood relatives. This is a significant factor between carers and people with disabilities. For example, the Queensland legislation appropriately acknowledges one person's dependence on an ongoing paid or unpaid carer. The NSW legislation does not impose the requirement that the victim and perpetrator be residing together, nor does it envisage that the amount of time the victim and perpetrator spend together is a relevant factor. In the Federation's submission, the NSW legislation ought to be preferred.

The Federation supports the arguments presented by Villamanta Legal Service in this regard, that such amendments would go some way to addressing the systemic discrimination faced by people with disabilities, particularly those with a cognitive impairment, and that such amendments would provide a more effective avenue of protection than the current complaint system through the Department of Human Services.

Question 9: Should the Crimes (Family Violence) Act 1987 enable intervention orders to be made against associates of a respondent when the associate has threatened or engaged in violent behaviour towards the protected person?

The Federation is of the view that the Act should allow an applicant to obtain an order against an associate (under the direction, encouragement or on behalf of a family member) who is engaging in violent behaviour toward the protected person.

⁵ Case study provided by Brimbank Melton Community Legal Centre.

Question 10: Should the Crimes (Family Violence) Act 1987 enable intervention orders to be made for the protection of a protected person's associates when the respondent has threatened to or has engaged in violent behaviour towards the associates?

The Federation acknowledges the ripple effect that family violence can have on associates of victims of family violence, such as friends, family and workmates. The Federation believes that courts should be given the flexibility to provide protection to associates without having to resort to the stalking provisions. This may take the form of permitting applicants to seek orders or variations of existing orders to cover named associates that are being targeted by a defendant or places they regularly attend such as places of employment. The court should be required to make a finding that an associate is being targeted because of their relationship to the primary victim, so as not to allow such a provision to be misused and the definition of family violence to be made too broad.

Question 11: Should the Crimes (Family Violence) Act 1987 be amended to limit the court's ability to make an intervention order against a child or young person under 18 years of age?

The Federation is of the view that orders should not be made against a child or young person under 18 years, where the applicant is a family member, unless there are exceptional circumstances. It is undesirable that children and young people are placed at risk of being brought into the criminal justice system by an intervention order being made against them. This is particularly so in circumstances where families are involved. In such cases the child, young person and family should be able to access appropriate support services to overcome the issues that have led to the application being taken out.

If orders are to be made against children or young people under 18 years, the orders should be time-limited for an initial period of up to 6 months. Indefinite orders should not, in any circumstances, be made against children or young people. Furthermore, consent orders should not be made without the court giving proper consideration as to whether an order is the appropriate means of dealing with the young person's behaviour.

Question 12: What might be done to ensure that everyone who requires the more immediate protection of an interim intervention order is aware they may apply for one?

The Federation considers that a number of avenues exist to better inform those in need of protection that an interim order could be made for their protection. The Federation's suggestions are:

- Increased resources so that Intervention Order Court Legal Support Services are available at every court everyday to assist applicants and defendants with understanding and navigating the system, through legal

advice, representation, advocacy and ongoing casework. Currently CLCs provide intervention order court support at 11 Magistrates' Courts around Victoria. This work is not specifically funded but, rather, is undertaken by CLC's utilising their limited, general funding. Court support is therefore available only at certain courts in Victoria and on limited days/during limited hours.

- An extra question being put on the application form for intervention orders which asks: "Is the family violence likely to happen to you again before you come back to court?"
- The court registrar or other relevant staff, who have an influential practical role in advising applicants, ought to ask the applicant if they are in need of immediate protection.
- Applicants ought to be informed that they can include children in their order where it is necessary, and that they can put forward relevant issues supporting the order.
- There also needs to be increased resources available in the community to ensure that all people living in situations of violence can access information about interim intervention orders. This information needs to be delivered in a variety of media and languages to meet the needs of diverse communities. The work of CLCs in providing community legal education programs to local communities is an example of these sort of initiatives.
- Increased resources so that a Family Violence Support Worker is available at each court to provide information, referral and support about family violence support services in the community.

Question 13: Should the Crimes (Family Violence) Act 1987 provide that, if it expires, an interim order should be extended until the application for an intervention order is finalised, unless the circumstances of the protected person have changed?

The Federation supports the capacity for administrative extension of interim orders. Members of the Federation have been involved in cases where defendants have avoided being served with papers. In such cases, interim orders should be extended administratively and applicants should not be required to attend court unless they do not wish the extension to occur or their circumstances have changed. However, an interim order should not be indefinitely extended, and there should be a limit to the number of times on which this can occur.

The Federation suggests that, after two extensions, the police operating procedure should make it standard practice for police to apply to the court for an order for substituted service to be made.

The Federation notes that the effort made by an applicant to go to court and attempt to get an intervention order is significant. If the protection afforded by such an order is to be foregone because the perpetrator cannot be served with the order, this can lead some victims to "give up" because the legal process is seen as ineffective.

Question 14: The proposed Amendments will, if passed, remove the requirement that family violence intervention orders be supported by oral evidence. Are further changes needed to increase the likelihood that interim orders will be granted without the person seeking protection being required to give oral evidence?

The Federation supports amendments that remove the requirement that interim applications **must** be supported by oral evidence. In our experience, applicants are often at a time of acute stress, have not had the benefit of legal advice, or do not have sufficient knowledge of their rights or of the system in which those rights are protected. This means that an applicant should only be required to take an oath that the evidence in their written application is true and correct on the understanding that oral evidence can be given at the final hearing. This would also assist people with a disability to obtain the necessary protection of an order, as outlined by Villamanta in their submission. The Federation considers that the magistrate may need to hear oral evidence in some cases, but that this should not be required at all times.

However, if oral evidence has been given at the interim stage, then a note should be made on the court file to ensure the applicant does not have to give oral evidence unnecessarily at the final hearing.

As it currently stands, there is insufficient space on the application form to indicate the reasons that an interim order is being sought and hence magistrates often do not have enough information to make an interim order without oral evidence being given. Furthermore, in the one on one interview with a registrar an applicant may be more comfortable about providing information than from a witness box in a court room. This could be achieved by creating more space on the application form, including space for reasons why an interim order is required and improved and regular training for registrars in awareness and understanding of family violence. If this were to occur, a magistrate may have information on the form to make a decision without requiring an applicant give oral evidence, which can add to the stress applicants are experiencing.

Question 15: Should the Crimes (Family Violence) Act 1987 provide for a process by which an uncontested interim order automatically converts to a final order in certain circumstances? If so, when should this occur?

The Federation is of the view that an uncontested interim order should automatically convert to a final order only in circumstance where the court has

heard oral evidence from an applicant. This evidence could have been given in the interim application and a note should be made on the computer file to that effect to avoid this having to occur again where circumstances have not changed. The Federation has found that some clients may not contest an intervention order for financial reasons or for lack of legal/social support – some protection needs to be provided so that these people are not additionally disadvantaged.

Question 16: Are any changes required to improve the process of obtaining interim intervention orders outside ordinary business hours?

The Federation supports police officers in rural areas being able to authorise a complaint notwithstanding their ranking, where there is no-one of sufficient rank available. The Federation has found that some rural police stations are run by just one police officer, and they do not necessarily have the police ranking to authorize a complaint. The Federation strongly believes that all police should be provided with training in family violence and that Victoria Police should work towards all officers who can authorise complaints being required to be training in family violence.

The Federation also supports reforms to allow interim applications made by police officers to be tape-recorded and made by telephone, with police being given the power to detain defendants for no longer than two hours, while the application is made. This should be permitted in rural areas during business hours.

Question 17: Should others beside members of the police force be able to apply for interim intervention orders outside business hours? If so, who?

The Federation is aware that legislation in other states permits family violence workers to apply for interim orders outside business hours. We believe greater consultation needs to be had with those services as to whether this would assist applicants to get protection or would simply be an opportunity for police to divest responsibility for this function. We are concerned about the resource implications for family violence services if they were to take on this role. We note also that there are very few 24 hour services in operation in Victoria.

Question 18: What changes are needed to ensure undertakings are only used when it is safe and appropriate to do so?

The Federation is firmly of the view that undertakings should not be used where the parties are unrepresented. It is the Federation's view that magistrates should have to hear evidence where the parties are unrepresented, and be satisfied that it is safe to allow the application to be withdrawn and replaced by undertakings.

The Federation is aware of instances where police have told complainants that they cannot act on an undertaking, as they are not legally enforceable. The Federation suggests that the police codes of practice should be amended to require police to act regardless of whether there is an undertaking in place, as the matter may be able to be dealt with as an assault or stalking matter, or police may be able to apply for an intervention order.

Question 19: What changes will ensure that people seeking protection from family violence fully understand the consequences of accepting an undertaking from the respondent to the court before agreeing to withdraw their application?

The Federation suggests more should be done to make sure that support services provide more information to applicants on the limitations of an undertaking stressing the fact that they are not legally enforceable, and what this means. Additional written information on undertakings should also be provided.

Magistrates should also be required to explain to applicants when granting an undertaking on its limitations and to make it clear that if anything else happens, the applicant can and should come back to court where the application for an intervention order can be reinstated.

The Federation also supports the comments of Villamanta, that lawyers and court support staff should be specifically trained in working with people with a disability, to ensure that clients make informed decisions and understand undertakings they are making. In addition, disability specific support workers should be available to assist.

The Federation also recommends that this information be clearly set out on the undertaking.

Question 20: Is the current approach to determining the duration of intervention orders appropriate?

The Federation has found that applicants are usually unaware as to how long they can have an intervention order made out for. The Federation suggests that an extra question should be put on the application for an intervention order form which asks: "How long do you think you are going to need the intervention order for?" With the options of: 6mths, 12mths, other, for an indefinite period.

The application form should also have a field where an applicant could add determining factors to be considered by a court in deciding on the length of the order.

The Federation further suggests that intervention orders should be made for 12 months as standard practice. The legislation should set out factors for a

magistrate to consider in determining the length of an order beyond the standard 6 or 12 months: e.g. recent separation, current property settlement, history of violence, parties moving away, patterns of harassment, etc.

Question 21: What changes would improve the protection provided to protected persons at the time their intervention orders expires?

The Federation considers that a number of avenues exist to improve the protection provided to protected persons at the time that their intervention orders are about to expire. The Federation's suggestions are:

1. Notice of expiring orders should be sent to complainants who should be asked to nominate at the time the order is made which address they want that notice sent to. - In addition to point 4.
2. Given the statistics on Post Traumatic Stress Disorder as a long term effect of family violence on the victims⁶, the Federation is firmly of the view that continued fear of violence should be included as grounds for an extension of an intervention order, without any further incident needing to have occurred.
3. Intervention orders should be amended to include a statement that applicants should contact the court a month prior to their order's conclusion if they need to have their order extended.
4. In the case were the applicant has forgotten to extend their intervention order, interim orders should be granted as a matter of course pending hearing and an application to extend an expired order should be able to be made, provided the application is made within a reasonable period after the order expires.

Question 22: Should the police be able to apply for variations to an intervention order when they did not apply for the original order? Should the protected person's consent be required for this to occur?

The Federation supports the recommendation that police should be able to apply for a variation to an intervention order, when they did not apply for the original order, provided that the protected person's consent for the variation has been obtained.

Question 23: Should the process of seeking a variation or revocation be made easier for protected persons?

⁶ "Family Violence and Homelessness- Removing the Perpetrator from the Home", Discussion Paper produced by Domestic Violence and Incest Resource Centre, Melbourne, 2002.

The Federation acknowledges that protected persons may want to make a variation to their order where their circumstances have changed. We are also aware of cases where the protected person may be requesting a variation to their order under duress. It is the Federation's view that the protected persons should have better access to legal advice and other support services to ensure that variation applications are not being made under duress. Courts should be able to make administrative variations to orders where a protected person has had legal advice.

Question 24: Should the Crimes (Family Violence) Act 1987 require that the court is satisfied that:

- ***When a protected person is seeking a variation or revocation, the application does not result from pressure on, or coercion of, the protected person; and***
- ***The revocation or variation, if granted, will not compromise the safety of any protected family member before granting a variation or revocation?***

The Federation strongly supports such an amendment to the Act. The Federation further suggests that even where a revocation or variation is made, clause 1 of a standard order, that a defendant not be permitted to cause harm etc to an applicant, should remain in place for the life of the order.

Case study:

A protected person contacted a local CLC as she had an intervention order against her husband. Both parties continued to reside under the same roof. The defendant continued intimidating the protected person through harassment and abusive behaviour. The protected person was so frightened and distressed by the defendant's continued behaviour that she felt that she could not contact the police to report the breaches. Furthermore, as the original application did not succeed in removing the defendant from the home, she had lost faith in the legal system.

The defendant made an application to recover his firearms. The local CLC advised the protected person that she needed to oppose the defendant's application. The protected person informed the local CLC that the defendant had advised her that if she opposed the firearms application, then he would kill her and the young children. In the process of the firearms application, the local police came to the family home to interview the protected person in relation to her view of the firearms application. As the protected person was in fear of her life, she refused to directly oppose the firearms application and instead, answered 'no comment' to the police officer's queries about why the defendant should not have his firearms returned. The police informed the protected person that her 'no comment' answer would be problematic for the magistrate in determining the firearms application. The protected person informed us

that she hoped that the police would 'pick up' that she was so frightened to give her real views opposing the firearms application due to potential repercussions from the defendant.⁷

The Federation recommends that a magistrate should only allow a variation/revocation/firearms application in situations where s/he is satisfied that the applicant and the applicant's family are not in any risk of danger or harm.

Question 25: Are any other changes required to improve the revocation and variation provisions in the Crimes (Family Violence) Act 1987?

The Federation has several suggestions with regards to improving the variation and revocation provisions in the *Crimes (Family Violence) Act 1987*:

- Police should not be able to charge or threaten to charge applicants with aiding and abetting the breach of an intervention order. Just because complainants have allowed the perpetrator back into their home does not mean they have consented to being assaulted.
- The intervention order should be amended to clearly indicate that should the complainant's or defendant's situation change, they should come back and have their orders varied.
- The law needs to clarify the status of an order where parties reconcile then separate once or more during the period of an order which is not varied and where a breach occurs during a period of separation. One option as mentioned above is that clause 1, that a defendant not be permitted to cause harm etc to an applicant, should be presumed to be the terms of the order in this situation. This would need to be made clear to the parties at the time of making the order.
- There needs to be clear guidelines in the legislation that no variation or revocation be made unless a court is satisfied that the protected person is safe.

Question 26: If the guardian of a person in need of protection obtains an intervention order, should the Crimes (Family Violence) Act 1987 stipulate that only the guardian has the authority to bring any application for variation, revocation or extension of the order?

The Federation supports the position of Villamanta Legal Service in answer to this question, namely that the individual should also have the right to bring any application for variation, revocation or extension of the order. This right should **not** be restricted to the guardian only.

⁷ Casestudy provided by Whittlesea Community Legal Centre.

6. Chapter 6

Question 27: Have we accurately described the barriers that prevent people who need protection from accessing the intervention order system?

The Federation agrees with the Commission's description of the barriers to accessing intervention orders both generally and for particular groups within society. In addition, the Federation makes the following comments:

Societal and Practical Barriers to Intervention Orders

The Federation believes that the attitude of magistrates is an additional barrier people face on accessing intervention orders. In our experience, many magistrates do not understand the nature of family violence and are cautious in the exercise of their discretion.

Additional Barriers for Particular Groups: People from Non-English Speaking Backgrounds

In the Federation's experience, many women from newly arrived communities have experienced an abject failure of authorities in their home country to acknowledge, legislate against or provide protection for women in situations of family violence and sexual assault. This results in a fear and mistrust of police and authority in Australia, due to the experience in their home country.

There is also a strong expectation within some communities to resolve family problems through community mediation or religious intervention rather than through the court processes. This is exacerbated by a lack of understanding by police, courts and other support services of these alternative processes and how to work with them in the best interests of the victims.

A further issue for newly arrived women in small communities is ostracism from the community, which further compounds the impact of family violence.

The Federation believes that the police response fails to understand the cultural dynamics or the impact of past trauma. Some court staff and magistrates also lack insight and understanding of cultural issues resulting in women disengaging from the court process.

The Federation is concerned at the failure of government to adequately prioritise and resource interpreting services for Family Violence matters in Magistrates Courts. Also, many of the court interpreters that are used are of incorrect dialect, ethnicity or gender – resulting in mistrust and communication breakdown.

Additional Barriers for Particular Groups: Indigenous People

In the Federation's experience, many Indigenous people experience structural barriers in accessing the intervention order system. Due to a general unfamiliarity with legal processes, many Indigenous people have difficulty in physically making

the application. Financial, health and housing difficulties can be all consuming in themselves – engaging legal processes without optimum supports in place is often too hard.

There is also a lack of broad based community legal education about legal options and supports available for people in situations of family violence and a lack of community legal education about other legal assistance available for family violence situations such as VOCAT and the urgent interim order process.

Until April 2004 there were no specific Indigenous legal services for victims/survivors of family violence which has disempowered victims. There remains a lack of resourcing for specialised supports for indigenous victims of family violence, including for psychological and general assistance. There is also a wide ranging lack of resources for indigenous women in rural Victoria including for safe emergency housing and urgent legal assistance in child protection matters. There is only one Aboriginal Women’s Refuge in Victoria.

The Federation believes there has been inadequate attention paid by law and policy makers as to why the indigenous community do not opt for intervention orders or other legal responses to family violence. This can be due to concern about feeling responsible for a perpetrators incarceration that leads to more community fragmentation. There is also a fear of payback, particularly in smaller communities and a fear that confidentiality will not be adhered to in seeking assistance about family violence issues, particularly in but not limited to small communities. For women who’s partner or family are prominent locally, taking legal action locally is very difficult.

The Federation is concerned at inappropriate responses by court staff and magistrates who fail to consider the impact of a history racist and discriminatory treatment. This results in women disengaging from the legal process. This is compounded by inappropriate court processes and formalities. Where defendants cannot be located for service of intervention orders, women become frustrated with Court processes.

The fear of coming to the attention of DHS resulting in possible removal of children is also a significant barrier.

Additional Barriers for Particular Groups: People with Disabilities

That family violence is a significant issue for people with disabilities is evidenced by the significant numbers of families of people with disabilities involved in the child protection system.⁸

⁸ “The majority of children in Child Protection come from low income families, affected by substance abuse, mental health problems, intellectual disability or family violence. Between 1995 and 2001 the proportion of parents involved with Child Protection with one or more of these characteristics grew from 40 per cent to more than 70 per cent. The proportion with two or more of these characteristics rose from 9 per cent to 44 percent.” *Protecting children: ten priorities for children’s wellbeing and safety, Technical Options Paper*, Published by Community Care Division, Victorian Government, Department of Human Services, August 2004.

The most significant barrier to accessing the intervention order system for people with disabilities is the limited definition of “family” or “intimate relationship” within the Act, that excludes people with a disability living in community residential units, suffering domestic violence at the hands of carers. Furthermore, there are significant difficulties for people with cognitive impairments in giving evidence or being considered a reliable witness in court proceedings and intervention order applications. We support the comments of Villamanta Legal Service with respect to these issues.

Question 28: Are there any other groups of people within the community who face particular obstacles that prevent them from using the Crimes (Family Violence) Act 1987?

Additional Groups facing Additional Barriers: People Living in Regional or Rural Communities

People living in rural or regional communities are often geographically isolated from both the police and the courts. The closest police station could be hours away. In addition, these police stations are often understaffed. A police officer may therefore be reluctant to attend a house if there is no other officer to attend to other call outs, or to provide back-up if the perpetrator is violent towards the officer. This issue is ultimately an infrastructure concern - the Victorian Police simply do not have enough members in rural areas.

As with Indigenous people, regional and rural communities are often tight-knit, and people experiencing family violence may be reluctant to access intervention orders because they feel shame and/or do not want the community to know what they have been experiencing. In some cases, the police officer or magistrate could be a close friend of the alleged perpetrator.

Another practical barrier for people living in rural or regional communities is that accessing intervention orders may mean that either the victim or the perpetrator will be forced to leave the community.

Additional Groups facing Additional Barriers: Asylum Seekers

Asylum seekers are people who are waiting on the outcome of a permanent protection visa application and are either on Temporary Visas in the community or are in detention. Some asylum seekers who have been found to be refugees in the first instance are on Temporary Protection Visas waiting to be reassessed again at the conclusion of their Temporary Visa. Many on Bridging Visa E's have no access to Medicare, work rights or Centrelink.

Where women and children form part of a husband's or father's protection visa claim as dependents and separation due to family violence occurs, it is crucial that the visa issues be specifically addressed by a refugee lawyer. It is possible for a woman to separate and make her own protection visa claim at some stages, if she has her own protection claims. It is of concern that asylum seeker women do not take action following family violence because of fears about their visa status or because of threats about this from the perpetrator.

If the woman's application is at an appeal stage beyond which she can make her own claims the Minister for Immigration has discretion to allow a new protection visa application to be made. Ministerial discretion is however exercised in very limited circumstances.

Question 29: What strategies should be adopted to address these barriers?

Increased availability of access to appropriate and targeted support services will go a long way to addressing these barriers. If victims have a chance to talk through options with trained people that they can learn to trust, it is the Federation's experience that they are more likely to go through with an intervention order application. Services need to be appropriate for diverse cultures, people with disabilities and people in same-sex relationships.

In addition, better support and assistance from police may alleviate some of the barriers experienced by people seeking access to the intervention order system.

The Police Code of Practice for the Investigation of Family Violence sets out protocols on how police should deal with family violence, and it provides for police training so they can effectively carry out their functions. The Code of Practice attempts to address barriers to accessing the intervention order system in a number of ways:

- Providing training for police in relation to the protocols which should assist in changing the attitudes of the police and their understanding of family violence;
- Providing information and advice to victims of family violence on appropriate referral agencies, including how to apply for intervention orders or the police officer seeking an intervention order on the person's behalf;
- Securing the safety of the victim so as to minimise the fear of retaliation from the perpetrator; and
- Specific guidelines in relation to rural and regional women and children, indigenous people, people with disabilities, the elderly, people from same-sex relationships and culturally and linguistically diverse communities in order to address the specific barriers experienced by these groups.

Due to the infancy of the code, it is too early to comment on whether the guidelines and police training have had a positive effect on police being able to assist in alleviating the barriers to accessing intervention orders.

In addition, **all** police need to be provided with training to better understand the impact of family violence, to be more sensitive to the needs of victims of family violence and to give guidance as to how police can appropriately deal with matters involving victims of family violence. The following case study illustrates why this is necessary.

Case study:

A woman with limited English and no income was seeking asylum with her child. She was a victim of family violence in Australia and lived in a high security women's refuge, under instructions not to give out the refuge address to anyone. The woman and her child were both undergoing treatment for trauma suffered as a result of the family violence.

One day the woman was in a hurry to make an appointment with a welfare organisation providing her with assistance, when she was caught by police, crossing railway lines outside of an official crossing. It is common practise in her country of origin to cross railway lines wherever is convenient. The police asked her for her name and address and she hesitated in disclosing her residential address. She did however produce her licence, tried to explain her change of address and volunteered a postal address. Eventually, the woman provided the address of the refuge after feeling threatened and intimidated by the police officer and being fined with refusing to provide a correct name and address.

St Kilda Legal Service assisted the woman to deal with the fines. The Legal Service advocated for more than a year to Victoria Police seeking withdrawal of the fines. The police response was steadfast, that the exercise of discretion to withdraw fines rests with the individual police member and they did not believe that the discretionary power was used inappropriately in this case. Finally, the matter was heard in the Magistrates Court and the fines were struck out.

Whilst the fines did not have to be paid, the woman has been left lacking confidence and trust in the police and feeling that they will not assist her with an intervention order or any breaches of it.

Indigenous People

It is crucial to ensure that indigenous victims of family violence in both rural and metropolitan areas have access to targeted and culturally sensitive financial, legal, housing, health and other general supports. There needs to be increased allocation of resources for aboriginal women's refuges and specialist indigenous women's legal services in Victoria.

Improved responses by police and courts are required and court processes should be reviewed to ensure that they are appropriate for the needs of indigenous people. Police and courts need to be better informed about cultural practices of communities within their location in relation to family violence so as to improve understanding and responses. There needs to be a vast improvement in police training on indigenous issues generally.

Improved standards of provision of interpreting services are required in relation to family violence matters.

In relation to indigenous women's concern about involving perpetrators in the criminal justice system, women need to be supported to put the health and well being of themselves and their children as their priority. Crimes of family violence

are often extremely serious and require high levels of intervention. Whilst the concerns that women have for reporting perpetrators are understandable, the ongoing trauma and damage to women and children resulting from inaction is not acceptable. Women need to be well supported by specialist and culturally sensitive services throughout the process to deal with these difficult issues.

The Aboriginal community must be supported to take leadership in developing any alternative approaches to family violence within the community. It is crucial that the voices and experiences of victims, including children, form a strong part of that dialogue.

In relation to fear of DHS child protection involvement, indigenous women across the State need greater accessibility to urgent specialised legal advice about DHS intervention at the early stage.

The practical assistance available to victims of family violence through VOCAT should be more widely promoted within the community as a further useful resource to victims/survivors.

Asylum Seekers

Community education of police and other service providers in relation to visa issues is required, so that asylum seeker women are better supported and receive more informed advice. It is acknowledged that immigration law and policy are commonwealth issues. The state government has a continued role to advocate that these laws and policies should be changed.

7. Chapter 7

Question 30: What additional supports, services or other changes are required to make the process of applying for an intervention order accessible and effective for people who need protection, and who apply for an intervention order for their own behalf?

Court Registries

The Magistrates' Court Family Violence and Stalking Protocols provide guidelines to magistrates and registrars on the proper procedures in relation to family violence matters. The protocols aim to alleviate barriers to accessing intervention orders by:

- Providing training for registrars in relation to the protocols;
- Specifically setting out procedures for dealing with potential applicants so that the applicant feels comfortable and that the discussion is confidential, and that the applicant is provided with advice in relation to court support services that are available for emotional and practical support;
- Requiring interpreters where required; and
- Requiring registrars to provide advice as to how the applicant can secure their safety.

Whilst the protocols set out satisfactory guidelines for assisting people who need protection, the Federation has found that the protocols are inconsistently followed and are not enforceable. The court registry's ability to assist applicants seeking intervention orders is critical to the level of assistance received by the applicant but varies dramatically. In our experience, the assistance received depends largely upon the subjective opinion of the registrar and the amount of time that the staff have available to assist. For example, the protocols direct that applicants are to be interviewed in an interview room, or a room away from the public, wherever possible. This rarely occurs. The Federation considers that these shortfalls can be addressed by:

- Further training of registrars;
- Funding for more staff members at registries; and
- Setting up a grievance or complaints process for applicants who are dissatisfied with the support provided by registrars so that registrars are more accountable.

The new demonstration courts to be set up in Ballarat and Heidelberg may go some way to addressing these current concerns. The Federation believes that the proposed level of support for the demonstration courts needs to be available in all registries in regular Magistrates' Courts. Further funds need to be invested, particularly in relation to court staff and registry and magistrate training, so that the same level of support is available for all applicants.

In addition, the actual form filled out by applicants seeking intervention orders needs some attention. The form may hinder the applicant's ability to properly present his/her case. The current form only allows a small space for responses, about 200 words in total, and full responses cannot always be included.

Legal advice, representation and advocacy

Community Legal Centres provide free legal advice, information, assistance, representation and community legal education in a range of legal areas where issues can arise from and relate to family violence including family law, victims of crime assistance, and intervention orders. Access to early legal advice and assistance to women in family violence situations, particularly in these areas of law, can be vital to ensuring their ongoing safety and future wellbeing. However, due to current legal aid and community legal centre funding constraints, such advice and assistance is currently available only inconsistently across Victoria.

Community Legal Centres have been at the forefront of delivering legal support services to applicants seeking intervention orders in the Magistrates' Court for many years. In doing so CLCs have developed innovative models to fill a significant gap in service provision by providing legal advice and assistance and facilitating/co-ordinating domestic violence support, predominantly to women seeking orders under the *Crimes (Family Violence) Act 1987*. CLCs currently provide intervention order court support at 11 Magistrates' Courts around

Victoria. This work is not specifically funded but, rather, is undertaken by CLCs utilising their limited, general funding. Court support is therefore available only at certain courts in Victoria and on limited days/during limited hours.

The Federation considers the availability of legal representation as vital for protecting the applicant's interests. Ideally this should be available prior to court and comprehensively across the State. Until legal advice is provided systematically, the Federation believes that where an applicant has not had advice before court and is unable to obtain legal advice or legal representation immediately at court, the matter should be adjourned and any interim intervention order extended accordingly. If no interim intervention order is in place, the magistrate should consider making such an order.

Question 31: Should most family violence intervention order applications be made by police? If so, are any further changes necessary to achieve this? What are the benefits and risks of this approach?

The Federation does not believe that the police should necessarily be the primary applicants for intervention orders. We do however believe that police should be more willing to make applications in appropriate circumstances or, when they decide not to make an application on the person's behalf, provide better support and advice to aggrieved persons. The underlying principle of agency demands that the victim maintain a sense of control over the intervention order application process.

A number of benefits arise from family violence intervention order applications being made by police:

- In the Federation's experience, applications made by police definitely increase the likelihood of the application being successful (if the applicant also considers the order should be made and turns up at court for the hearing of the application);
- Pressure is relieved from the victim by removing the extremely personal element felt when the victim is the applicant. Most notably, where the application is made by the victim, the victim is responsible for questioning the perpetrator. This is often very distressing for the victim; and
- Police have greater access to funds and resources, so that the victim's interests are properly protected.

On the other hand, if police become the primary applicants for intervention orders, victims may feel that their sense of agency is lost and that they do not have the same right to apply for orders on their own behalf. Also, in cases where the victim decides to apply for an order without police assistance, the absence of the police may be viewed by magistrates as a sign that the police do not believe that an intervention order should be granted.

Question 32: What should police do when the person in need of protection does not want an intervention order application to be made?

Police training in family violence should include the three principles of a good family violence system, namely safety, agency and accountability. Where the person in need of protection does not want an intervention order application made, police should not apply for an intervention order but instead should exercise one of a number of other options:

- Police should make a referral to alternate services, such as domestic violence services. Responsibility for family violence matters should not be premised on the assumption that the justice system is the proper institution to deal with every situation – there are alternate avenues. Unfortunately, however, there are currently not enough available services to provide sufficient support for all cases. This should be rectified.
- Victims may be unwilling to make an application for an intervention order because they have not been provided with adequate information or support, including from police, or because of previous police responses, they do not consider the order to be worth the paper it is written on. Accordingly, additional support from police in accordance with the Code of Conduct should result in more victims being willing to apply for intervention orders that police take out on their behalf.
- The police should keep a closer track on reports of family violence incidents. Currently, police don't keep records about reports of family violence. Each report is therefore often seen as a separate incident. Knowing whether a person has made reports in the past is important for determining the threat being posed by the perpetrator, properly assessing the victim's safety and providing the appropriate level of encouragement about seeking an intervention order or other relevant supports. Records of previous calls will also make police more accountable where they have been aware that a person has made a number of reports but fail to apply for an intervention order on that person's behalf. The fact that previous reports have been made can also assist as evidence in the application.

Question 33: Are any changes needed to improve prosecution of applications by the police prosecutor; provision of evidence by police witnesses in intervention order matters; and gathering of evidence at family violence incidents?

As stated above, police should keep records of reports made about family violence incidents and provide these records as evidence in applications.

Police should also be more willing to testify in court. In the Federation's experience, every time an officer gives oral evidence, an intervention order will usually be granted, probably because the magistrate respects the officer, and views such evidence as a sign of the seriousness of the application.

Question 34: Should section 13 of the Crimes (Family Violence) Act 1987 contain an exception in relation to people in need of protection who have a guardian appointed under the Guardian and Administration Act 1986?

The Federation supports the position of Villamanta Legal Service, that “an exemption should be made to ensure guardians have a right to apply for an order, without the consent of the individual, if deemed to be in the best interests of the individual, ... **only if** the individual has the right to oppose the application.” We support the requirement that the individual be separately represented in these applications, by a lawyer trained in working with people with a cognitive impairment.

Question 35: In your experience, what approach do court staff and magistrates apply when determining where intervention order applications can be made?

In our experience, the approach of court staff and magistrates to determining where intervention order applications can be made is *ad hoc*.

Question 36: Is the current law regarding where an intervention order application can be made appropriate? If not, what amendments should be made?

The Federation supports guidelines being applied flexibly to where an intervention order application should be made. The Federation suggests that applications should be made wherever possible at the closest court to the applicant’s place of residence. If however, the applicant wants it heard at a different venue this should be permitted, for reasons including that the applicant does not want the alleged perpetrator to know where the applicant is residing. Interim orders should be able to be obtained from any court regardless of proximity to the applicant’s place of residence.

Additionally, the current law or at least the Magistrates' Court Family Violence and Stalking Protocols should expressly stipulate that, where a defendant makes a counter application, that both applications should be heard concurrently, and that the proper place of venue is where the original application was made, or, if this causes one party hardship, in a centrally located court. In the Federation's experience, where counter applications are made, the counter applicant may be able to get a hearing date before the hearing date of the original application. The original application is therefore deferred to the counter application and the original applicant is required to travel to wherever the counter application is made. This should be rectified.

Question 37: The proposed amendments to the Crimes (Family Violence) Act 1987 will, if passed, require magistrates who are dealing with an

intervention order application to consider and make orders in relation to any children who are family members of the parties and who may be at risk of family violence. Will these changes to the Act be adequate to ensure protection for the children of protected adults?

As outlined in our answer to question 6, the Federation strongly supports the Children's Court Family Division being retained as the decision-making court with respect to all intervention orders that involve children. Children's Court magistrates are generally more aware of a child's best interests due to their training, experience and the legislation under which they make decisions. Whilst it may be more convenient for intervention order applications relating to adults to also consider any affected children, the best interests of the child may not be adequately protected. In addition, the child is unlikely to have their opinion about the application heard, where the child does not have separate legal representation.

If it is impractical for all matters involving children to be heard in the Children's Court, the *Crimes (Family Violence) Act* should be amended to enshrine the decision-making principles of the *Children and Young Persons Act 1989* in intervention order matters heard in the Magistrates' Court that involve children. These principles include that in all matters affecting children, the best interests of the child should be the paramount consideration in decision-making and that all children with capacity to instruct a lawyer should be separately represented and have their opinion taken into account by a court in decision-making.

These reforms will require that magistrates and court staff undertake specialist training in dealing with matters affecting children and understanding the principle of "best interests of the child". It will also require that resources are allocated to the legal aid system so that children can be separately represented by lawyers with specialist training in working with children, from the age of 7, give or take a year.

Question 38: Should the Crimes (Family Violence) Act 1987 allow courts to initiate an intervention order when hearing other proceedings, such as criminal proceedings or child welfare proceedings? If so, should this be made possible in respect of adults as well as children?

The ability of courts to initiate an intervention orders when hearing other proceedings could be a useful development, but the following issues should be taken into consideration:

- In child welfare proceedings, the ability of the court to initiate intervention orders means that the Department of Human Services may be in a position to put more pressure on parents to take out intervention orders on behalf of the other parent, and the outcome of the child welfare proceedings may become contingent on the outcome of the intervention order process;

- To be able to make intervention orders at criminal proceedings is a good idea, but the Federation notes that the victim may not necessarily be present at the criminal proceedings to respond to the intervention order initiative. Police prosecutors should raise the issue with the victim prior to the hearing of a criminal matter so that the idea can be properly considered by the victim. The victim should be given an opportunity to respond before the magistrate orders any intervention order.

8. Chapter 8

Question 39: Are there other directions, restrictions or conditions that should be specifically provided for in the Crimes (Family Violence) Act 1987? What are they and why should they be added?

On a general note, the Federation recommends a simplification of the language and paperwork associated with the *Crimes (Family Violence) Act 1987*. Many interstate intervention orders are much simpler than the Victorian equivalent. The Victorian legislation is unclear and the booklet given to applicants has been extensively criticised, as it does not provide any assistance in completing the application and associated paperwork.

Specifically, the form of application for intervention orders could be improved by removing the 'molesting' condition from the form. The inclusion of this condition is problematic because it is misinterpreted.

In addition, the conditions imposed in intervention orders in relation to child contact often cause problems. Harassment of one parent by the other commonly takes place when a child is being handed over from one parent to another.⁹ This causes distress for all parties involved, including the child. Irrespective of this practical concern, intervention orders are regularly granted with child contact as an exception. It is imperative that this problem is addressed.

Question 40: Should intervention orders be more detailed and tailored to particular circumstances of the parties? If so, how should this be achieved?

The greater tailoring of orders is critical to any intervention order scheme. This should not occur at the expense of standard forms for intervention applications and orders. Instead, the tailoring should involve greater capacity for making additional conditions that are tailored to the particular circumstances of the parties. For example, the application form should include, in addition to the 'tick-off box' system, room to encourage parties to consider and provide ideas for more tailored orders. The issues that this may pose for non-English speakers or those with low literacy skills applying for intervention orders can be overcome by better support services at court and pre-court to assist with the application process.

In addition, the Federation recommends that the power of the magistrate to consider additional conditions of an order should be stipulated in the Act. However these conditions must be able to be enforced. For example, a condition that stipulates a defendant having a zero alcohol reading when exercising child contact is unenforceable and ineffective. In a situation such as this, it would be more appropriate to stipulate supervised contact.

⁹ Rhoades, Graycar & Harrison, "The Family Law Reform Act: The First Three Years", December 2000.

In the Federation's experience, a large number of intervention order recipients do not understand the application form and the orders made. A simple flyer, to accompany the application form and the order, may be a solution. This flyer would need to clearly explain that there are a range of options and what each of them means. It would assist applicants, lawyers and magistrates in creating new and tailored conditions.

The Federation also acknowledges that while it is expected that the new Domestic Violence Court will have the power to enforce a range of conditions attached to intervention orders, it will take time before the court is properly established.

Question 41: Should intervention orders that require the respondent to leave and stay away from the family home be made more frequently than they currently are? If so, what changes would best achieve this.

The Federation considers that exclusion orders are beneficial because they assist to achieve the four principles we have outlined for a good family violence system, namely agency, safety, accountability and decision-making in the child's best interests. They immediately remove the perpetrator and force them to change their lifestyle, thereby making them start to become accountable for their behaviour. They also avoid disempowering the victim by avoiding them having to move from their home.

The Federation supports exclusion orders being made more frequently. Our experience is that magistrates are still reluctant to make exclusion orders because male perpetrators are often the sole owner of the home. With rental properties, magistrates are reluctant to make an ouster order if the male is on the lease. The sentiment regularly demonstrated by magistrates in many cases is that "you can't kick a man out of his own home". One suggestion for overcoming this in the short term is a shorter enforcement period, shorter than the duration of the order itself, which may result in ouster orders being made more frequently. This is by no means to be seen as a panacea for the existing problems in this area.

The Federation recommends that the Act be amended to require that courts deciding whether an exclusion order should be granted, should consider safety, accountability and agency of the victim as the paramount concerns. Magistrates should make rights associated with ownership secondary to these principles.

Question 42: What other services and systems are needed in order to support the safe and effective use of ouster orders?

Improved access to affordable emergency housing and affordable and habitable long and short term housing is necessary to support ouster orders. In our experience there is not enough appropriate accommodation for ouster orders to be used as often as they should be.

Question 43: Have we accurately reflected the issues relevant to mandating men’s attendance at behaviour change programs as part of an intervention order? Should other issues be taken into account?

The Federation does not consider that adequate studies have been undertaken into whether these programs are producing effective outcomes and whether they are culturally sensitive and practical. Accordingly, we do not wish to comment at this stage.

Question 44: Does the current approach to dealing with child contact issues in family violence intervention order cases ensure adequate protection for children and protected adults? If not, what changes to the legislation and/or procedure would lead to more consistent protection without unnecessarily restricting children’s contact with respondent parents?

The Federation agrees with the comments made in the Consultation Report and by the people already consulted by the Commission. The Federation does not consider that contact issues around family violence have been adequately addressed. We believe that there should be no unsupervised contact if there is a risk of harm or violence (physical or non-physical) being inflicted upon a child. Magistrates should be encouraged to make greater use of section 68T of the *Family Law Act (Cth)* – it is important that magistrates understand that a violent parent is not better than no parent at all.

The New Zealand model denies a violent parent contact with his or her child until the court is satisfied that the child is safe. The court can impose a series of conditions on the perpetrator, such as behaviour management programs. Once the perpetrator has satisfied these conditions, the court will be more inclined to believe that the child will be safe. This model focuses on the substantive issues facing the family, not some nebulous concept of what is “safe”. The Federation supports exploring how this could be applied in Victoria.

Question 45: The proposed amendments to the Crimes (Family Violence) Act 1987 will, if passed, require magistrates to determine whether any Family Court orders are in place before making an intervention order in relation to a child. They also insert a note regarding magistrates’ powers to vary or suspend Family Court contact orders. Will these amendments lead to more consistent protection for children and protected adults or are further changes needed?

The Federation supports the proposed amendments to the Act as a step towards providing greater protection for children and protected adults. In addition, supervised contact services and supervised contact changeover services should be more widely available.

Question 46: When an application for an intervention order seeks protection for an adult and children, should the application be heard in; the Magistrates' Court; the Children's Court; or separated so that the application relating to children be heard in the Children's Court while the application relating to the adult is heard in the Magistrates' Court?

Refer to answers provided in questions 6 and 37.

Question 47: What is the best way to ensure that magistrates are familiar with the nature and dynamics of family violence and to ensure consistent decision-making.

As previously outlined, the Federation supports amendments to the Act that provide an overarching principles or objects section. We also support training being provided to magistrates about family violence and related issues.

Question 48: Should the Crimes (Family Violence) Act 1987 provide additional guidance to magistrates about what matters must be taken into account when making an intervention order and when deciding which provisions to include in an intervention order.

As previously outlined, the Federation supports amendments to the Act that provide additional guidance to magistrates about what matters must be taken into account when making an intervention order.

Question 49: Would the inclusion of an 'objects clause' improve interpretation and application of the Crimes (Family Violence) Act 1987.

As previously outlined, the Federation supports amendments to the Act that provide an overarching principles or objects section.

Question 50: Are there any problems with the use of costs orders under the Crimes (Family Violence) Act 1987 against either applicants or respondents. If so, what changes would address this?

The Federation supports the current provisions of the Magistrates' Court Act that parties are required to bear their own costs, except in exceptional circumstances. However work should be done to see that this applies in practice. There is a problem with some barristers who are representing respondents making false threats to scare applicants into agreeing to an undertaking on the ground of costs. This could be addressed by magistrates taking a harder line with legal representatives who threaten to ask for costs.

9. Chapter 9

Question 51: The Victoria Police Code of Practice for the Investigation of Family Violence articulates police members' obligations in dealing with breaches of intervention orders. Are other changes needed to improve police responses to breaches, including decisions about whether to lay charges and gathering of evidence to support prosecution of breaches?

The Police Code of Practice has not been in place long enough for the Federation to comment on its effectiveness in improving police responses to breaches of intervention orders. The Federation recommends that an ongoing monitoring process be established, that includes local service providers meeting to provide feedback to police.

Question 52: What should the police response be where sufficient evidence exists to charge and prosecute a respondent for breach of an intervention order but the protected person wants no further action to be taken?

Whether the police decide to prosecute without the consent of the protected person will require the police to weigh up the three underlying objectives of the Family Violence Laws – the safety of the protected person, the accountability of the perpetrator and the agency of the protected person.

In order to properly undertake this assessment, the Federation recommends that there be capacity for case conferencing where the protected person, along with an advocate, is able to speak with the police officer and discuss why prosecution might not be the most appropriate method for dealing with the breach. The Federation understands that case conferencing has had a positive effect in the ACT and is actually leading to more protected people consenting to the prosecution after they have been given the opportunity to discuss the matter and receive proper support.

Alternatives to police prosecution should also be available in order to better achieve the three underlying objectives of the Family Violence Laws, such as court sanctioned diversion to anger management programs or drug and alcohol treatment. Many breaches of intervention orders will not be suitable for diversion and a clear criteria about what cases would be suitable for diversion would need to be set up.

Question 53: Are any further changes needed to clarify and improve the police response to breaches where the protected person has consented to the breach, or to a previous breach of the intervention order?

The Federation is concerned that police often do not act on a complaint as the protected person is considered to have aided and abetted the breach. The Federation notes the Consultation Paper's finding that extreme caution should be exercised when prosecuting protected people for aiding and abetting a breach of an intervention order. The Federation does not believe that Police should be able

to charge or threaten to charge applicants with aiding and abetting the breach of an intervention order under any circumstances. Just because protected persons have allowed defendants back into their home does not mean they have consented to being assaulted. This should be included in the police Code of Practice (see also question 25).

The law needs to clarify the status of an order where parties reconcile then separate once or more during the period of an order which is not varied and where a breach occurs during a period of separation. One option as mentioned above is that clause 1, that a defendant not be permitted to cause harm etc. to an applicant, should be presumed to be the terms of the order in this situation. This would need to be made clear to the parties at the time of making the order.

Question 54: Should the Crimes (Family Violence) Act 1987 specify different types/levels of breaches, with different maximum penalties? Would other changes to the penalty provisions in the Act make intervention orders more effective?

The Federation supports courts continuing to have full discretion to impose the most appropriate penalty in the circumstances. Better education for magistrates about the effects of family violence is a step towards achieving more consistent sentencing across all courts.

The Federation supports the court being required to consider the breach in light of all the circumstances, including the original behaviour that led to the intervention order being taken out, as a factor in considering the seriousness of the breach.

Question 55: Should referral to a behaviour change program be a mandatory part of a sentence for breach of an intervention order?

Review of the use of referral to behaviour change programs has not been concluded, so it is not yet possible to determine how successful it is in achieving the goals of Family Violence Laws.

In the Federation's opinion, behaviour change programs are not suitable for all people and all cases, and mandatory referral is inappropriate.

Question 56: Is diversion ever an appropriate way for the court to deal with breaches of an intervention order?

In order to accord with the proposed principles of a family violence system, diversion may be an appropriate way for the court to deal with breaches of an intervention order in certain circumstances or communities where it will work to make the defendant accountable for their behaviour. As with considering whether the case is appropriate for referral, the magistrate should look to the original behaviour and look at all the circumstances of the case before deciding

on the appropriateness of diversion. We do not support police being the gatekeepers for access to diversion programs – this decision should be made by a court. If diversion is to be made available in family violence matters, significantly more appropriate diversion programs need to be developed and made available to refer offenders to. This is especially the case in rural and regional areas.

Question 57: Are there any other options for monitoring a respondent's compliance with an intervention order, and should they be implemented?

The Federation disagrees with uninvited police monitoring to ensure compliance with intervention orders. Uninvited police monitoring does not assist in achieving the goals of the Family Violence Laws, and may even undermine its objectives.

A person may be discouraged from making an application for an intervention order if they think that they will then be monitored by the police. Uninvited police monitoring also undermines the agency of the protected person. One aim of an intervention order is protection of the protected person. Arbitrary police intervention takes the protection out of the hands of the protected person and transforms it more into a police mechanism.

10. Chapter 10

Question 58: What changes are required to ensure that protected persons are informed about whether and when the intervention order made for their protection has been served and is enforceable?

The Federation believes that the police and the court should be required to contact the applicant directly to inform him/her that the order has been served. In the event that an order can not be served, the protected person should be contacted by the police and the court so that s/he can put an alternative safety plan into place.

Question 59: Should the police be given greater powers to detain a person against whom a telephone intervention order is being sought, or against whom an order has been made but not served?

The Federation supports limited civil detention powers for police for as long as is necessary but no longer than two hours, for the **sole** purpose of obtaining a telephone intervention order and serving it.

Question 60: Is there a need to clarify the effect of an order for substituted service?

The Federation believes that there is a need to clarify the effect of an order for substituted service. When it is known by the police or court that the defendant is aware that an order has been made and they appear to be avoiding service, an

extension of an interim order should be granted on two occasions, and then on the third occasion it should be standard practice for an order for substituted service to be made (see also Q13).

The Federation has found that there needs to be further clarification of the effect of an order for substituted service. This is exemplified by the case study below:

A client had been attempting to make an application against her former husband for three months. The Police were unable to locate him for service as he was a truck driver. Section 11(3) provides that "If it appears to the court, by evidence on oath or by affidavit, that service cannot be promptly effected, the court may make an order for substituted service."

The magistrate refused to make this order for substituted service at the defendant's parent's home. He also refused to make an order for substituted service at the defendant's workplace (where he returned to park his truck). The reasons for this refusal were not given. The magistrate adjourned the matter again, without making an interim order. The applicant felt confused and let down by the court system.¹⁰

The Federation recommends that there be specific procedures and processes by which a court is required to make orders for substituted service.

Question 61: Should respondents be required to provide notice about whether they intend to contest an application for an intervention order? If so, what changes will reduce distress experienced by persons seeking protection, while ensuring that the process is fair for all parties?

The Federation recommends that respondents should be required to provide notice about whether they intend to contest an application where practicable.

However, a way that this process can be fairer for both parties is to have a contest mention system whereby if it appears at the time of the first hearing that a matter is going to be contested, the matter can be adjourned to a contest mention date within the next week or so. This allows both parties to seek legal advice and know of the likelihood of needing separate legal representation in the future and plan to have evidence ready and witnesses available. At the contest mention, matters can be booked in for a contest if there is no resolution.

In the event that a defendant does not respond to the notice when s/he has been served with the application, or is made aware of the existence of same (by the court or the police), the application should automatically be reverted to an interim order and a subsequent final hearing date be consequently listed.

Question 62: What can be done to improve the safety of people when they attend court to obtain an intervention order, or when they attend court as witnesses in intervention order proceedings?

¹⁰ Case study provided by Whittlesea Community Legal Centre.

Separate waiting rooms should be provided for both parties and their witnesses. In addition, Protective Services Officers ("PSOs") should be present at all courts specifically for Intervention Order matters. In the event that a private security company is being utilised by the court for this service, the private security officers should receive specialised family violence awareness training.

Question 63: Are there other aspects of the court environment or the facilities available at court that stop people from pursuing intervention orders? What should be done to address these matters?

When an applicant is first being interviewed by a registrar, the interview should take place in a separate, private room. In the Federation's experience, it is extremely distressing and humiliating for victims of family violence to have to relive their experiences at the "Inquiries" counter. Registrars/initial contact staff should be trained fully in the nature and dynamics of family violence.

Furthermore, the Federation recognises that there needs to be more explicit information provided to applicants on how to apply for an intervention order. For example, this information could include what questions in the application need to be addressed. The applicant can then obtain advice and assistance with how to answer these questions prior to making the application.

There also need to be clearer standards and training for court registrars in relation to when a matter needs to be put before a magistrate for consideration of an interim order. In the Federation's experience, different courts use different procedures and it often depends upon how busy a court is on any given day.

Additionally, court staff should be trained to encourage applicants to seek support from support services and have them present to assist at the application interview with an applicant. This is due to the fact that many applicants forget to raise pertinent facts due to trauma, stress and the impact of family violence.

The Federation has also observed that the time allocated for interviews is often inadequate. Applicants feel that the process is rushed and that they do not have sufficient time to tell their stories. In addition, there should be a flexible and responsive court appointment system to recognise people in complex situations juggling responsibilities.

While the appointment system is a practical way to manage the volume, the Federation is concerned that at times applicants are led to believe that they are not able to come drop in to obtain an interim order when it is urgent to do so. We are concerned that applicants are being told that there are no immediate appointments and therefore they must return on a later day. This does not adequately protect people who are attempting to reduce harm in family violence situations.

The Federation also supports the comments made by Villamanta Legal Service with respect to the need for courts to ensure disability accessibility, in the broadest sense.

Question 64: Is legal representation readily available for people who have applied for a family violence intervention order?

Legal representation is not readily available for all applicants. Community Legal Centres provide free legal advice, information, assistance, representation and community legal education in a range of legal areas where issues can arise from and relate to family violence including family law, victims of crime assistance, and intervention orders. However, due to current legal aid and community legal centre funding constraints, such advice and assistance is currently available only inconsistently across Victoria. CLC's currently provide intervention order court support at 11 Magistrates' Courts around Victoria. This work is not specifically funded but, rather, is undertaken by CLC's utilising their limited, general funding. court support is therefore available only at certain courts in Victoria and on limited days/during limited hours.

Even when a CLC lawyer is present at a court, CLCs can not assist all clients. Due to limited resources, the assistance is generally limited to advice only or referrals and information. All courts have different procedures (i.e. some have contest mention systems and others do not) and therefore, depending upon the specific court process, the client may or may not get legal advice prior to the time that his or her matter is being called in the court. Legal representation is only available when there has been sufficient time to arrange for representation – a contest mention system or notice that a matter will be defended would assist this.

Question 65: Is it desirable that people seeking an intervention order have access to legal representation? If the respondent does not contest the application; and/or if the respondent contests the application?

The Federation strongly believes in the fundamental rights of all people, those seeking and defending intervention orders, to have access to legal advice and representation. People should be able to have access to legal advice and representation so that they may know their legal rights and responsibilities. Furthermore, legal representation can assist in early dispute resolution.

Both the applicant and respondent should have access to legal representation if the matter is being contested. The existing trauma and abuse that has resulted from family violence can be further exacerbated when an applicant is required to self-represent. It is obviously extremely traumatic for a victim to attempt to cross-examine a person who has subjected him/her to physical, emotional or financial abuse.

Question 66: Is legal representation readily available for respondents in family violence intervention order proceedings?

Legal representation is not readily available for respondents in family violence intervention order proceedings. As outlined above in question 64, only sometimes are CLCs or Victoria Legal Aid (VLA) able to assist respondents in defending their matters - this is dependent upon resources and time.

Furthermore, respondents have very limited ways in which they are able to fall within the eligibility requirements of VLA. They are only eligible if:

- a) the defendant is a child; or
- b) the order sought would curtail an important right of the defendant (for example excluding the defendant from his/her home), and a court might be persuaded to make a less restrictive order or no order at all; or
- c) the defendant was arrested and is still in custody.

Furthermore, as the mention system does not operate in a majority of courts even eligible defendants may not be able to exercise their right to apply to VLA for legal assistance.

Question 67: Is it desirable that respondents in intervention order proceedings should have access to legal representation. If so, why?

As outlined above, the Federation strongly believes in the fundamental rights of all people, those seeking and defending intervention orders, to have access to legal advice and representation. A respondent should be entitled to access to legal representation for natural justice reasons. In situations where parties have had a prior relationship, emotions are extremely raw and therefore, a third party advocate is more likely to maintain the arms-length relationship required in negotiating or advocating on the respondent's behalf. The respondent is also able to make a more informed decision about whether to contest or consent to a matter.

Question 68: Is adequate and appropriate representation provided for children who attend the Children's Court as persons in need of protection; and respondents in family violence intervention order matters?

Children have particular needs in terms of the legal representation they require. The VLA guidelines for representation of children in the Family Division of the Children's Court recognise this by providing a lawyer to all children. In metropolitan Melbourne, this service is provided by specially trained staff from VLA Melbourne office or private practise and the representation is adequate and appropriate. In rural and regional areas, the quality of representation varies depending on the particular private practitioner – significant improvements could be made in rural and regional areas.

Question 69: When the Magistrates' Court is considering an application for an intervention order in relation to a child, should separate representation be provided for the child? What practical and other issues need to be taken into account?

As outlined in our answers to questions 6 and 37, the Federation believes that all children with capacity to instruct a lawyer should be separately represented and

have their opinion taken into account by a court in decision-making. Lawyers acting for children should act on an instructions model where the child has capacity to instruct.

Question 70: If you consider that children involved in Magistrates' Court proceedings should be provided with separate legal representation, should this representation be provided using the same model of representation as that provided in the Children's Court?

As outlined above, the Federation believes that all children should be provided with separate legal representation, using the same model of representation as the Children's Court and not the best interests model used by the Family Court.

Question 71: What additional supports, services or other changes are required to assist: people seeking protection and respondents during intervention order proceedings?

In addition to the supports outlined in questions 12 and 30, the Federation supports family violence support workers being available at the court in addition to the applicant liaison support worker that is proposed for the new Family Violence Courts. The role of the family violence support worker would be to act as an intermediary for the applicant and to link applicants with relevant services and organisations during and after the intervention order process. This would include putting the applicant in touch with relevant family lawyers, victims of crime advocates, Centrelink, refuges/housing services, counsellors. The family violence support worker is an ongoing support worker for the applicant outside the court system. This is in contrast to the applicant liaison support worker who is envisaged (at this stage) to provide support, referral and information whilst the applicant is at the court only.

The Federation also supports the development of a role of support and information worker for respondents to provide assistance to the respondent in relation to counselling (personal, alcohol or drug related), housing and legal matters. The defendant's support worker could be a member of the existing court support services available such as Court Network.

Question 72: What would be the advantages and disadvantages of giving the Children's and Magistrates' Courts the power to notify the Department of Human Services Child Protection Service when hearing an intervention order matter that raises protective concerns regarding a child; and invite the Department of Human Services Child Protection Service to intervene as a party in particular intervention order matters affecting a child's welfare?

At this time, the Federation strongly opposes any changes that would increase the incidence of notifications to the Department of Human Service Child Protection (DHS) as the result of an intervention order process. The Federation does not believe that the child protection system, as it currently stands, is in a

position to provide the necessary supports to a victim of family violence in the majority of cases. The Federation is concerned that potential applicants will avoid the intervention order process if they think that DHS may become involved as a result. Moreover, in many cases, the protective concerns in relation to the child's welfare may well be addressed once an intervention order is in place and the perpetrator of family violence is removed.

DHS workers can and are involved in intervention order matters when children are included on orders if they are already involved with the family. In these circumstances, DHS can be utilised as a witness. DHS can also be involved in cases by supporting young people, already on protective orders, in obtaining an intervention order. This role should not be expanded.

Question 73: What would improve the parties' understanding of the terms, effects and consequences of an intervention order when one is made or varied?

The Federation makes the following suggestions to assist parties' understanding of intervention orders:

- That magistrates take the time to explain in plain English the terms and conditions of the intervention order, what constitutes a breach and what to do if a breach occurs;
- Legal representation for all parties;
- More material in plain English for parties to access at the application stage and to take away once an order is made.

Question 74: What would improve the parties' understanding of what happens during intervention order proceedings and the outcome of these proceedings generally?

As above. It may also assist if the parties are able to view a video/dvd re-inaction of the intervention order process. This could be accessed separately by both parties, or provided on a website akin to the VCAT website which has a video explaining tribunal hearings.

Question 75: Should the Crimes (Family Violence) Act 1987 be amended to empower magistrates to stay or dismiss an application if satisfied that the proceeding is vexatious, or on any other grounds? What are the risks and benefits of such a provision?

The Act should be amended to empower magistrates to stay or dismiss an application if they are satisfied that the proceeding is vexatious. However, the powers should be extremely limited and the legislation should proscribe an express procedure and process that should be followed. The parties that are in danger of being declared vexatious should receive sufficient warning of the same.

Given the nature of family violence (ie: the cycle of violence), magistrates and court staff must be made aware of the fact that victims of family violence will withdraw their applications in the hope that the defendant changes his/her behaviour. Inevitably, when a defendant does not change his/her behaviour, the applicant is forced to return to the court to make an application. However, members of the Federation have found that in such instances, magistrates do not recognise why the previous applications for revocation or withdrawals have been made. Hence, declaring a person vexatious should be made with great care by the magistrates. Furthermore, when a person is in danger of being declared vexatious, they should be immediately entitled to legal representation.

Question 76: Should the Crimes (Family Violence) Act 1987 be amended to require that, before granting an intervention order following a cross application, the Court must be satisfied that the criteria for granting an intervention order at section 4(1) have been met?

Section 4(1) criteria should be met in relation to every order that is made regardless of whether the defendant in a matter has an application on foot. Legislative change should not be necessary to achieve this.

Question 77: Are there other changes to the legislation, or to court processes, that would improve the current approach to cross applications and mutual orders?

Federation members have experienced situations whereby a defendant makes a cross-application on the day of the applicant's final hearing. At this stage, instead of the defendant needing to prove that the grounds for making a cross application are met and giving evidence before a magistrate, the matter is heard at the same time as the original application. Commonly, the defendant has not given notice of the cross-application but has brought a number of witnesses to support his/her cross-application. Without notice of same, the applicant is prevented from being fully prepared to contest the cross-application.

Hence, the Federation has seen this ploy as a tool for intimidation and distress for applicants who have waited for their applications to be heard. We have seen this result in the applicant feeling pressured into consenting to the cross-application in order to prevent further distress and a prolonged contest.

This situation could be avoided by the original application being heard on the originally determined date, and the cross application being adjourned for a contested hearing, giving the applicant time to prepare their defence.

Question 78: The proposed amendments to the Crimes (Family Violence) Act 1987 will allow a magistrate to order that an order be varied or revoked on application by a respondent only if there has been a change in circumstances. Are other changes needed to prevent the revocation and variation provisions of the Act being misused by vexatious respondents?

See questions 23-25.

11. Chapter 11

Question 79: Do magistrates currently direct that evidence be given using alternative arrangements in intervention order cases? If so, how often?

In the Federation's experience, there are rare circumstances where magistrates direct that evidence be given using alternative arrangements in intervention order cases. However, members of the Federation know of one example where a magistrate closed a courtroom at the Sunshine Magistrates Court and used a remote witness facility when a client was particularly traumatised by a defendant. The defendant had appeared at court with a large number of supporters. The applicant was extremely distressed and frightened.

Question 80: Should the Crimes (Family Violence) Act 1987 provide for the routine use of CCTV or other alternative arrangements in intervention order proceedings for all children, whether or not the application is being heard in the Family Violence Division of the Magistrates' Court; and adults on whose behalf an intervention order is sought?

The Federation believes that magistrates and court staff need to be trained in the sensitivities and power dynamics that are prevalent in family violence situations. When suitably trained, magistrates should be able to identify the situations where a CCTV or alternative arrangement is appropriate.

In addition, representatives of the applicant such as the police or their legal representatives should be able to make a simple request for alternative arrangements at the request of, or consent of the applicant.

Question 81: Should the Crimes (Family Violence) Act 1987 provide for the court to be routinely closed during hearing of applications to make, vary, revoke or extend an intervention order and proceedings for breach of an intervention order? Why or why not?

The Federation recognises that there are advantages and disadvantages to providing the courts to be routinely closed in the above circumstances.

The advantages are privacy, respect and to prevent further humiliation and distress. This is particularly relevant for some CALD communities. This may also work towards encouraging more people to make applications if they know they can raise issues before the magistrate only. There may be other ways of achieving these aims without taking the significant step of closing the court, such as improving the registrar interview process.

The disadvantages are that closing a court in the above circumstances raises concerns about why the court should be closed only for these matters and not initial applications. Furthermore, closing the court as a matter of course prevents the justice system from being an open and transparent system. Finally, sometimes it is beneficial to applicants and defendants to be aware of how the

court system operates, and they can view the process when the courts remain open to the public.

Question 82: Should the Crimes (Family Violence) Act 1987 be changed to prevent an unrepresented respondent or defendant from personally cross-examining protected persons or persons who are seeking protection in intervention order application proceedings; and in criminal proceedings for breach of an intervention order? If so, what mechanisms should be put in place to protect the rights of the respondent or defendant?

The Federation strongly supports initiatives that would prevent unrepresented defendants from personally cross-examining applicants and the applicant's witnesses, who are often personally known by the defendant as well. Legal representation should be provided to all parties to ensure that this does not occur and to protect the rights of the parties involved.

Question 83: Should the same provisions be put in place for other witnesses in intervention order proceedings? If so, which witnesses should receive this protection?

The Federation believes that child witnesses should also receive this protection.

Question 84: What is your experience of obtaining appropriate access to interpreters for intervention order proceedings?

In the Federation's experience, the courts only have funding for one interpreter who may be utilised by both parties and often in more than one matter. The availability of interpreters can be very limited and often parties need to wait for extended periods of time for interpreters to be finished dealing with other cases. This severely compromises the interpreter. Furthermore, in some communities that are very small, the interpreter may know one or both of the parties personally. This again compromises both parties and the interpreter.

The Federation has noted that there are problems when one party speaks a different dialect of the language that the interpreter is fluent in. For example there are a number of different Arabic dialects. Furthermore, the gender of interpreters should be a consideration in family violence matters.

In some courts, interpreters are only hired by the court until 1.00pm. This often results in the interpreter having to leave before the matter is finally determined. Therefore, parties are not provided with sufficient time to give clear explanations of what occurred, nor are magistrates able to explain the orders they are making and the consequences of breaches, etc.

In relation to the structure of various courts, Federation members have found that interpreters often sit with the first party. This can unsettle the other party, who believes the interpreter is supporting the first party. Interpreters need to be more

thoroughly trained in relation to the impact of family violence on parties and their need to remain totally impartial.

The Federation has also experienced situations where court staff have informed parties that they do not need an interpreter notwithstanding the parties' request for same.

Question 85: Where both parties to an intervention order matter require an interpreter, should the provision of separate interpreters for each party be mandatory?

The Federation supports the provision of separate interpreters for each party in a matter.

Question 86: What mechanisms would improve access to independent, professional interpreters for people involved in intervention order proceedings?

The Federation reiterates the answers provided in question 84 in relation to interpreters being required to undergo family violence awareness training. In addition, the Federation supports greater resource allocation for courts to be able to hire interpreters for both parties.

Question 94: Should there be a capacity to call expert witnesses to give broad contextual evidence about the nature, dynamics and effects of family violence in intervention order cases? Why or why not? If so, what changes would be required to enable this to occur?

Magistrates should be educated about the nature, dynamics and effects of family violence so that there is no need to call expert witnesses.

However, in the event that magistrates are not regularly educated in the above issues, the Federation believes that there should be the capacity to call expert witnesses such as financial counsellors, social workers and/or psychologists to give expert evidence. An expert witness could demonstrate the effect of family violence on children, the dynamics of financial abuse and the like.

However, the dangers in this would be that if these expert witnesses were not available due to lack of resources, then a party's case may be perceived as less valid.

Furthermore, waiting for expert reports could also extend the court process unnecessarily and further put applicants and children at risk of harm.

12. Summary of Key Points in this submission

- The justice system must adopt a variety of processes to allow justice in all situations. Accordingly, a more flexible system, that is better equipped to deal with the more complex and diverse range of behaviour, is required.
- The Federation supports further exploration of alternative justice system approaches to family violence.
- The Federation suggests that the primary objectives of the *Crimes (Family Violence) Act 1987* be:
 - *Safety* - to ensure the safety of the victim;
 - *Accountability* - to ensure perpetrators are accountable;
 - *Agency* - to restore the victim's capacity to make decisions for themselves; and
 - *Best interests of the child* - are a paramount consideration in decision-making where children are affected.
- Intervention orders relating to stalking should be dealt with under separate legislation, independent of the provisions of the *Crimes (Family Violence) Act*.
- The *Crimes (Family Violence) Act* ought to be clarified in order to make it clear that non-physical abuse (for example, emotional and economic abuse) can be protected against under the Act.
- Actual or threatened abuse of animals should fall within the category of emotional abuse and be covered by the Act.
- The definition of "family member" ought to be expanded to incorporate the ordinary meaning of the words "family member" that do not involve blood relatives and should be broad enough to allow for the protection of people with disabilities who are suffering violence at the hands of their carers.
- Police should be able to make telephone applications to a magistrate for interim intervention orders out of business hours, and should be given restricted power to detain potential defendants whilst the application is being made.
- Undertakings should not be used where the parties are un-represented.
- It is a fundamental right of all people, including those seeking and defending intervention orders, to have access to legal advice and representation.
- Police should keep records of reports made about family violence incidents and make these available for use as evidence in applications.

- Courts dealing with exclusion or ouster orders, should consider safety to be a paramount concern, and magistrates should make rights associated with ownership secondary to ensuring the safety of any victims.
- Child contact issues where there is family violence need to be addressed. There should be no unsupervised contact if there is violence.
- At this time, changes that would increase the incidence of notifications to the Department of Human Service Child Protection (DHS) as the result of an intervention order process, should not be made.
- There should be capacity for case conferencing where the protected person, along with an advocate, is able to speak with the police officer and discuss why prosecution might not be the most appropriate method for dealing with the breach.
- Behaviour change programs may not be suitable for all people and/or cases, and therefore mandatory referral is not appropriate.
- All children with capacity to instruct a lawyer should be separately represented and have their opinion taken into account by a court in decision-making. Lawyers acting for children should act on an instructions model where the child has capacity to instruct.